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

QUESTIONS FROM SENATOR SESSIONS

1. Do you believe that President Obama has exceeded his executive authority in any way? If so, how?

RESPONSE: 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.

2. On August 6, 2014, just a few months before President Obama announced his executive amnesty, he said: "I think that I never have a green light [to push the limits of executive power]. I'm bound by the Constitution; I'm bound by separation of powers. There are some things we can't do. Congress has the power of the purse, for example… Congress has to pass a budget and authorize spending. So I don't have a green light."

   Do you agree with that statement?

RESPONSE: I agree that the President is bound by the Constitution and that the Constitution vests Congress with the power of the purse.

3. Do you agree that Congress has a duty not to fund programs that are unconstitutional?

RESPONSE: I agree that Congress, like the Executive Branch, should act within the constraints of the Constitution.

4. Do you agree that Congress has the power to fund programs it agrees with, and not to fund programs it disagrees with or considers to be unlawful?

RESPONSE: I agree that Congress has power over appropriations, which should be exercised consistent with the constraints of the Constitution.

5. On January 20, 2014, it was reported that two Yemini nationals, Saddiq al-Abbadi and Ali Alvi, members of al Qaeda, had been charged with conspiracy to murder U.S. nationals abroad and providing material support to al Qaeda, and will be tried in United States federal court in your district, the Eastern District of New York. Both men fought against U.S. military forces on multiple occasions, and Al-Abbadi allegedly led an attack against U.S. forces in Afghanistan during which a U.S. Army Ranger was killed and several others were seriously wounded. On January 23, 2014, it was reported that Faruq Khalil Muhammad 'Isa, accused of orchestrating an attack that killed five U.S. soldiers in

Iraq, will also be tried in the Eastern District of New York. It is undisputed that these individuals are foreign terrorists, captured abroad while engaged in armed conflict against U.S. forces. Do you agree that these individuals 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?

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.

6. If an individual is charged with violations of the laws of war and appears to be an active and committed member of al Qaeda or another terrorist organization that has threatened the United States or its allies, would you support the detention of that individual as a prisoner of war so long as al Qaeda or that terrorist organization continues to threaten acts of war or terrorism against the United States or its allies?

RESPONSE: If confirmed as Attorney General, I would support using all lawful tools of national power to protect the nation from terrorism. It is my understanding that detention of enemy combatants, consistent with the 2001 AUMF as informed by the law of war, is among the lawful options available to the government, depending on the facts and circumstances.

7. Does the president have the power to detain terrorism suspects without trial in the United States? If so, for how long?

RESPONSE: It is lawful for the United States to detain enemy combatants without criminal charges or trial for the duration of the conflict, consistent with the 2001 AUMF as informed by the law of war. The location of a particular detention facility would not alter the government's detention authority, although the laws of war would inform in what circumstances such individuals could be detained.

8. Do you agree that, under the laws of war and controlling case law, the United States military has the ability to detain enemy combatants until the end of hostilities without bringing charges?

RESPONSE: Although I have not had occasion to address this question in my role as a United States Attorney, based on my general understanding of the law of war and applicable Supreme Court precedent, the United States military would, under appropriate circumstances, have the authority to detain an enemy combatant until the end of hostilities without bringing charges.

9. Do you agree 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, and that there is no such requirement in the military system for enemy combatants?

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

10. Do you agree that in the civilian justice system, when a suspect is interrogated, he has a right to counsel, the interrogator must tell him of that right, and the interview must cease until a lawyer arrives if the request is made, and that there is no corresponding right in the military system for enemy combatants?

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

11. Do you agree that in the civilian justice system, an individual must be brought promptly before a judge and be charged with a crime or released (formerly known as the "48-hour rule"), and that there is no such requirement in the military system for enemy combatants?

RESPONSE: Federal Rule of Criminal Procedure 5 requires that upon arrest either within or outside the United States, a federal law enforcement officer must promptly bring an arrestee before a magistrate judge "without unnecessary delay," although an individual may voluntarily waive this requirement, as has occurred with some frequency in terrorism cases. 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.

12. Do you agree that, in the civilian justice system, the Speedy Trial Act sets strict guidelines on how long after arrest a prosecutor has to present a case to a grand jury, and that there is no similar timeline by which the military must charge an enemy combatant who is detained during wartime?

RESPONSE: The Speedy Trial Act imposes a number of time limits within which a defendant must be indicted and brought to trial, although these may be suspended for good cause or by waiver of a defendant. 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.

