Nomination of Loretta E. Lynch to be Attorney General of the United States
Questions for the Record
Submitted February 20, 2015

QUESTIONS FROM SENATOR SESSIONS

1. In Question 1, you were asked whether you believe that President Obama has exceeded his executive authority in any way and, if so, how. You responded: "As the United States Attorney for the Eastern District of New York, I have not been charged with determining when and whether the President has exceeded his executive authority." While I understand that you may not have been charged with making such determinations in your capacity as United States Attorney, the question did not ask whether you were charged with such determinations. Should you be confirmed as Attorney General, you will be responsible for such determinations. In order to properly evaluate your nomination, it is important for members to know your views in that regard. Please take this opportunity to consider and respond to the original question.

RESPONSE: While in my current role I have not been charged with making determinations about whether the President has exceeded his executive authority. I do understand that if I am confirmed as Attorney General, I will oversee the Department in its role of advising the President with respect to the constitutionality of proposed actions. I recognize and fully appreciate that, when advising the President regarding proposed executive actions, it is the Department of Justice's responsibility to provide candid, independent, and principled legal advice regarding the lawfulness of the proposed actions, even where that advice is inconsistent with the preferences of policymakers. As I testified at my confirmation hearing, if I am confirmed as Attorney General, I will take the Constitution and the laws of the United States as my guide in exercising the powers and responsibilities of that office, and I will fulfill those responsibilities with integrity and independence. I will appropriately supervise the Office of Legal Counsel, which I would expect (consistent with its mission) to provide advice regarding the lawfulness of such actions based only on a thoroughly researched, soundly reasoned, and independent assessment of the law.

2. In Question 5, you were asked whether Saddiq al-Abbadi, Ali Alvi, and Faruq Khalil Muhammad 'Isa are unlawful enemy combatants and, as such, could be tried before a military commission and detained for the duration of hostilities under the law of war. You responded:

> "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."

You also said that because the cases referred to in Question 5 are ongoing prosecutions, you "cannot comment on the specific facts or decision-making processes in those matters, other than to indicate that the process described above was observed." The question did not ask you to disclose details about the decision-making process in the above cases nor did it address your role in the decision to prosecute the individuals in Article III courts. Instead, it asked whether the individuals qualify as unlawful enemy combatants and, as such, could be tried before a military commission and detained for the duration of hostilities. Please take this opportunity to answer that question.

RESPONSE: As I mentioned in my original answer, as United States Attorney, my role has been limited to determining whether there was a prosecutable federal criminal case. Accordingly, I have not had the opportunity to carefully consider whether these individuals qualify as "unlawful enemy combatants" or whether they could be tried before a military commission and detained for the duration of hostilities.

Because this is an ongoing prosecution, I cannot comment on the specific facts, but it is my understanding that if it could be established from such conduct that the individuals were part of or substantially supporting al-Qaida, the Taliban, or associated forces, they could be detained pursuant to the Authorization for the Use of Military Force of 2001 (AUMF), as informed by the laws of war. It is also my understanding that individuals engaged in such alleged conduct could fall within the jurisdiction of the Military Commissions Act.

3. In your responses to Question 9, which asked about the distinctions between the civilian and military justice systems with regard to interrogation and the right to remain silent; Question 11, which asked about the distinctions between the civilian and military justice systems with regard to bringing an arrestee before a judge; and Question 12, which asked about the distinctions between the civilian and military justice systems with regard to charging timelines, you included in your answer the following: "I have not had the occasion as a United States Attorney to examine the requirements under the military commission system, but, if confirmed as Attorney General, I would support using all lawful tools of national power, including the military commission system, to protect the nation from terrorism." However, in response to Question 5, you stated that you "believe strongly that the United States government must use every available tool," including military commission trials, to protect the American people. If you believe that military commissions are one of the "tools" available to the government to protect the American people, you must have some familiarity with the military commission system. Accordingly, please take this opportunity to answer the original questions posed by Questions 9, 11, and 12. Please also explain what you mean by the phrase "national power."

