

Senator Grassley, Chairman
Follow-up Questions for the Record
Sally Yates
Nominee, to be United States Deputy Attorney General
April 16, 2015

1. **At a hearing in the House of Representatives, on April 15th, Congressman David Young and ICE Director Sarah Saldana had the following exchange:**

Young: “Director Saldana, I want to reread that quote from the President on February 25th at Florida International University when he said “There may be individual ICE officials or border patrol who aren’t paying attention to our new directives. But they are going to be answerable to the head of the department of homeland security because he has been very clear about what our priorities should be. If somebody is working for ICE, and there is a policy and they don’t follow the policy, there are going to be consequences for it.” What did you think about when the President said that, when you learned about it? Did that concern you at all? Did you have any red flags go up at all?”

Saldana: “I’m trying to be honest with you sir, No...No it didn’t strike me as unusual”

Young: “Well if I had policies and directives that were contrary to the law I would understand if they didn’t want to follow them. I would expect them to follow the law first.”

Saldana: “And that’s where you and I probably have a fundamental disagreement.”

I find it distressing that Director Saldana would take the position that ICE agents should follow policy directives, even where those policy directives conflict with clear statutory commands.

Do you agree with Director Saldana that law enforcement officers should follow policy directives, even if those directives instruct a law enforcement officer to perform a duty or function that is contrary to statutory law?

RESPONSE: I cannot speak to Director Saldaña’s specific comments. In my experience, policy directives from the Department of Justice are subjected to review prior to issuance to ensure, among other things, that they are not contrary to law. Law enforcement officers must always perform their duties and functions in a lawful manner.

2. **I asked if you agreed that the Second Amendment, as a fundamental right, requires access to ammunition. You responded that you would make sure that all proposals within the purview of the Department of Justice are lawful under the Constitution. Regardless of ATF's position on the issue, do you believe that the ability to access ammunition is required by the Second Amendment?**

RESPONSE: Yes, I believe that the Second Amendment requires some level of access to ammunition. The U.S. Supreme Court has made it clear that, like the other rights articulated within the Bill of Rights, the rights protected by the Second Amendment are not unlimited, and the nature and extent of that access to ammunition must be evaluated in the context of the facts presented in specific cases.

3. **According to testimony by the Department of Defense General Counsel, Stephen Preston, before the House Armed Services Committee last June, the OLC advice offered to the President was provided via email. In my Questions for the Record, I asked you if this was accurate. You did not answer that question but instead discussed the need to have some materials remain confidential in order to "preserve and protect the Executive Branch's proper functioning under the Constitution." Of course, disclosure of facts related to how and in what form the OLC advice was offered, including if it was offered via email, could not possibly be covered by any privilege. Confirmation of a medium is not advice, and it does not put in jeopardy any interests the executive branch may have, as a constitutional matter.**

- a. **Was Stephen Preston's testimony that the OLC advice was provided via email accurate?**

RESPONSE: In order to preserve and protect the proper functioning of Executive Branch deliberations under the Constitution, it has been the Department's longstanding practice across administrations of both parties generally to maintain the confidence of the nature, timing, and content of confidential legal advice provided by the Department's lawyers, including whether the Department's advice was sought on a particular question. The exception to this practice is where disclosure is approved through processes, such as OLC's formal publication process, that ensure that attorney-client confidences are appropriately protected.

I was U.S. Attorney for the Northern District of Georgia at the time of the Bergdahl transfer and as such did not participate in any decisions related to the issue. The Department of Justice, however, can confirm that the Department provided informal legal advice relating to the Bergdahl transfer, by email. Those attorney-client communications remain confidential. However, I appreciate your interest in understanding the legal rationale for the Administration's conclusion that the transfer of the five individuals was lawful. To assist you in understanding the rationale for that decision, I would again direct you to the memorandum the Department previously provided to you that was provided to the Government Accountability Office (GAO).

- b. **If you will not answer whether Mr. Preston’s testimony was accurate, please identify the privilege you are asserting, as well as the legal rationale supporting this claim.**

RESPONSE: Not applicable.

- c. **I also asked you to provide the date(s) the advice was sought as well as the date(s) when it was provided. Given your response to this question, please explain the privilege you are asserting and the legal rationale supporting this privilege.**

RESPONSE: As explained above, it has been the Department’s longstanding practice across administrations of both parties generally to maintain the confidence of the nature, timing, and content of confidential legal advice provided by the Department’s lawyers, except where disclosure is approved through processes, such as OLC’s formal publication process. In light of the testimony by the Department of Defense, however, the Department of Justice can confirm that the Department provided informal legal advice relating to the Bergdahl transfer, by email, in May and June of 2014.