13. In May 2011, in a speech before the American Association of Professional Law Enforcement, you stated:

> "Military commissions have been strengthened, and whether you agree or disagree with [the] Congressional action that restricted Guantanamo Bay detainees to military commissions, the fact is there is no longer the presumption that terrorism cases will automatically be tried in federal court."

In 2009, President Obama signed legislation passed by a Democratic-controlled Congress strengthening the Military Commissions Act of 2006. While you have acknowledged that military commissions have been strengthened, you appear to be continuing to operate under the presumption that foreign terrorists captured abroad should be brought into the United States and put in a civilian judicial system. If confirmed, will you continue Attorney General Holder's policy that there is a presumption that foreign terrorists should be tried in Article III courts?

RESPONSE: If confirmed as Attorney General, I would continue to support the approach of carefully evaluating all lawful options in the fight against terrorism, including both federal courts and military commissions in appropriate cases. The decision of whether and, if so, in what forum to try a terrorist, must be based on the specific facts of a case and an evaluation of which options are available and in the best interests of our national security. I can attest, based on my firsthand experience as a United States Attorney, to the effectiveness of our criminal justice system as one of the tools in the fight against terrorism. Our criminal justice system has proven in hundreds of terrorism cases, since before 9/11, to be a swift, secure, and effective option, among others, to gather valuable intelligence, incapacitate terrorists, and ensure justice is served.

14. Do you believe that it should be the policy of the United States to negotiate with terrorists?

RESPONSE: It is my understanding that it is the policy of the United States not to grant concessions to terrorists. If confirmed as Attorney General, I would support that policy.

15. If confirmed, will you advise the president to keep in place the United States' longstanding policy of not negotiating with terrorists?

RESPONSE: As indicated above, it is my understanding that it is the policy of the United States not to grant concessions to terrorists. If confirmed as Attorney General, I would support that policy.

16. Do you support a permanent extension of the intelligence-gathering authorities under the Foreign Intelligence Surveillance Act (50 U.S.C. § 1805(c)(2)(B), 50 U.S.C. §§ 1861-2, and 50 U.S.C. § 1801(b)(1)(c)), which are set to expire on June 1, 2015?

RESPONSE: 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.

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.

17. During your hearing, you were asked a number of legal questions to which you demurred on the grounds that you needed more information, had not studied the issue, or were not sufficiently familiar with the “legal framework” governing a particular question. But when asked by the Ranking Member, you testified without hesitation that “waterboarding is torture . . . and thus illegal.” Please take this opportunity to explain the basis for your conclusion, including what steps you took prior to your testimony to form a reasoned opinion, and why you were more familiar with this area of the law than the subjects on which you declined to answer.

RESPONSE: I was able to answer this question more definitively because I was already familiar with the issue based on the extended public debate it received. My answer was based on my understanding of waterboarding and the extreme trauma it causes, which would fall within any ordinary understanding of “torture.”

18. Section 8 of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006), provides protection from prosecution for U.S. personnel involved in certain detentions and interrogations of enemy combatants occurring between September 11, 2001, and December 30, 2005. Please explain your understanding of the scope of this immunity.

RESPONSE: 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.

19. Did you participate in the drafting of or provide input for the October 28, 2014 Executive Office for United States Attorneys’ policy memo directing that U.S. Attorneys should pursue only the most egregious marijuana offenses on Indian reservations that are growing and selling marijuana, even if those reservations are located within states where marijuana is illegal under state (and federal) law? If so, what was the scope and substance of your participation and/or input?

RESPONSE: The Attorney General’s Advisory Committee, which I chaired, provided input on the development of guidance on marijuana issues in Indian Country. That guidance makes clear that the same enforcement priorities and prosecutorial considerations that guide prosecutorial decisions in every state also apply in Indian Country. Further, the guidance emphasizes that United States Attorneys should consult with tribes individually to discuss individual tribe circumstances with regard to marijuana enforcement as they do with other issues involving federal law enforcement in Indian Country.

20. If confirmed, what actions would you direct a U.S. Attorney to take if an Indian reservation, located in a state where marijuana use is illegal under state law, legalized marijuana?

RESPONSE: Because each case presents different facts and legal questions, I am not in a position to comment on the hypothetical scenario raised in your question. However, as a general matter, if I am confirmed as Attorney General, consistent with the Department's existing guidance, I would expect each United States Attorney to assess the threats and circumstances in his or her district, and to consult closely with tribal partners and the Justice Department when significant issues or enforcement decisions arise in this area.

21. If confirmed, what actions would you direct a U.S. Attorney to take if an Indian reservation, located in a state where marijuana use is legal under state law, criminalized marijuana?