RESPONSE: With respect to Question 9 concerning interrogation and the right to remain silent, I explained that 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. Moreover, the government may make use of the 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. Accordingly, I disagree with the categorical statement that in the civilian justice system, defendants are required to be told they have the right to remain silent and that interrogation must stop if they invoke that right. I agree, however, that there is no such requirement in the military commission system, which applies to certain "unprivileged belligerents" as defined in the Military Commissions Act.

With respect to Question 11 concerning the requirement to bring an arrestee before a judge, I explained that while Federal Rule of Criminal Procedure 5 requires a federal law enforcement officer to promptly bring an arrestee before a magistrate judge "without unnecessary delay," an individual may voluntarily waive this requirement, as has occurred with some frequency in terrorism cases. Accordingly, I disagree with the unqualified statement that in the civilian justice system, an individual must be brought promptly before a judge and be charged with a crime or released. I agree, however, that there is no such requirement in the military commission system.

With respect to Question 12 concerning charging timelines, I explained that the Speedy Trial Act imposes a number of time limits within which a defendant must be indicted and brought to trial, but that these may be suspended for good cause or by waiver of a defendant. Accordingly, the civilian justice system preserves the flexibility necessary to address the unique circumstances posed by prosecutions of terrorists. I agree that the United States military may detain individuals who are part of or substantially supporting al-Qaida, the Taliban, and associated forces without criminal charges or trial for the duration of the conflict, consistent with the 2001 AUMF as informed by the laws of war.

There are a number of differences between the civilian justice system and military commissions, including jurisdictional differences and differences in the types of offenses that may be prosecuted, which must be taken into account in determining the appropriate tool in any particular case. If confirmed as Attorney General, I would work with representatives from the agencies who are tasked with protecting the American people, including, as appropriate, military commission prosecutors, to determine the most effective tools to apply in a case, based on the particular facts and applicable law.

I used the phrase "tools of national power" to refer to lawful tools available to the Government, including military, diplomatic, economic, law enforcement and intelligence tools.

4. In Questions 14 and 15, you were asked whether you believe it should be the policy of the United States to negotiate with terrorists and, if confirmed, whether you will advise the president to keep in place the United States' longstanding policy of not negotiating with terrorists. In your response to each question, you stated: "It is my understanding that it is the policy of the United States not to grant concessions to terrorists. If confirmed, I would support that policy." Please explain what you mean by "grant concessions." Please also explain the difference between "negotiating" with terrorists and "granting concessions" to terrorists.

RESPONSE: It is my understanding that the no concessions policy would prevent the government from providing any benefit to a terrorist group holding hostages. Although I have not studied the issue, it would be important to maintain lines of communication with hostage takers in order to explore all options to secure the safe return of U.S. hostages, consistent with the no concessions policy.

5. In Question 16, you were asked whether you support a permanent extension of a number of intelligence gathering authorities under the Foreign Intelligence Surveillance Act (FISA), which are set to expire on June 1, 2015. You responded:

> "Although I have not had the occasion to consider these particular provisions of the Foreign Intelligence Surveillance Act (FISA) as a United States Attorney, I believe that it is important that our intelligence and law enforcement professionals have the full panoply of tools to deal with evolving national security threats like international terrorism, while ensuring that we use those tools in a way that effectively protects privacy and civil liberties. As I mentioned during the hearing, as a prosecutor, I am quite familiar with the invaluable benefits provided by roving wiretaps in narcotics prosecutions; those wiretaps are critical to conducting electronic surveillance against those attempting to evade it and are only issued after judicial review.
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> I understand that the Administration supported the USA FREEDOM Act, which would have extended these three provisions of FISA while also providing additional privacy protections, including prohibiting bulk collection under Section 215. If confirmed as Attorney General, I look forward to working with this Committee, as well as the Intelligence committees, on legislation to counter serious national security threats in a manner that also protects the privacy and civil liberties of our citizens."

While I appreciate your view that it is important for intelligence and law enforcement professionals have the full panoply of tools to deal with evolving national security threats, your response did not address whether you would support a permanent extension of intelligence-gathering authorities under 50 U.S.C. § 1805(c)(2)(B), 50 U.S.C. §§ 1861-2, and 50 U.S.C. § 1801(b)(1)(c). Please take this opportunity to respond to the original question.