- d. **Finally, I reiterate my request for the Department to provide the OLC advice it provided to the President, in whatever form it took. If you are unwilling to do so, please identify the privilege and legal reasoning.**

RESPONSE: As I explained during the hearing, the Department previously decided not to publicly release OLC’s informal legal advice and I do not intend to revisit that decision. As you know, it has been the Department’s longstanding practice across administrations of both parties generally to maintain the confidence of the nature, timing, and content of confidential legal advice provided by the Department’s lawyers, including whether or not the Department’s advice was sought on a particular question, except where disclosure is approved through processes, such as OLC’s formal publication process, that ensure that attorney-client confidences are appropriately protected.

4. **Regarding the ongoing Congressional investigation of quid pro quo hiring allegations within the USMS Asset Forfeiture Division, you wrote in response to Question 4 that you “take seriously all allegations of employee misconduct” and that the Department “remains committed to addressing any such allegations and taking action where appropriate”. However, information obtained by the Committee suggests the Department’s denial of these allegations may have been premature and was prepared prior to the completion of the USMS’s more thorough internal investigation into the matter.**

- a. **What steps does the Department take to ensure the accuracy of its responses to Committee inquiries?**

RESPONSE: The Department and its components strive to provide complete and accurate responses to all Congressional inquiries. We recognize the importance of ensuring accuracy while also being mindful of the need to respond to Congress in a timely manner. I understand

that with regard to this particular matter, the USMS has initiated an extensive review of these issues, and that the Department provided you further information and advised you of this review on April 17, 2015. The USMS continues to collect and review information so the Department may provide a complete and thorough response to you as expeditiously as possible.

- b. When the Office of Legislative Affairs (OLA) issued its April 3, 2015 response to the Committee, was OLA aware that the internal USMS investigation of this matter remained incomplete?**

RESPONSE: With regard to your letter referenced above, dated March 19, 2015, I understand that the Office of Legislative Affairs (OLA) replied on the stated deadline of March 26, 2015. In light of concerns raised by your staff, the USMS has continued its review of the issues raised in your letter, as well as your subsequent letter dated April 7, 2015. We take seriously the important issues you have brought to our attention and we are grateful that you have done so. As you are aware, OLA sent you a letter regarding this matter on April 17, 2015, reflecting our concerns that the ongoing review had brought to light an email chain that was inconsistent with representations in our letter of March 26, 2015. As noted above, the USMS continues to collect and review information so the Department may provide a complete and accurate response to your letters as expeditiously as possible.

- c. Will you personally ensure that DOJ's review of this matter is completed in a professional and comprehensive manner and report your findings to this Committee?**

RESPONSE: Yes.

- 5. Your answers to my questions for the record 1(a) and (b), and 2(a),(b),(c), and (d) were unresponsive, please answer the questions:**

- a. Do you believe the Department's proposed changes should include within the category of persons to whom a protected disclosure may be made an FBI employee's direct supervisor and others within the employee's chain of command? If not, why not?**

RESPONSE: As you know, the Department's report of April 2014 was the culmination of a working group of attorneys from the FBI, the Justice Management Division, the Office of Attorney Recruitment and Management, the Office of the Inspector General, the Office of Professional Responsibility, and the Office of the Deputy Attorney General. Ultimately, in the report, this group advocated expanding the list of persons to whom a protected disclosure may be made to the second-highest ranking tier of field office officials. As we formulate these proposed regulations, we will consider this report and all of the testimony before the Senate Judiciary Committee regarding the appropriate category of persons to whom a protected disclosure may be made. As is the normal course, any new regulations will be subject to the requisite notice and comment process, through which we will gather more information and views on this issue.

- b. When will the Department issue regulations implementing additional recommendations in its own report, issued a year ago?**

RESPONSE: The Department will issue the regulations necessary to implement the recommendations in the report as soon as possible, which, as described above, will be subject to the requisite notice and comment process.

- c. Why shouldn't the Department's proposed regulations incorporate provisions endorsed by GAO, the IG and the FBI at the Committee's March 4, 2015 hearing to explicitly protect disclosures made by FBI employees to Congress? Please explain how the Department's proposed changes to OARM procedures, discussed in your response, are relevant to whether the Department supports explicitly protecting disclosures to Congress.**

RESPONSE: As previously described, the Department's review of proposed regulations is not complete. While we do not know what will or will not be included, we are seriously considering the GAO's report and all of the testimony before the Senate Judiciary Committee on these matters. The response regarding possible changes to OARM procedures was an attempt to address not just the enumerated question 2(a), but also the concerns articulated in the larger preface of question 2.