RESPONSE: Because every circumstance is different, I am not in a position to comment on the hypothetical scenario raised in your question. However, as a general matter, if I am confirmed as Attorney General, consistent with the Department's existing guidance, I would expect each United States Attorney to assess the threats and circumstances in his or her district, and to consult closely with tribal partners and the Justice Department when significant issues or enforcement decisions arise in this area.

22. In his August 2013 memo to U.S. Attorneys, Deputy Attorney General Cole announced the Justice Department would essentially cease prosecutions in states that had legalized marijuana, as long as those states have "strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests." As Chairwoman of the Attorney General's Advisory Committee, were you involved in drafting that memo? If so, please explain your involvement, including what you advised the Attorney General with regard to the policies set forth in the memo.

RESPONSE: I was not involved in the drafting of the August 2013 memorandum.

23. Attorney General Holder has advocated for reducing mandatory minimum sentences for drug trafficking, and has endorsed legislation that would reduce by at least half the mandatory minimum sentences for trafficking in heroin, methamphetamine, cocaine, LSD, PCP, marijuana, and other opiates. A number of law enforcement groups, including the National Association of Assistant U.S. Attorneys (NAAUSA), the Federal Law Enforcement Officers Association, and the National Narcotic Officers' Associations' Coalition opposed that legislation. It was also reported that several other groups, including the Fraternal Order of Police, the National Sheriffs' Association, the International Association of Chiefs of Police, the National Association of Police Organizations, the Major County Sheriffs' Association and the National District Attorneys Association were very concerned that cutting mandatory minimums in half will

severely impact their ability to secure a defendant's cooperation in indicting the "bigger fish" in a drug conspiracy. In a January 31, 2014 letter to this Committee, NAAUSA – which represents the interests of the 5,400 Assistant U.S. Attorneys nationwide – wrote:

"Mandatory minimums serve as an indispensable tool in enabling law enforcement and prosecutors to secure offender cooperation and dismantle criminal organizations. The current system of mandatory minimum penalties is the cornerstone in the ability of Assistant United States Attorneys and federal law enforcement agents to infiltrate and dismantle large-scale drug trafficking organizations and to take violent armed career criminals off the streets. Mandatory minimums deter crime and help gain the cooperation of defendants in lower-level roles in criminal organizations to pursue higher-level targets. They have been demonstrably helpful in reducing crime. Time and again, Assistant United States Attorneys have solved crimes and secured justice through the deterrent power of mandatory minimum sentences."

a. Do you agree with NAAUSA's statement?

RESPONSE: I believe that mandatory minimum sentencing statutes are among our many important tools that promote the goals of sentencing and public safety. At the same time, the Department's Smart on Crime initiative helps ensure that sentencing laws are used in a sensible and effective way that is proportional to the crime, while also holding offenders accountable and prioritizing our limited resources.

b. Do you agree that drug trafficking is a serious offense that is deserving of equally serious mandatory minimums in order to deter such behavior?

RESPONSE: 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.

24. As a United States Attorney, what types of drug offenders have been your priority targets?

RESPONSE: As noted above, as an Assistant United States Attorney, a career prosecutor, and as the United States Attorney for the Eastern District of New York, I have used narcotics laws on numerous occasions. In the Eastern District of New York, we rely heavily on the mandatory minimums statutes when dealing with the worst of the worst—drug kingpins, against whom we have built significant trafficking cases, many of whom have been extradited from foreign countries or have been operating within our district.

25. If a member of a drug trafficking ring is apprehended while in possession of such a substantial amount of drugs so as to trigger a mandatory minimum sentence, and the individual cooperates, it is very common for the prosecutor to file a motion for "substantial assistance," which means that person will not receive a mandatory minimum even though they were carrying enough drugs to trigger the mandatory minimum. How often would you estimate this occurs in your office?

RESPONSE: As a general matter, prosecutors look at all facts and evidence, as well as a defendant's cooperation, in making charging and sentencing decisions for a particular defendant. Because every case presents its own unique set of facts that would bear on the decision regarding appropriate sentencing, I am not able to estimate how often Assistant United States Attorneys in the Eastern District of New York decide whether or not to pursue a mandatory minimum sentence in narcotics cases.

26. Congress's purpose in creating sentencing guidelines was to ensure that the sentence a defendant received for a particular crime did not depend on the judge he or she happens to draw – a reality that has been characterized as "luck of the draw." Under the Supreme Court's decision in *United States v. Booker*, however, the federal sentencing guidelines are now advisory, rather than mandatory. Now that judges are no longer required to follow the guidelines, we are seeing the very disparities, including racial disparities, in sentences that Congress sought to correct. According to a 2012 report from the United States Sentencing Commission, "unwarranted disparities in federal sentencing appear to be increasing." If confirmed, will you commit to work with Congress to ensure that federal courts take sentencing guidelines into account in every case to avoid unwarranted sentencing disparities?

