Senator Grassley, Chairman
Questions for the Record
Sally Yates
Nominee to be United States Deputy Attorney General

1. **In April 2014, the Department of Justice submitted a report to the President examining the FBI whistleblower regulations.[1] In January of this year, the U.S. Government Accountability Office (GAO) published a report examining those regulations and the Department's handling of FBI whistleblower complaints.[2] During the March 24 hearing, you indicated that you had not reviewed the Department's report. I encourage you to review the Department's analysis and recommendations, as well as those of the GAO.**

   In its April 2014 report, the Justice Department recommended expanding whistleblower protections to disclosures made to the second-in-command of an FBI field office.[3] Despite the urgings of employees, whistleblower advocates, and even the Office of Special Counsel, however, the Department did not recommend expanding protections to disclosures made to direct supervisors or other management within an FBI employee's chain of command.

   As the Department notes, "[The Office of Special Counsel (OSC)] believes that to deny protection unless the disclosure is made to the high-ranked supervisors in the office would undermine a central purpose of whistleblower protection laws."[4] The U.S. Government Accountability Office (GAO) report examining the Department's handling of FBI whistleblower cases similarly stresses that employees who report to a "nondesignated entity," whether they intend to officially blow the whistle or not, leaves those employees with "no recourse" against retaliation.[5] GAO explains that it is common for whistleblowers in the FBI to report wrongdoing to their immediate supervisors, and some report concerns without realizing or expecting to make a "whistleblower disclosure."[6] Moreover, internal FBI policy *encourages* reporting

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[1] Department of Justice Report on Regulations Protecting FBI Whistleblowers (Apr. 2014), at 12-13 (The current regulations protect disclosures made to the first-in-command of an FBI field office) [Hereinafter "DOJ Report"].

[2] U.S. Government Accountability Office, Report to the Chairman, Committee on the Judiciary, U.S. Senate, Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints (Jan. 2015) [Hereinafter "GAO Report"].

[3] DOJ Report at 12-13.

[4] *Id.* at 14.

[5] GAO Report at 18.

[6] *Id.* at 19; Notably, the impulse to report wrongdoing to a direct or immediate superior is common in the private sector as well as in the government. *See* Ethics Resource Center, Inside

wrongdoing within the chain of command.[7] The policy "specifically prohibits retaliation against employees who report compliance risks to any supervisor in the employees' chain of command, as well as additional specified officials, but *does not offer any means of pursuing corrective action if an employee experiences retaliation for such a disclosure*."[8]

It is not surprising, then, that during the course of its review the Department examined its handling of 89 FBI whistleblower cases, and determined that 69 of them were deemed "non-cognizable." A "significant portion" of those involved disclosures that were "not made to the proper individual or officer under 28 C.F.R. § 27.1(a)."[9]

a. **Given the clear findings of both reports that a significant number of FBI whistleblowers are left with no recourse for reporting wrongdoing, why shouldn't the law or regulations protect disclosures made to direct supervisors and others within an FBI employee's chain of command?**

RESPONSE: I believe strongly that whistleblowers play an important role in discovering and preventing waste, fraud, and abuse in the government, and I can assure you that the Department takes reports of retaliation very seriously. The Department is working with the FBI to improve the process for adjudicating claims of retaliation. These changes will ensure that the Department has a fair and efficient process for adjudicating these claims, and include expanding the list of persons to whom a protected disclosure may be made. As Acting Deputy Attorney General, and if confirmed, I will work to ensure that our employees, whether at the FBI or in any other part of the Department, do not face retaliation for making a protected disclosure.

b. **The Department released its report recommending changes to the FBI whistleblower regulations almost a year ago. What steps has the Department taken to implement its own recommendations, and when will the changes that the Department already has recommended take effect?**

RESPONSE: The Department has already taken a number of steps to implement the recommendations in the report, including providing whistleblowers with access to Alternative Dispute Resolution, implementing a policy of referring any final decision that includes a finding of unlawful reprisal to the FBI Office of Professional Responsibility – copying the FBI Director, expanding resources for the office that handles appeals of FBI whistleblower cases, committing to publicly release the Office of Attorney Recruitment and Management (OARM) annual reports

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the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey, at 11 (2012) ("In 2011, 56 percent of first reports were made to the employee's direct supervisor."); *available at* http://www.ethics.org/files/u5/reportingFinal_0.pdf.

[7] GAO Report at 19 n. 41 (citing Policy Directive 0032D, Non-Retaliation for Reporting Compliance Risks (Feb. 11, 2008) and Policy Directive 0727D Update (Sept. 23, 2014)).

[8] *Id.*

[9] DOJ Report at 7.

in the future, and working with the DOJ Office of the Inspector General (OIG) to develop improved training for FBI employees. Implementation of the other recommendations in the report requires additional regulatory authority, and the process of drafting those regulations is ongoing.

2. **During the March 24 hearing, I asked you whether the FBI regulations should be amended to clarify that FBI whistleblower disclosures to Congress are protected. I also noted that the Department recommended in its April 2014 report establishing sanctions for violations of protective orders in the context of OARM proceedings.[10] During the Committee's March 4 hearing examining the FBI whistleblower regulations, witnesses from the first panel noted that this sanctions proposal could be used to significantly disadvantage whistleblowers in Department proceedings. The proposal also has no exception for disclosures to Congress or the Department of Justice Inspector General, and thus could function as gag orders.**

    a. **Will 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?**

RESPONSE: The Department's review of the regulations necessary to implement this change is ongoing. While we do not yet know everything that will be incorporated into the regulations, we will seriously consider these suggestions.