- d. What steps does the Department propose to take to exercise effective oversight over OARM and ensure that any sanctions for violations of protective orders are not used as methods of retaliation themselves against whistleblowers?**

RESPONSE: The proposal regarding OARM sanction authority would, if included in any new regulation, be modeled on the rule that is currently in place for MSPB judges, including that an MSPB judge must provide appropriate prior warning, allow a response to the actual or proposed sanction when feasible, and document on the record the basis for a sanction.

- e. Do you agree that the sanctions proposal could be used to thwart Congressional oversight of whistleblower cases? Why or why not?**

RESPONSE: The purpose of the sanctions proposal is to ensure that FBI whistleblowers have access to OIG and FBI OPR files during the OARM process, which may be privacy-protected or law enforcement sensitive.

- f. Why should there not at least be an exception to these gag orders for disclosures to Congress and the Inspector General?**

RESPONSE: As stated above, our review of proposed regulations is not complete, but we appreciate the perspectives provided in the hearing held by the Senate Judiciary Committee, as well as the follow-up questions you have asked. We will consider all of this as we move forward with any new regulations.

- 6. On March 26, 2015, the Office of Inspector General (OIG) released a report which found that Drug Enforcement Administration (DEA) agents engaged in "sex**

parties” with prostitutes hired by drug cartels in Colombia.¹ According to the report, seven DEA agents admitted to attending these parties, but none of them were dismissed.² Instead, the penalties imposed on these agents ranged from a 2-day suspension to a 10-day suspension.³

On the same day, I wrote you a letter expressing concerns that the Justice Department (DOJ) may not be taking adequate steps to prevent its employees from buying sex and thereby contributing to the demand for the human sex trade. On April 10th, DOJ responded as follows:

The Attorney General and Acting Deputy Attorney General share your concerns about the conduct detailed in the OIG report (report). We are also troubled by the apparent *inadequacy* of the Drug Enforcement Administration's (DEA) response to that and other conduct that we have learned about since the release of the report. . . . While discipline was imposed on each of the agents who admitted to the [sex parties] misconduct, *none of the agents were dismissed*. Although we have *significant concerns about the lack of severity of this discipline*, federal civil service protections preclude us from reopening these closed matters.⁴

Yet, also on April 10th, the Attorney General issued a memorandum that imposes that same inadequate measure of discipline on employees who solicit sex, going forward: the possibility of mere suspension, instead of automatic termination.⁵ This is far from zero tolerance.

The Attorney General’s April 10th memo appears to be a tacit admission that under certain circumstances, the U.S. Department of Justice will tolerate employees who engage in a practice that, by its own terms, “creates a greater demand for human trafficking victims and a consequent increase in the number of minor and adult persons trafficked into commercial sex slavery.”⁶

As such, the memo may send a similar message of tolerance to would-be johns, pimps, and human-traffickers, both domestically and abroad. The memo may also perpetuate a cynical perception held by some that reducing the demand for the sex trade is unviable. Given the Department’s demonstrated commitment to combating the human sex trade, I doubt that this was the intent of Department leadership.

¹ U.S. Department of Justice, Office of Inspector General, *The Handling of Sexual Harassment and Misconduct Allegations by the Department’s Law Enforcement Components* (March 2015), at 27-28 [hereinafter OIG Report].

² *Id.* at 28

³ *Id.*

⁴ Letter from The Hon. Peter J. Kadzik, Assistant Attorney General, U.S. Department of Justice, to Sen. Charles E. Grassley, Chairman, Sen. Comm. on the Judiciary (April 10, 2015), at 1 (emphases added).

⁵ U.S. Department of Justice, Office of the Attorney General, Memorandum for all Department Personnel, Prohibition on the Solicitation of Prostitution (April 10, 2015).

⁶ *Id.*

During consideration of Ms. Loretta Lynch's nomination to be the next Attorney General, I asked if she would commit to implementing a zero-tolerance policy that requires the dismissal of DOJ employees who are found to have engaged in solicitation of prostitution.⁷ I did so in response to a January 2015 OIG report disclosing problems in the DOJ's policies governing the off-duty conduct of its employees,⁸ including the lack of a Department-wide policy concerning solicitation of prostitution, much less a zero tolerance policy. This review followed a 2012 OIG finding that three DEA officials paid for sexual services while in Cartagena, Colombia.⁹

In her February 9th response to my question on this subject, Ms. Lynch failed to commit to a zero-tolerance policy, saying only that she will review policies to ensure that those who violate the "highest standards" of conduct are held accountable.¹⁰ I hope this includes a zero tolerance policy, but I simply do not know based on the nominee's response. Also, the nominee's answer indicates a failure to appreciate the deterrence value of a zero tolerance policy.