RESPONSE: Yes. One of the important goals of the Sentencing Reform Act is to reduce unwarranted disparities in federal sentencing. I share that goal and look forward to working with the Sentencing Commission and with Congress to better meet that goal.

27. The Supreme Court in *United States v. Rita* held that appellate courts may regard properly calculated within-guidelines sentences as presumptively reasonable. In view of this holding, do you believe it would improve compliance with the guidelines – and thereby reduce disparities – to adopt an appellate standard in line with the *Rita* decision? If you disagree, please cite the basis for your view.

RESPONSE: Whether or not a presumption of reasonableness standard of review would improve compliance with the guidelines is an empirical question that the Sentencing Commission began examining in its most recent *Booker* report. The Commission found that in fiscal year 2011, "the presumption of reasonableness did not appear to outweigh" other factors that influenced the rate of affirmances of sentencing appeals. The Commission found that "there was no consistent pattern among the circuits based on whether or not they chose to apply the presumption of reasonableness. The circuit with the highest affirmance rate in fiscal year 2011, the First Circuit, does *not* apply the presumption, whereas the circuit with the next-highest affirmance rate, the Seventh Circuit, does apply the presumption. At the other end of the spectrum, the two circuits with the lowest affirmance rates, the Fourth and Tenth Circuits, *do* apply the presumption." *See* U.S. Sentencing Commission, Report on the Continuing Impact of United States v. Booker on Federal Sentencing, Part B (2012). This suggests that adopting a presumption of reasonableness standard of review may not significantly impact appellate review of sentences and therefore may not improve guideline compliance. I look forward to working with the Sentencing Commission and with Congress to further exploring this issue in the coming years.

28. As United States Attorney, you must have been contacted about the possibility of clemency in cases handled by your office. Did you ever endorse any of these suggestions (*i.e.*, did you ever agree that clemency was warranted in any case your office prosecuted)? If yes, please provide examples. If no, please explain why not.

RESPONSE: As the United States Attorney for the Eastern District of New York, I have been contacted by the Office of the Pardon Attorney in regard to petitions for clemency in cases that had been prosecuted by the Eastern District of New York. As you know, the Constitution gives the President the exclusive authority to grant or deny clemency petitions. That authority has never been delegated to any person or agency. Presidents, however, have sought and continue to seek advice from the Department of Justice on the exercise of their authority. The Department's advice on a particular petition might incorporate the views of the United States Attorney's Office from the district of conviction. Because the Department's communications to the White House on these matters constitute advice concerning the President's exercise of a constitutionally committed authority, the advice is privileged and confidential.

29. Do you agree that robust enforcement of existing criminal laws deters the use of a gun during a criminal act?

RESPONSE: As a United States Attorney, protecting the public from violent crime has been among my top priorities. The primary tool at my disposal in doing so has been the robust enforcement of laws that punish violent criminals and deter others from committing violent acts.

30. Do you agree that before enacting new laws that restrict the constitutional rights of law-abiding citizens, we should enforce the laws already in place that apply to criminals?

RESPONSE: As a United States Attorney, I have been committed to enforcing the law and protecting the rights of law-abiding citizens. If confirmed as Attorney General, I would work with Congress to ensure that any legislative proposals focused on federal criminal law are consistent with the United States Constitution and respectful of the rights of its citizens.

31. If confirmed, will you commit to enforce existing criminal laws and not to seek new authorities that limit the rights of law-abiding Americans?

RESPONSE: As indicated above, throughout my prosecutorial career, I have been committed to enforcing the law and protecting the rights of law-abiding citizens. If confirmed as Attorney General, I would work with Congress to ensure that any legislative proposals focused on federal criminal law are consistent with the United States Constitution and respectful of the rights of its citizens.

32. In April 2013, the Senate rejected measures that would have instituted a ban on so-called "assault weapons" and large capacity magazines, required universal background checks, and created new unnecessarily high criminal penalties for firearm offenses. In October 2014, Attorney General Holder referred to these as "really reasonable gun safety measures."

    Do you agree with Attorney General Holder's statement?

RESPONSE: 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.

33. Do you personally favor allowing concealed carry permits for law-abiding citizens?

RESPONSE: As a United States Attorney, I believe that principles of federalism counsel respect for the role of the states to control who may carry concealed firearms and in what circumstances within their borders, consistent with the Constitution.