RESPONSE: As the Administration and the Intelligence Community have stated, these three provisions of FISA are important tools to help protect our Nation from terrorist attacks, and it is critically important that Congress pass legislation to prevent these authorities from lapsing. If confirmed, I would support the extension of these provisions and commit to working with Congress to ensure the Intelligence Community has the necessary authorities to meet our national security needs consistent with our shared commitment to privacy and civil liberties.

6. In Question 18, you were asked to explain your understanding of the scope of the immunity provided to U.S. personnel involved in certain detentions and interrogations of enemy combatants between September 11, 2001 and December 30, 2005. You responded: "I have not had occasion to address that statute in my role as a United States Attorney, but I have reviewed the statute and believe that it describes in plain terms the scope of immunity." Please take this opportunity to familiarize yourself with the statute and provide an answer to the original question.

RESPONSE: Although I have not had occasion to address this provision in my role as a United States Attorney, based on a review in connection with responding to these questions, I understand that the statute provides a defense for certain actions of agents of the U.S. government who are U.S. persons where the U.S. persons did not know that their actions were unlawful and a person of ordinary sense and understanding would not know that the actions were unlawful. This defense is applicable in a civil action or criminal prosecution against such a U.S. person arising out of that person's engagement in specific operational practices that involve the detention or interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests or its allies, and that were officially authorized and determined to be lawful at the time they were conducted. The defense applies with respect to any criminal prosecution that relates to the detention and interrogation of such aliens, is grounded in 18 U.S.C. § 2441(c)(3), and relates to actions occurring between September 11, 2001, and December 20, 2005.

7. In Question 23(b), you were asked if you agree that drug trafficking is a serious offense that is deserving of equally serious mandatory minimums in order to deter such behavior. In response, you stated:

> "As I noted in my testimony before the Committee, with respect to the enforcement of the narcotics laws that contain mandatory minimums—laws which I have had occasion to use on numerous occasions as a career prosecutor and United States Attorney—those laws are being followed not just by my Office but throughout the United States Attorney community. Every United States Attorney's Office retains and exercises the discretion to seek a mandatory minimum sentence. We also look at the nature of the crime and narcotics problems in our particular districts to determine whether a mandatory minimum sentence would be appropriate under the particular facts of each case."

This statement did not answer the question. Please take this opportunity to do so.

RESPONSE: I believe trafficking in illegal drugs is a serious crime. Current federal law provides for mandatory minimum sentences for some drug trafficking offenses but not for others. I agree with congressional intent, as expressed in the drug trafficking provisions of Title 21, that some drug trafficking offenses are deserving of a severe mandatory minimum penalty, while others are not.

8. In Question 32, you were asked if you agree with Attorney General Holder's statement that a ban on so-called "assault weapons" and large capacity magazines, universal background checks, and new unnecessarily high criminal penalties for firearm offenses are "really reasonable gun safety measures." You responded:

> "As a United States Attorney, one of my highest priorities has been to protect Americans from violent crime, including violent gun crime. I understand that the Administration supports passage of legislation that would strengthen and enhance the now-sunsetted 1994 Public Safety and Recreational Firearms Use Protection Act. If confirmed, I look forward to working with Congress on any appropriate legislation toward that end.

This statement did not answer the question. Please take this opportunity to do so.

RESPONSE: I am not familiar with the context of the Attorney General's remarks and would not want to speculate on what he may have intended by them. As I previously stated, I am aware that the Administration supported passage of specific legislation regarding firearms, but that legislation did not become law.

9. In Question 35, you were asked whether, if confirmed, you would commit to devote Justice Department resources to put a stop to the practice of state and local jurisdictions' refusal to honor ICE detainers. You responded:

> "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 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."

This statement did not answer the question. Please take this opportunity to do so.