As I noted in my March 26th letter, it is not enough to set anti-human trafficking as a prosecutorial priority – it must also be a managerial and personnel priority. A bright line rule warning all employees to steer clear of contributing to the demand for human trafficking is needed, with a sufficiently serious penalty attached to a violation of that rule. Anything short of the penalty of termination is not zero tolerance.

Please respond to the following questions – which are nearly identical to the questions that I asked you in my March 26th letter, but were left unanswered by the Department's April 10th response.

- a. Will you adopt a zero-tolerance policy that requires the dismissal of any DOJ employee who is determined to have engaged in the solicitation of prostitution, without exception?**

RESPONSE: In response to the Inspector General's report, the Attorney General immediately issued guidance that unequivocally prohibits its personnel from soliciting prostitutes under any circumstances, including in places where doing so is otherwise legal. The guidance was developed in conjunction with the Department's human resources and administrative components and includes the stiffest possible sanctions, including termination from employment. To send a clear message to Department personnel and deter future misconduct, the guidance also mandates a minimum penalty of suspension. The guidance addresses the concerns associated

⁷ Nomination of Loretta E. Lynch to be Attorney General of the United States, Questions for the Record, Submitted February 9, 2015, <http://www.judiciary.senate.gov/imo/media/doc/Lynch%20QFR%202-9-15.pdf>, at 43-44.

⁸ U.S. Department of Justice, Office of Inspector General, *Review of Policies and Training Governing Off-Duty Conduct by Department Employees Working in Foreign Countries* (Jan. 2015), at ii, 7, 40, 48-50.

⁹ Letter from U.S. Department of Justice, Office of Inspector General to Sen. Joseph Lieberman, Chairman, and Sen. Susan Collins, Ranking Member, Sen. Comm. on Homeland Security and Governmental Affairs (Dec. 20, 2012).

¹⁰ Nomination of Loretta E. Lynch to be Attorney General of the United States, Questions for the Record, Submitted February 9, 2015, <http://www.judiciary.senate.gov/imo/media/doc/Lynch%20QFR%202-9-15.pdf>, at 43-44.

with the solicitation of prostitution by Department employees, while respecting employees' due process rights consistent with federal civil service laws.

- b. What legal barriers and restrictions, if any, are currently in place that would prevent the Department from adopting an effective zero-tolerance policy?**

RESPONSE: The guidance does not establish a penalty of mandatory termination. The Department has not explored the legality of adopting such a policy.

- c. What additional authority, if any, do you need from Congress to ensure that DOJ employees are terminated for engaging in the solicitation of prostitution?**

RESPONSE: The guidance does not establish a penalty of mandatory termination. Accordingly, the Department has not explored the legality of adopting such a policy.

- d. According to the March 26, 2015 OIG report, the OIG “cannot be completely confident that the FBI and DEA provided the OIG with all information relevant to its review.”¹¹ Will you instruct all DOJ components to fully cooperate with the OIG in its reviews, including providing timely access to all documents requested by the OIG?**

RESPONSE: Yes. The Department has previously and will continue to direct all components and agencies to provide the Inspector General, in a timely fashion, with all of the documents he needs to complete his reviews. In the coming weeks, I will be implementing a new Department-wide policy to ensure that the IG promptly receives wiretap, grand jury, and Fair Credit Reporting Act material when he believes that material is necessary for him to complete his reviews, consistent with my authority under the relevant statutes.

- 7. Since February of this year, the OIG has already sent four reports informing Congress that the FBI has violated an appropriations rider that prohibits the use of appropriated funds to deny the OIG timely access to all records.¹² On April 14, 2015, the OIG sent another report affirming that the FBI is still refusing to comply, and that “document requests remain outstanding in every one of the reviews and investigations that were the subjects of those letters.”¹³**

¹¹ OIG Report, at ii.