34. Do you acknowledge that as head of the Justice Department the Attorney General has the responsibility to ensure that federal immigration laws are enforced?

RESPONSE: Yes. The Attorney General, together with the Secretary of Homeland Security, is responsible for ensuring that federal immigration laws are enforced.

35. According to U.S. Immigration and Customs Enforcement's FY2014 Enforcement and Removal Operations Report, ICE's efforts in removing convicted criminal aliens have been adversely impacted by "an increasing number of state and local jurisdictions that are declining to honor ICE detainers," resulting in the release of criminal aliens into the community. The report states that since January 2014, state and local law enforcement agencies have refused to honor 10,182 detainers. It is my understanding that through September 2014, the recidivism rate for this group was a stunning 25 percent, including 5,425 subsequent arrests and 9,316 criminal charges. It is also my understanding that litigation by individuals and advocacy groups are a major factor in this non-cooperation. If confirmed, will you commit to devote Justice Department resources to put a stop to this dangerous practice?

RESPONSE: I support efforts to engage with state and local law enforcement partners to achieve consistent policies for the apprehension, detention, and removal of undocumented aliens. If 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.

36. Pursuant to the Prison Rape Elimination Act (PREA), the Justice Department routinely withholds grants to state and local jurisdictions for noncompliance. If confirmed, would you support withholding State Criminal Alien Assistance Program (SCAAP) grants to jurisdictions that refuse to honor ICE detainers?

RESPONSE: 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.

37. Do you agree that the decision to release criminal aliens in general poses an unnecessary and unreasonable risk to the public safety?

RESPONSE: It is my understanding that Immigration and Customs Enforcement (ICE) administers the immigration detention system and is responsible for determining whether to release particular aliens from its custody. I respectfully refer questions regarding ICE's exercise of its authorities to ICE. It is my view as a prosecutor, however, that any custodial decisions must be made within the confines of the law, determined on a case-by-case basis, and account for any risks to public safety.

38. Do you support a role for state and local law enforcement, consistent with federal law, in enforcing federal immigration laws? Please explain your answer.

RESPONSE: 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.

39. The 287(g) program, which trains local law enforcement to determine whether an individual is lawfully present, has been extremely successful. The website for U.S. Immigration and Customs Enforcement (ICE) once touted the program's success: "Since January 2006, the 287(g) program is credited with identifying more than 304,678 potentially removable aliens – mostly at local jails. ICE has trained and certified more than 1,300 state and local officers to enforce immigration law." In a statement last

October, an ICE spokesperson said the 287(g) program "acts as a force multiplier for the agency and enhances public safety in participating jurisdictions by identifying potentially dangerous criminal aliens and ensuring they are removed from the United States and not released back into our communities." Nevertheless, the Obama administration has systematically dismantled the program, cancelling agreements with local law enforcement and slashing funding for the program, largely because amnesty advocates oppose the program. If confirmed, will you commit to working with Congress to rebuild the 287(g) program, and devote the necessary Justice Department resources to the program?

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

40. If confirmed, will you commit to reinstating Operation Streamline prosecutions and ensure that the Justice Department has or requests the resources necessary to expand the program across the entire southwest border?

RESPONSE: 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.

41. Is accurately reporting one's income and properly filing one's income tax return an obligation shared by everyone in this country? If so, do you agree that someone who fails to do so lacks "good moral character" as required under the various provisions in the Immigration and Nationality Act? If not, please explain why not.

RESPONSE: As the United States Attorney for the Eastern District of New York, I have not had the opportunity to study the question of what constitutes "good moral character" for purposes of the Immigration and Nationality Act, though I agree that filing tax returns is an obligation shared by all who are required to file them.

42. To my knowledge, the Office of Legal Counsel opinion regarding the president's executive action on immigration 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. Please identify the legal authority for the provision of Employment Authorization Documents to these individuals. If you find that such authority does not exist, will you ask the Office of Legal Counsel to revise its opinion?

RESPONSE: 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.

43. If confirmed, will you commit to conducting a thorough review of pending cases within the Executive Office for Immigration Review (EOIR) – the Immigration Courts and the Board of Immigration Appeals – to identify the source of the backlog in the system, and to providing the results of that review to this Committee within 60 days?