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

10. In Question 36, you were asked whether, if confirmed, you would support withholding State Criminal Alien Assistance Program (SCAAP) grants to jurisdictions that refuse to honor ICE detainers. You responded:

> "I understand that while the Prison Rape Elimination Act provides that certain grant funds will be withheld from states that are noncompliant, a similar statutory penalty is not present in the State Criminal Alien Assistance Program (SCAAP). If confirmed as Attorney General, I will work closely with leadership of the Bureau of Justice Assistance, which administers SCAAP, and my colleagues at the Department of Homeland Security to examine ways to improve SCAAP."

While I appreciate your commitment to examining ways to improve SCAAP if confirmed, your response does not answer whether you would support withholding SCAAP grants to jurisdictions that refuse to honor ICE detainers. Please take this opportunity to respond to the original question.

RESPONSE: Unlike the PREA program, which has a statutory mandate for withholding certain formula funds for noncompliance with the PREA standards, it is my understanding that there is no similar statutory authority for SCAAP. In addition, SCAAP is a reimbursement program and not a grant program, like PREA and other Department of Justice grant programs. If confirmed as Attorney General, I will examine the authority granted to the Department for administering SCAAP funds and review whether there is authority to deny or restrict funds to jurisdictions that refuse to honor ICE detainers.

11. In Question 39, you were asked if you will commit to working with Congress to rebuild the 287(g) program, and devote the necessary Justice Department resources to the program. You responded:

> "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 confirmed as Attorney General."

While I understand that as United States Attorney you have had no role in addressing ICE's implementation of this program, the question asked simply whether you would commit to work with Congress to rebuild the program and devote the necessary Justice Department resources to the program. Please take this opportunity to respond to the original question.

RESPONSE: As I noted in response to Question 39, I am committed to public safety in 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. If confirmed as Attorney General, I would also work with Congress in order to achieve these critically important objectives, and I am certainly committed to working with Congress to determine the best path forward, whether it is the 278(g) program or some other program.

12. In Question 40, you were asked if you will commit to reinstating Operation Streamline and ensure that the Justice Department has or requests the necessary resources to expand the program across the southwest border. You responded:

> "As the United States Attorney for the Eastern District of New York, I have not stood in the shoes of the Southwestern Border United States Attorneys as they have set their priorities. While I have great confidence in those United States Attorneys, if confirmed as Attorney General, I will personally take a close look at the policies governing prosecution of illegal border crossers to ensure that those policies are best protecting the security of the United States and its citizens."

While I understand that you have not had a role in setting the priorities of the Southwestern Border United States Attorneys, in order to properly evaluate your nomination, it is important for members to know how you would prioritize Department resources if confirmed. Accordingly, please take this opportunity to respond to the original question.

RESPONSE: As I tried to describe in my previous answer, in my current role, I do not have the detailed information necessary to be able to comment on how I might prioritize Department resources to address improper entry by aliens along the Southwestern Border of the United States. If confirmed, I can assure you that in conducting my evaluation, the security of the United States and the safety of its citizens will be my top priority. I recognize that this an important issue, and if fortunate to be confirmed, I will work closely with the Committee on budgetary issues related to the enforcement of immigration laws. In my view, public safety and national security should not be jeopardized by budget challenges.

13. Question 42 states that the Office of Legal Counsel (OLC) opinion regarding the president's executive action does not identify any statutory authority for the provision of Employment Authorization Documents to the majority of the individuals eligible for either the Deferred Action for Childhood Arrivals or the Deferred Action for Parents of Americans and Lawful Permanent Residents programs. The question asked you to identify the legal authority for the provision of Employment Authorization Documents to these individuals. You responded: "It is my understanding that this issue is currently the subject of pending litigation and that it 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." The question did not ask you to comment on matters subject to pending litigation, but rather asked you to cite a legal authority for the basis for OLC's analysis – an analysis which you repeatedly characterized as "reasonable" during your testimony before this Committee. Please take this opportunity to respond to the original question.