¹² Letter from Michael Horowitz, Inspector General, U.S. Department of Justice, to Sen. Comm. on Appropriations and House Com. on Appropriations (Feb. 3, 2015); Letter from Michael Horowitz, Inspector General, U.S. Department of Justice, to Sen. Comm. on Appropriations and House Com. on Appropriations (Feb. 19, 2015); Letter from Michael Horowitz, Inspector General, U.S. Department of Justice, to Sen. Comm. on Appropriations and House Com. on Appropriations (Feb. 25, 2015); Letter from Michael Horowitz, Inspector General, U.S. Department of Justice, to Sen. Comm. on Appropriations and House Com. on Appropriations (Feb. 3, 2015); Letter from Michael Horowitz, Inspector General, U.S. Department of Justice, to Sen. Comm. on Appropriations and House Com. on Appropriations (Mar. 4, 2015); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, (2014), at Div. B, Title II, Sec. 218.

¹³ Letter from Michael Horowitz, Inspector General, U.S. Department of Justice, to Sen. Comm. on Appropriations and House Com. on Appropriations (Mar. 4, 2015).

One day later, on April 15, 2015, the FBI responded to my February 26 and March 6, 2015 letters on this subject,¹⁴ and stated as follows:

Indeed, in order to resolve the disagreement [with the OIG], consistent with standard Department practice, the Office of the Deputy Attorney General has asked the Office of Legal Counsel (OLC) to render an opinion as to the correct reading of the law. As we await the OLC opinion or other dispositive guidance, in order to comply with the Inspector General Act *and* all other applicable provisions of law, we must conduct a legal review of the large volume of documents that we regularly produce to the OIG.¹⁵

Section 6(a)(1) of the Inspector General Act of 1978 means what it says when it gives Inspectors General a right to access all Department records,¹⁶ but apparently the FBI needs an affirmation of this clear reading of the statute from OLC.

On October 10, 2014, Representative John Conyers and I wrote to Acting Assistant Attorney General Karl Thompson requesting that the Office of Legal Counsel provide to the House and Senate Judiciary Committees a copy of the opinion.¹⁷

In your April 13, 2015 response to my question to you on this subject, you stated that you “expect [OLC’s] work to be completed as soon as possible.”¹⁸

To date, the OLC opinion remains outstanding. Your answer to question 3 was unresponsive. Please answer the questions:

a. When will the OLC complete the opinion?

RESPONSE: I expect OLC to undertake a thorough and independent analysis of the applicable law in its opinion. OLC’s value to the President and Executive Branch turns on the strength of its analysis, and so I believe OLC’s advice should be clear, accurate, thoroughly researched, and soundly reasoned. I appreciate that it may not be possible for OLC to predict precisely when its analysis, which involves four complex statutory schemes, will be completed, but I have made sure that OLC understands that completing this opinion as soon as possible without sacrificing the quality of its analysis is a high priority for the Department.

¹⁴ Letter from Charles E. Grassley, Chairman, Sen. Comm. on the Judiciary, to the Hon. James Comey, Director, Federal Bureau of Investigation (Feb. 26, 2015); Letter from Charles E. Grassley, Chairman, Sen. Comm. on the Judiciary, to the Hon. James Comey, Director, Federal Bureau of Investigation (Mar. 6, 2015).

¹⁵ Letter from the Hon. Stephen D. Kelly, Assistant Director, Federal Bureau of Investigation, to Charles E. Grassley, Chairman, Sen. Comm. on the Judiciary, (Apr. 15, 2015).

¹⁶ Section 6(a)(1) of Pub. L. 95-452, Oct. 12, 1978, 92 Stat. 1101, as amended.

¹⁷ Letter from Charles E. Grassley, Ranking Member, U.S. Senate Committee on the Judiciary and John Conyers, Ranking Member, U.S. House of Representatives Committee on the Judiciary to Karl R. Thompson, Acting Assistant Attorney General (Oct. 10, 2014).

¹⁸ Nomination of Sally Yates to be Deputy Attorney General of the United States, Questions for the Record, Submitted April 13, 2015, at 4-5.

b. Will you commit to making the opinion public by a date certain?

RESPONSE: Once OLC completes its analysis, I expect OLC immediately to consider the opinion for publication. In the interim, since my appointment as Acting Deputy Attorney General, I have worked hard to find a solution to this problem. In the coming weeks, I will be implementing a new Department-wide policy to ensure that the IG promptly receives wiretap, grand jury, and Fair Credit Reporting Act material when he believes that material is necessary for him to complete his reviews, consistent with my authority under the relevant statutes.

8. In response to Question 5 asking if you would support legislation requiring state and local law enforcement to comply with immigration detainer requests by federal authorities, you stated you would look forward to working with the Committee on “any legislation that would help to improve our immigration system in a manner that protects national security and public safety.” Do you believe that legislation requiring state and local law enforcement to comply with immigration detainer requests by the feds would help to improve our immigration system in a manner that protects national security and public safety?