RESPONSE: Although I am not familiar with the specifics of EOIR's case load and its adjudication rates, I understand that its case load has continued to increase over the past few years. I understand, too, that Congress has appropriated funds to hire more immigration judges and agency staff to address the increasing case load and the added demands of the recent influx of people across the southwest border. If confirmed as Attorney General, I will work with Congress to ensure that EOIR has the resources necessary to fairly and efficiently adjudicate the cases that come before it, and that EOIR appropriately uses those funds to administer its case load as efficiently and fairly as possible.

44. It is my understanding that EOIR has provided members of the Board of Immigration Appeals with an extremely generous, and perhaps questionable, teleworking program. If confirmed, will you provide a description of this policy to the Committee within 60 days?

RESPONSE: I have not had the opportunity to study policies implemented in other parts of the Department and am not familiar with the Board of Immigration Appeals' telework policy in particular. If confirmed as Attorney General, I commit to learning more about this issue with your concerns in mind.

45. Last year, the Board of Immigration Appeals issued a published decision in the *Matter of Chairez*, 26 I&N Dec. 349 (2014), which held that the United States Supreme Court's decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), applies to the analysis of criminal convictions in immigration proceedings. *Descamps*, and its predecessor cases (*Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005)), arose out of concerns regarding the Sixth Amendment in the criminal sentencing context. Do you agree with the Board's decision? If so, why should a strict, technical analysis, which can only benefit aliens with serious criminal convictions, be applied to civil immigration proceedings, where the Sixth Amendment does not apply? Is the safety of our communities more important, or the ability of a criminal alien to remain in this country?

RESPONSE: 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*. If confirmed as Attorney General, I look forward to learning more about these important issues.

46. 8 U.S.C. §1229a clearly states that an alien has the right of being represented – at no expense to the government – in removal proceedings. The Board of Immigration Appeals has a "*Pro Bono* Project," in which it secures counsel for previously unrepresented aliens in cases on appeal with the Board.

    a. Do you believe that this program complies with federal law?
    b. If confirmed, will you direct the Board to stop using taxpayer resources to find counsel for aliens and eliminate this program?

RESPONSE: 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.

47. The Department of Justice has provided federal funds for an AmeriCorps program to provide attorneys to aliens in immigration proceedings.

    a. Do you believe that this program complies with federal law?
    b. If confirmed, will you cease using taxpayer resources to provide attorneys for aliens in immigration proceedings and eliminate the program?

RESPONSE: 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.

48. In the 2001 case *Zadvydas v. Davis,* the Supreme Court held that the government can detain an alien ordered removed for the initial 90 days allowed by 8 U.S.C. §1231(a)(2), and thereafter only for a period reasonably necessary to secure the alien's removal. It is presumptively reasonable for the government to detain the alien for six months or less, but after that time the government must show a significant likelihood of removal in the reasonably foreseeable future. Unfortunately, due to either the alien's actions or the alien home country's lack of "cooperation," the government, even if acting diligently, often cannot repatriate the alien. This has resulted in the release of thousands of criminal aliens back into the general public, where they often re-offend, in many cases committing even more heinous crimes. Would you support legislation to fix the problems caused by this case?

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

49. Similarly, in the 2013 case of *Rodriguez v. Robbins*, the U.S. Court of Appeals for the Ninth Circuit held that criminal and arriving aliens held in mandatory detention under 8 U.S.C. §§1226(c) and 1225(b), respectively, must be provided with a bond hearing after six months detention. In other words, the detention of criminal and arriving aliens is only mandatory for six months, after which the government is required to show that the aliens in custody are either a flight risk or a danger to public safety in order to continue detention. This is true regardless of the detainee's adjudication status. Like *Zadvydas*, this case could contribute to the release of dangerous criminal aliens back into communities. Would you support legislation to fix the problems caused by this case?

RESPONSE: If confirmed as Attorney General, I would welcome the opportunity to work with you and any members of the Committee on legislation that would help to fix the problems in America's broken immigration system. This would include any legislation designed to protect the public from terrorists and criminal aliens who pose a threat to public safety. As the United States Attorney for the Eastern District of New York, I know that my Office has taken the position that courts should respect Congress's statutory command that aliens subject to detention under the Immigration and Nationality Act remain in detention during the pendency of their removal proceedings. If confirmed as Attorney General, that position would not change.

50. 8 U.S.C. § 1228(a) states that the Attorney General "shall provide for the availability of special removal proceedings at certain Federal, State, and local correctional facilities" for certain criminal aliens. Conducting hearings in such a manner reduces the cost of future detention at taxpayer expense. Do you support the expansion of this program, and if so, how will you sure its implementation by EOIR? Will you coordinate with the Department of Homeland Security to ensure that, where applicable, as many removal hearings as possible will be conducted in this manner?