RESPONSE: It is my understanding that the Office of Legal Counsel cited 8 U.S.C. § 1324a(h)(3) and 8 C.F.R. § 274a.12(c)(14) as the legal basis for granting work authorization to deferred action recipients who can demonstrate an economic necessity for employment. OLC's opinion explains that "DHS's power to prescribe which aliens are authorized to work in the United States . . . is grounded in 8 U.S.C. § 1324a(h)(3), which defines an 'unauthorized alien' not entitled to work in the United States as an alien who is neither an LPR nor 'authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security].'" OLC Op. at 18. The opinion further explains that, since 1981, a regulation has permitted "aliens who lack lawful immigration status to apply for work authorization, including deferred action recipients who can demonstrate an economic necessity for employment. See 8 C.F.R. § 274a.12(c)(14)." *Id.* at 19.

14. In Question 45, you were asked specific questions about the Board of Immigration Appeals' (BIA) decision in the *Matter of Chairez*, 26 I&N Dec. 349 (2014). You responded:

> "As the United States Attorney for the Eastern District of New York, I have not been involved in any matters pending before the Board of Immigration Appeals, and I have not had the opportunity to review the Board's decision in *Matter of Chiarez* [sic]. If confirmed as Attorney General, I look forward to learning more about these important issues."

While I appreciate your willingness to learn more about these issues if confirmed, this statement does not answer the question. The decision(s) to which I refer are available on the Justice Department's website: http://www.justice.gov/eoir/vll/intdec/vol26/3807.pdf; http://www.justice.gov/eoir/vll/intdec/vol26/3825.pdf. Please familiarize yourself with this case and take this opportunity to respond to the original questions.

RESPONSE: It is my understanding that the Board of Immigration Appeals (BIA) recently vacated its 2014 decision in *Matter of Chairez* and held that immigration judges must follow its interpretation of *Descamps v. United States*, 133 S. Ct. 2276 (2013), to the extent that there is no controlling authority to the contrary in the circuit court of appeals in whose jurisdiction immigration judges sit.

If I am confirmed as Attorney General, I will ensure that the Executive Office for Immigration Review (of which the BIA and the immigration courts are part) serves its stated mission of uniformly interpreting and administering the Nation's immigration laws. Having the BIA and immigration judges follow applicable federal court precedents would serve that mission.

15. In Questions 46(a) and 46(b), you were asked whether the BIA's "*Pro Bono* Project" – which is housed within the Justice Department – complies with 8 U.S.C. §1229a and whether, if confirmed, you will direct the BIA to stop using taxpayer resources to find counsel for aliens and eliminate the program. You responded:

> "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 confirmed as Attorney General, I look forward to learning more about this important issue."

Please take this opportunity to familiarize yourself with this program and provide an answer to the original question.

RESPONSE: I do not read 8 U.S.C. § 1362 to bar the government from exercising its discretion to fund (or, in the case of the BIA Pro Bono Project, to facilitate) legal representation in certain immigration proceedings. Rather, the statute simply provides that an alien's right to counsel in those proceedings does not include a right of representation at the government's expense.

It is my understanding that the BIA Pro Bono Project is designed to match *pro se* respondents who have pending cases before the BIA with *pro bono* counsel who are able to better and more effectively prepare appeals than aliens acting without such assistance. Further, it is my understanding that the project does not use government funds to pay those lawyers.

16. In Questions 47(a) and 47(b), you were asked whether a federally funded AmeriCorps program – "justice AmeriCorps" – that provides attorneys to aliens in immigration proceedings complies with federal law. You were also asked whether, if confirmed, you will cease using taxpayer resources to provide attorneys for aliens in immigration proceedings and eliminate the program. In response, you stated:

> "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 confirmed as Attorney General, I look forward to learning more about this important issue."

Please take this opportunity to familiarize yourself with this program and provide an answer to the original question.

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

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

If confirmed, I will look for ways through this program and other lawful initiatives to improve the conduct of immigration proceedings.

17. In Question 51, you were asked whether you believe that the Fairness Doctrine is constitutional. You responded:

> "I have not had occasion to encounter this issue in my role as a United States Attorney. If Congress is considering legislation that would codify the fairness doctrine, I would welcome, if confirmed as Attorney General, the opportunity for the Department of Justice to evaluate the constitutionality of such legislation."

While it is not surprising that you have not had occasion to encounter this issue in your role as United States Attorney, this statement does not answer the question. Please take this opportunity to do so.