RESPONSE: If the Department of Homeland Security identifies a need for additional statutory authority, I would welcome the opportunity to work with DHS, as well as you and your staff, on the content of any such legislation.

9. In response to Question 6 regarding misconduct by NSA employees, you cited “the Department’s long-standing practice not to disclose non-public information about investigations that did not result in publicly filed criminal charges” as justification for the Department’s failure to comply with my requests for information on this issue. However, that practice is far from consistently followed. The Department does release information about investigations that did not result in filing criminal charges when it believes it is in its interests. For example, according a February 10, 2010 FBI press release:

Earlier today, representatives of the FBI and Justice Department provided a 92-page investigative summary along with attachments to victims of the attacks, relatives of the victims and appropriate committees of Congress. This document sets forth a summary of the evidence developed in the "Amerithrax" investigation, the largest investigation into a bio-weapons attack in U.S. history. As disclosed previously, the Amerithrax investigation found that the late Dr. Bruce Ivins acted alone in planning and executing these attacks.

The investigative summary and the attachments are now accessible to the public and have been posted to the Justice Department Web site at www.usdoj.gov/amerithrax under the Freedom of Information Act. In addition, roughly 2,700 pages of FBI documents related to the Amerithrax case are now accessible to the public and have been posted to the FBI website at

<http://foia.fbi.gov/foiaindex/amerithrax.htm> under the Freedom of Information Act.¹⁹

Accordingly, the Department has recognized in its prior practice that the release of such information can be appropriate when there is a strong public and Congressional interest in its work despite the lack of any criminal charges being filed. How do you distinguish the Departments previous releases of such information from your current position? Additionally, is it your position that Congressional oversight responsibilities may be overridden or ignored because of the Justice Department's "long-standing practices"?

RESPONSE: I assure you that I value the role played by Congress in overseeing the Executive Branch, and I am committed to working with you and other members of the House and Senate Judiciary Committees to accommodate your legitimate oversight interests. The Department strives to ensure that Congress has the documents and information it needs to conduct oversight, while also protecting the Department's law enforcement and confidentiality interests.

I appreciate your specific interest in the Department's handling of seven cases of possible wrongdoing by individuals, which have been sent to, or discussed with, the Department since 2004. Although it is the Department's long-standing practice not to disclose non-public information about investigations that did not result in publicly filed criminal charges, we have, nonetheless, sought to accommodate your interest in these matters by providing you with information from the available records as to why the Department declined to prosecute these individuals. I also understand that the Department's Office of Legislative Affairs would be pleased to schedule a briefing on this topic to further satisfy your information needs in this matter.

10. In light of ongoing civil litigation and the criminal investigation of the IRS targeting scandal, has the Justice Department instituted a litigation hold or other preservation effort to the storage sites, mentioned in Question 8, in Pennsylvania and West Virginia to cover all potentially relevant information, including electronically stored information? If so, when? If not, why not?

RESPONSE: The Department's Tax Division issued a separate litigation hold letter describing the claims raised to the Internal Revenue Service and the Office of Chief Counsel in each of the 501(c)(4) cases shortly after each case was filed. During the course of litigation, the Tax Division has had contact with both the IRS and TIGTA to discuss the proper steps to take to preserve information relevant to the claims raised in the litigation.

11. In your attempt to justify the Department's refusal to provide OLC information in your reply to Question 11, you cite to the "Best Practices Memo" for the contention that, although the Department favors publication of significant OLC opinions, countervailing considerations may make it improper to publish. The Best Practice

¹⁹ <http://www.justice.gov/opa/pr/justice-department-and-fbi-announce-formal-conclusion-investigation-2001-anthrax-attacks>

Memo says such a countervailing consideration can be “when an agency requests advice regarding a proposed course of action, the Office concludes it is legally impermissible, and the action is therefore not taken.” In your opinion, would a situation in which the President requests advice regarding a proposed course of action, the Office concludes it is legally impermissible, and the action is taken anyway also qualify as a countervailing consideration justifying withholding publication of the OLC opinion?

RESPONSE: As U.S. Attorney for the Northern District of Georgia and as Acting Deputy Attorney General, I have not been involved in the publication determinations by the Office of Legal Counsel (OLC). As I understand it, there is an array of factors that OLC considers during the publication process, as outlined in the Best Practices Memo, and many of those factors turn on the particular circumstances and nature of the advice, which makes it difficult to answer questions about the publication of a hypothetical opinion in the abstract.