RESPONSE: Although I am not familiar with the details of special removal proceedings at federal, state, and local correctional facilities, I am committed to supporting programs that minimize the cost of detention at taxpayer expense. If confirmed as Attorney General, I will work with the Department of Homeland Security and State and local agencies to achieve that important goal.

51. The 1940s regulation that created the "Fairness Doctrine" was held unconstitutional in a 1986 Federal Communications Commission decision. The following year, the Department of Justice advised the president to veto legislation that would have codified the doctrine in statute. Do you believe that the Fairness Doctrine is constitutional?

RESPONSE: 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.

52. Please list which programs within the Justice Department, if any, you believe can be eliminated because they are ineffective, duplicative, unnecessary, or have outlived their purpose.

RESPONSE: As the United States Attorney for the Eastern District of New York, I have not had the opportunity to study this issue across the Department of Justice. Through my service on the Attorney General's Advisory Committee, I did see the difficult choices that United States Attorneys across the country have had to make during this time of tight budgets, and I know that everyone in the Department has been striving to do more with less. If confirmed as Attorney General, I commit to making sure the Department's resources are utilized in the most efficient and effective manner to accomplish the Department's mission.

53. I am told that litigating attorneys within Main Justice are paid significantly more than similarly-situated federal prosecutors within the 93 U.S. Attorney Offices across the country. This pay variance is especially large at the entry level, and can differ as much as $30,000 between similarly situated Assistant U.S. Attorneys and Justice Department trial attorneys. I am also told that the Department has the authority to correct the problem because it arises out of the uneven treatment in pay of Assistant U.S. Attorneys, covered under the specialized Administratively Determined pay schedule for Assistant U.S. Attorneys, and the pay of all other Department attorneys, covered under the government-wide General Schedule. In your capacity as chair of the Attorney General's Advisory Committee, what have you done to address this problem, and what will you do to correct it, if you are confirmed as Attorney General?

RESPONSE: The Attorney General's Advisory Committee was recently briefed by a working group of Department officials on the topic of disparity between the General Schedule and the Administratively Determined pay schedule. The topic continues to be examined. As Attorney General, I would be committed to ensuring that all attorneys within the Department of Justice are compensated on a fair and equitable basis.

54. On January 16, 2014, Attorney General Holder announced a new policy that prohibits federal agency forfeiture of assets seized by state and local law enforcement agencies. Would you agree that these forfeitures are important tools that enable law enforcement to effectively investigate, disrupt, and dismantle criminal organizations? If confirmed, will you continue Attorney General Holder's policy?

RESPONSE: I support Attorney General Holder's recently issued policy on federal adoptions and, if confirmed as Attorney General, would continue it. When the federal asset forfeiture program was first instituted, many states did not have forfeiture laws on the books. As a result, state and local law enforcement agencies lacked the necessary legal mechanism to forfeit property that had been used in a crime. The practice of adoption was a response to that situation. Today, however, all states have some form of asset forfeiture laws on the books. The Department's new adoption policy reflected, in part, recognition of this change in circumstances.

But even under the new policy, there are still some limited situations in which we continue to believe that federal adoption of assets seized by state and local authorities in appropriate. This "public safety" exception within the policy includes assets such as firearms, ammunition, explosives, and property used in child pornography.

This new policy will ensure that federal asset forfeiture can continue to be used to take the profit out of crime and return assets to victims, while safeguarding civil liberties and the rule of law. At the same time, it will encourage joint investigations between federal and state and local law enforcement, to continue strong working relationships with state and local partners including the sharing of law enforcement intelligence.

55. Have you ever expressed an opinion on whether the death penalty is unconstitutional? If so, what was that opinion? If not, do you have such an opinion and what is it?

RESPONSE: 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.

56. When Attorney General Holder announced that the administration would no longer defend the Defense of Marriage Act (DOMA), he claimed that by doing so, it was acting consistent with the Justice Department's "longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense." Do you agree that there are several reasonable arguments in defense of DOMA, including that the law is rationally related to legitimate government interests in procreation and childrearing, or do you agree with the administration that it is not rationally related to those ends?

RESPONSE: When Congress passes a law, the Department of Justice should vigorously defend the constitutionality of that law. That is a vitally important principle and a longstanding tradition of the Department of Justice, which affords appropriate respect to Congress as a co-equal branch of government, and I fully subscribe to it. There are limited exceptions to that rule, however, and I understand that the Attorney General, in a February 23, 2011, letter to Speaker Boehner, concluded that, under the Equal Protection component of the Due Process Clause, discrimination based on sexual orientation is reviewed under heightened scrutiny standard of review, and based on that conclusion determined that there were not reasonable arguments to be made in defense of Section 3 of the Defense of Marriage Act (DOMA). The Supreme Court has now invalidated Section 3 of DOMA.