RESPONSE: As I noted previously, I have not had occasion to encounter questions concerning the Fairness Doctrine in my role as United States Attorney. I understand that the FCC and the Department concluded in the 1980s that the doctrine was unconstitutional, but have not had occasion to consider the analysis supporting those determinations or to consider whether the intervening quarter century of First Amendment jurisprudence alters that analysis. As a result, I do not have developed views on the constitutionality of the doctrine at this time, and I would not want to prejudge the issue in the event the Department should be presented with it in the future. If confirmed as Attorney General, I would, as noted, ensure that the Department fully evaluated the constitutionality of the doctrine if presented by an effort to reenact or otherwise implement it.

18. In Question 55, you were asked if you have ever expressed an opinion on whether the death penalty is unconstitutional, and whether you have such an opinion. In response, you stated: "As I testified before the Committee, I believe the death penalty is an effective penalty. In bringing such cases, I will be guided, as I was during my time as a federal prosecutor, by the evidence and the law." While I appreciate your view that the death penalty is an effective penalty, the statement did not answer the question. Please take this opportunity to do so.

RESPONSE: To the best of my recollection, I have not expressed an opinion on whether the death penalty is unconstitutional. As I stated before, I believe the death penalty is an effective penalty and it is one that I have sought as a United States Attorney.

19. In Question 57, you were asked whether you acknowledge that the George W. Bush administration successfully defended the Defense of Marriage Act (DOMA) on the basis that the law is rationally related to legitimate government interests in procreation and childrearing. You responded:

> "The Supreme Court has addressed the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), and held that it is unconstitutional under the Equal Protection component of the Due Process Clause. Accordingly, arguments

> in defense of the statute were rejected. I have not reviewed the filings the Department made before the Attorney General's letter to Speaker Boehner in February 2011. In any event, the Supreme Court has now resolved the constitutionality of Section 3 of DOMA."

This statement does not answer the question. Please take this opportunity to do so.

RESPONSE: As I stated in my original answer, the Supreme Court has addressed the constitutionality of Section 3 of the Defense of Marriage Act, and held that it is unconstitutional. Prior to the Supreme Court's decision, some lower courts upheld the constitutionality of the statute under a rational basis standard of review, concluding that it was rationally related to a variety of governmental interests. Prior to the Attorney General's letter to Speaker Boehner in February 2011, the Department filed briefs defending the statute along those lines. The Supreme Court, however, has now resolved the validity of the arguments made in defense of the statute, including the particular argument your question references.

20. In Question 64, you were asked if you have ever expressed a view regarding whether it is appropriate for a United States judge to rely on foreign law in deciding the meaning of the United States Constitution and whether you have such an opinion. You responded: "Although I have not had occasion to address this question in my role as United States Attorney, if confirmed as Attorney General, I will be guided by applicable Supreme Court precedent." While I appreciate your commitment to follow precedent, this statement does not respond to the question. Please take this opportunity to do so.

RESPONSE: It is my belief that the contours of certain provisions of the Constitution may be properly informed by the English common law, which is a foreign law; such provisions may include, for example, those that safeguard the right to trial by jury and the right of the people to be secure against unreasonable searches and seizures. I have not had the opportunity to consider whether there are other circumstances in which it is appropriate to consider foreign law in the course of interpreting the Constitution.

21. In Question 65, you were asked whether you think that the jurisdiction of the International Criminal Court is based in customary international law, or solely on ratification of the Rome Statute. You responded: "I have not had occasion to encounter questions concerning the jurisdiction of the International Criminal Court in my role as a United States Attorney, and as a result, I do not have developed views on this issue at this time." While I understand you have not had occasion to encounter such questions in your role as United States Attorney, this statement does not answer the question. Please take this opportunity to do so.

RESPONSE: As I noted previously, in my role as United States Attorney, I have not had occasion to encounter questions concerning the jurisdiction of the International Criminal Court (ICC). As a result, I have not had the opportunity to consider the basis for the ICC's jurisdiction, and do not have developed views at this time. If confirmed as Attorney General, I would look forward to learning more about this issue.