- 12. Follow-up to Question 5 and 19 – I asked you whether you would support legislation that would clarify that it is mandatory for local jurisdictions to comply with detainer requests issued by Immigration and Customs Enforcement so that criminal aliens were not released. Your response was vague and unresponsive. I hope you will take the time to study the issue and review the pending legislation that would address the *Zadvydas v. Davis* decision with regard to length of detention for foreign nationals. Would you support legislative efforts to allow the government to hold certain aliens longer than six months pending removal, as is current practice? If not, why not?**

RESPONSE: Under current law, the government has the authority to detain aliens for longer than 6 months pending removal if there is either a significant likelihood of removal in the foreseeable future, or in certain circumstances if the alien is a danger to the community or a threat to national security. I am always interested in working with members of Congress on legislation to fix our country’s immigration system and protect the general public, and would be interested in working with you on any immigration legislation that you are proposing to offer in either area. This could include legislative efforts that would address the length of time that the government could detain certain aliens pending removal.

- 13. Follow-up to Question 15 – In your response to my question regarding federal lawsuits against certain states, you say that you “will continue the Department’s efforts to work closely with our federal, state, and local law enforcement partners to ensure that national security and public safety are our top priorities in enforcement of immigration laws.” However, the problem is that the Department is doing the exact opposite and not working with state and local partners. It is punishing states for cooperating with the federal government and rewarding states that are not. While I understand you will evaluate state laws on a case by case basis, I would like to know if there are any state laws relating to immigration enforcement currently in place that you find objectionable. Please elaborate.**

RESPONSE: While I have not undertaken a review of specific laws and policies, there are a number of factors that go into evaluating state laws. When it comes to immigration enforcement, the Department works with our federal partners, particularly the Department of Homeland Security. Part of the evaluation entails an assessment of state laws on a case-by-case basis under the principles set forth by the Supreme Court in *Arizona v. United States*, notably assessing whether particular state laws are consistent with the federal government priorities on immigration enforcement. To reiterate, those priorities currently focus on national security and public safety. However, in our assessment of state laws, other federal priorities are also taken into account, including broader law enforcement and civil rights priorities. Thus, where a particular state law focuses on immigration, it is possible that it could affect other, equally important federal equities that need to be considered. It would therefore not be appropriate for me to comment on particular state laws without that broader assessment.

14. Follow-up to Question 16 – The responses you have provided regarding several of my questions are repetitive and nonresponsive. While I appreciate that you will work closely with law enforcement partners, it is not clear how you will do that. I asked specifically how you would work with state and locals to reverse potential sanctuary policies and what solutions you would bring to the table to ensure more cooperation. Please elaborate on this issue.

RESPONSE: As noted in my response to Question 13, particular laws could affect not just immigration enforcement, but other federal priorities. Sanctuary policies could touch those other federal priorities, requiring a consideration beyond only the law's effect on immigration enforcement.

15. Follow-up to Question 17 – In your response related to grant funding for sanctuary cities, you appear to recognize that the purpose of the Department's grants is to keep the public safe. However, sanctuary communities are not keeping the public safe when they release dangerous illegal aliens back into the community. This is especially true after ICE has requested that they detain such dangerous or criminal aliens in order to provide time for the agency to take custody of them. Therefore, would you advise the Attorney General to instruct the Department to withhold funding when communities refuse to cooperate with federal law enforcement, especially if any funding from the Department is not related to public safety?

RESPONSE: Protecting public safety is the Department of Justice's primary responsibility. As I said at my confirmation hearing, as a career prosecutor, I would not support any action that I believed would undermine public safety. It is through this lens that I would approach providing advice to the Attorney General regarding funding to communities.

As you are aware, Department of Justice grant programs are very important to state, local, and tribal law enforcement. These programs provide criminal justice funding to state, local and tribal governments that help to reduce crime, address significant gaps in local funding, and respond to emerging criminal justice issues. The Department takes seriously its oversight of these grants, and works to ensure that grantees comply with all requirements and laws.

Many of the Department's grant funds are formula-based, with eligibility criteria and associated penalties set firmly by statute. Moreover, withholding grant funding can have a significant impact on key local criminal justice programs. Accordingly, the Department must carefully consider whether suspending funding, when it has discretion to do so, would be in the best interest of public safety and national security.