57. Do you acknowledge that the George W. Bush administration successfully defended DOMA on the basis that the law is rationally related to legitimate government interests in procreation and childrearing?

RESPONSE: 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.

58. Do you acknowledge that those same arguments had been relied on by federal and state courts in upholding states' traditional marriage laws?

RESPONSE: The constitutionality of state marriage laws that exclude same-sex couples is currently being considered by the Supreme Court, and Attorney General Holder has indicated that the Department of Justice will file a brief in that case. My understanding is that, although the clear majority of lower courts to consider that issue have held that the laws before them are unconstitutional, a few federal and state courts have upheld such laws on a variety of grounds.

59. Do you agree that the Executive Branch has a clear and unwavering duty to vigorously defend the constitutionality of any law for which a reasonable defense may be made?

RESPONSE: When Congress passes a law, the Department of Justice should vigorously defend the constitutionality of that law. That is a vitally important principle and a longstanding tradition of the Department of Justice, which affords appropriate respect to Congress as a co-equal branch of government, and I fully subscribe to it. There are only two exceptions. The first is where a statute violates the separation of powers by infringing on the President's constitutional authority. The second is where there are no reasonable arguments that can be offered in defense of a statute. These exceptions are narrow, and they should be invoked only after the most careful deliberation.

60. Do you agree that there is a difference between refusing to defend a law that the administration regards as unconstitutional and refusing to defend a law that the administration opposes on policy grounds?

RESPONSE: Yes.

61. Do you agree that if an administration refuses to defend clearly constitutional laws based on its own policy views, it is violation of the oath to protect and defend the Constitution and the laws of the United States?

RESPONSE: As noted above, by principle and longstanding tradition, when Congress passes a law, the Department of Justice should vigorously defend that law against a constitutional challenge. There are two principal exceptions to that tradition. The first is where a statute violates the separation of powers by infringing on the President's constitutional authority. The second is where there are no reasonable arguments that can be offered in defense of a statute. Neither exception encompasses a law that an administration opposes merely on policy grounds. If confirmed as Attorney General, I would comply fully with the Department's longstanding tradition.

62. According to the questionnaire that you submitted to the Committee, in February 2006, you spoke at the Federal Bar Council Winter Bench and Bar Conference on whether international law should be considered by United States courts. You indicated that you did not have lecture notes and that no transcript of the event is available. Please describe the substance of your remarks at that conference.

RESPONSE: While I do not have a specific recollection of my remarks at this event held in February 2006, I believe I was part of a panel wherein the participants were asked to represent different views for the purpose of discussion. If confirmed as Attorney General, I would uphold the Constitution and laws enacted by Congress as interpreted by the Supreme Court.

63. Have you ever expressed a view regarding whether it is appropriate for a United States judge to rely on foreign law? If so, what was that opinion? If not, do you have such an opinion?

RESPONSE: It is my belief that there are limited circumstances in which the courts of law of the United States could appropriately apply foreign law. For example, a choice of law clause in a contract may mandate the application of foreign law in a contractual claim, or a conflict-of-law analysis by a court may result in a determination that the substantive law of a foreign jurisdiction governs a particular dispute.

64. Have you 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 U.S. Constitution? If so, what was that opinion? If not, do you have such an opinion?

RESPONSE: Although I have not had occasion to address this question in my role as a United States Attorney, if confirmed as Attorney General, I will be guided by applicable Supreme Court precedent.

65. Do you think that the jurisdiction of the International Criminal Court is based in customary international law, or solely on ratification of the Rome Statute?

RESPONSE: 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.

66. In April 2009, a Spanish judge began an investigation into alleged torture at the detention facility at Guantanamo Bay. Speaking to reporters in Berlin a few days later, Attorney General Holder was asked whether the Justice Department would cooperate with such an investigation. He said: “Obviously, we would look at any request that would come from a court in any country and see how and whether we should comply with it . . . This is an administration that is determined to conduct itself by the rule of law and to the extent that we receive lawful requests from an appropriately created court, we would obviously respond to it.” He later clarified his statement by saying that he was talking only about “evidentiary requests.” If confirmed, how would you respond to such investigations and evidentiary requests?

RESPONSE: In the event I am confirmed as Attorney General and the United States receives an evidentiary request from a foreign state, I will review the contours of the request and the United States’ legal obligations—if any—to respond before determining how to proceed.