- 16. Follow-up to Question 20 – Your answer to my question about the Department's failure to appeal the decision in *Martinez v. Holder* was not responsive. I would like to know whether you agree that Martinez weakens national security. You responded that there are other elements besides being a "particular social group" that an alien has to meet for withholding of removal. However, the decision in this case makes it easier for gang members to remain in the United States. Do you think alien gang members should be allowed to remain in the country? Should they be a priority for removal?**

RESPONSE: Violent criminals, including violent gang members, represent one of the highest priorities this administration has for the use of its limited enforcement and removal resources. If confirmed to be the Deputy Attorney General, I will work to ensure that our policies and enforcement resources continue to protect the general public from violent criminal aliens – including violent gang members – in a manner that is consistent with our statutory and international law obligations with regard to the removal of aliens.

- 17. Follow-up to Question 22 – You write that the statute, in your view, does not bar the government from exercising its discretion to fund legal representation to certain alien children in immigration proceedings. Do you support using taxpayer funding for legal representation of people who have illegally entered the country or overstayed their visa, regardless of age?**

RESPONSE: I believe that the government's discretion to fund legal representation in immigration proceedings may be appropriately exercised when doing so is intended to improve the effective and efficient adjudication of those proceedings. For example, there are some categories of individuals who appear in our immigration courts, such as younger children and those deemed mentally incompetent, for whom providing legal representation may increase the efficiency of those proceedings (regardless of outcome). If confirmed, I would carefully review and evaluate any proposal, immigration court-related or otherwise, to improve the conduct of Department operations, and determine whether the proposal would comport with applicable law and serve the interests of justice.

- 18. Follow-up to Question 25(a) – You stated that, throughout your career, you have worked to secure our borders. Please specify these efforts.**

RESPONSE: Thank you for the opportunity to clarify my answer on this important question involving national security and public safety. Indeed, the Northern District of Georgia is not a border district and as such, I did not have the robust immigration docket of several of my colleagues. This said, as U.S. Attorney and before that as First Assistant U.S. Attorney, I supervised the work of prosecutors that had a substantial impact on border security in three important ways.

First, the International Terminal at Hartsfield-Jackson International Airport services millions of international passengers each year; in 2012, this number reached nearly 10 million passengers traveling to and from 50 countries. The office regularly prosecuted document fraud cases involving false passports or other fraudulent papers arising from the international terminal, as well as instances in which international passengers smuggled drugs or currency on their flights. In addition to our efforts at the airport, the office maintained an active program working with the State Department's Diplomatic Security Service (DSS) to prosecute passport fraud cases originating in the Atlanta area. The defendants in these cases are typically foreign nationals who are illegally present in the United States and are subject to removal from the country after their conviction. They lied on U.S. passport applications, falsely claiming to be a United States citizen and eligible for a U.S. passport. In 2014 alone, the office received and prosecuted five such cases from DSS.

Second, the office prosecuted many cases involving drug trafficking by the Mexican cartels and human trafficking of international victims, as Atlanta is a national hub for both crimes. While the criminal activity in these matters occurred hundreds of miles from the actual border, many of these prosecutions involved significant matters that were well known in Central America. These prosecutions often deterred or had impacts on the criminal organizations in their operations that involved crossings of the U.S. border.

Third, the office prosecuted hundreds of illegal reentry cases, involving foreign nationals who reentered the United States after previously having been removed, during my tenure as U.S. Attorney, and, prior to that, as First Assistant U.S. Attorney.

19. Follow-up to Question 25(a) - You stated that, throughout your career, you have worked to protect our national security through the enforcement of federal immigration laws. Specifically, how have you done so?

RESPONSE: The Northern District of Georgia prosecuted a significant number of immigration cases during my tenure as U.S. Attorney and, prior to that, as First Assistant U.S. Attorney. As described in the response above, the office prosecuted illegal reentry cases and document fraud matters involving false passports or immigration applications.

20. Follow-up to Question 25(a) – While I understand that the Department of Homeland Security is responsible for following through with a judge's removal order, the safety of the public is the Department of Justice's joint responsibility. Given the Department's charge over law enforcement matters in the United States, I would like to know more about where you stand with regard to catch and release policies. Please explain your thoughts about the release of criminal aliens by the Obama administration in the last few years and what can be done to prevent this in the future.

RESPONSE: I am not in a position to comment on the Department of Homeland Security's administration of the immigration detention system. That said, based on my experience in the Northern District of Georgia, I believe that prosecutors with limited resources must (1) prioritize

enforcement efforts by focusing on criminals who pose risks to public safety; and (2) make custodial decisions on a case-by-case basis, taking applicable law and public safety into account.