As you noted, the Department's report of April 2014, indicated that the Department supports revising its regulations and/or OARM's procedures, as appropriate, to include a provision providing sanction authority similar to that provided to Merit System Protection Board (MSPB) administrative judges under 5 C.F.R. § 1201.43. Under that provision, MSPB judges may impose sanctions upon the parties "as necessary to serve the ends of justice." As amended in October 2012, see 77 FR 62350, 62366, the rule provides that an MSPB judge must provide appropriate prior warning, allow a response to the actual or proposed sanction when feasible, and document in the record the reasons for any resulting sanction.

OARM has used protective orders in the past only in limited circumstances, including where the parties have requested the investigative file from FBI's Office of Professional Responsibility (OPR) or OIG. In those cases, the parties have agreed to enter a joint stipulated protective order to prevent the release of privacy-protected or sensitive law enforcement information. Although it has yet to had occasion to do so, OARM could also issue a protective order if necessary to protect from harassment a witness or other individual who testifies before it.

    b. **Do you agree that the proposal to sanction whistleblowers for violating protective orders could severely disadvantage FBI whistleblowers that do not have routine access to investigative files outside the OARM process? Why or why not?**

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[10] *Id.* at 14-15.

RESPONSE: The purpose of this proposal is to ensure that FBI whistleblowers have access to OIG and FBI OPR investigative files during the OARM process. OARM has used protective orders in the past only in limited circumstances, including where the parties have requested the investigative files. In those cases, the parties have agreed to enter a joint stipulated protective order to prevent the release of privacy-protected or sensitive law enforcement information. As noted above, this proposal is very narrow and is similar to the authority provided to MSPB administrative judges.

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

RESPONSE: As explained above, the purpose of the proposal is to ensure that whistleblowers have access to the documents they need as part of the OARM proceedings, while at the same time preventing the release of privacy-protected or sensitive law enforcement information.

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

RESPONSE: As explained above, our review of the regulations is ongoing. While we do not yet know everything that will be incorporated into the regulations, we will seriously consider these suggestions.

e. **Will the Department include this recommendation in its proposed regulatory amendments? Why or why not?**

RESPONSE: As explained above, our review of the regulations is ongoing. While we do not yet know everything that will be incorporated into the regulations, we will seriously consider these suggestions.

3. **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 requested by Inspector General Michael Horowitz regarding OIG's access to Department records.[11] When will the OLC complete the opinion? Will you commit to making the opinion public by a date certain?**

RESPONSE: I believe that the Inspector General plays a particularly critical role at the Department of Justice in helping us to identify misconduct or malfeasance, or simply waste, fraud and abuse, and that the Inspector General should receive all documents that he needs to complete his reviews. I understand that OLC, in response to a request from former Deputy

[11] 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).

Attorney General James Cole, is preparing a legal opinion addressing the circumstances in which the Inspector General is legally authorized to gain access to information obtained pursuant to the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2522 (2012); grand jury material protected by Rule 6(e) of the Federal Rules of Criminal Procedure; and information obtained pursuant to section 1681u of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (2012). I expect their work to be completed as soon as possible. Although it is my understanding that the Inspector General has never been denied access to Title III or Rule 6(e) material when necessary to complete his reviews, I am developing a department-wide policy that will expedite the production of such documents to the Inspector General, and I expect that policy to be finalized in the coming weeks.

4. **On March 18, 2015, I sent a letter to the Director of the U.S. Marshals Service, Stacia Hylton, asking for information about the alleged misuse of Asset Forfeiture Funds to purchase extravagant office furnishings.[12] In that letter, I also asked for information about whistleblower allegations that the Marshals Service is unlawfully spending funds allocated for Joint Law Enforcement Operations.**

   On March 19, 2015, I sent another letter regarding the Marshals Service to you.[13] I inquired about whistleblower allegations that Director Hylton recommended an individual for a lucrative contract position, even though he was not qualified. The whistleblower alleges that the Assistant Director of the Marshals Service's Asset Forfeiture Division, Kimberly Beal, improperly influenced subordinates to waive the contract qualifications in order to hire the contractor, in hopes of obtaining her current position.

   a. **Will you commit to providing my office with a timely and thorough response to this letter?**

RESPONSE: I understand that the Marshals Service and the Department responded to your March 18, 2015 and March 19, 2015 letters, and we will respond promptly to the follow-up letter that we received from you on April 7, 2015.

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[12] Letter from Charles E. Grassley, Chairman, U.S. Senate Committee on the Judiciary to Stacia A. Hylton, Director, U.S. Marshals Service (Mar. 18, 2015), *available at*: http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2015-03-18%20CEG%20to%20USMS%20%28Misuse%20and%20Waste%20of%20AFF%20Resources%29.pdf.

[13] Letter from Charles E. Grassley, Chairman, U.S. Senate Committee on the Judiciary to Sally Quillian Yates, Acting Deputy Attorney General (Mar. 19, 2015), *available at*: http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2015-03-19%20CEG%20to%20DOJ%20%28USMS%20Contracting%29.pdf.

b. **Will you investigate these very serious allegations of using Department funds to award highly-paid contract work to favored insiders, who the Department has determined are unqualified to perform that work?**

REPSONSE: I believe strongly in the rights and protections afforded to all government employees who report wrongdoing or mismanagement, in accordance with the federal laws that you helped write. I can also assure you that I take seriously all allegations of employee misconduct. The Department remains committed to addressing any such allegations and taking action where appropriate.

5. **State and local governments are outright ignoring Immigration and Customs Enforcement (ICE) detainers and putting criminal aliens back on the street, instead of helping ICE deport them. Earlier this month, in a hearing before the House Committee on Oversight and Government Reform, the Director of U.S. Immigration and Customs Enforcement, Sarah Saldaña, testified that since January 1, 2014, state and local jurisdictions have declined more than 12,000 ICE detainer requests. She further testified that "there are over 200 jurisdictions, including some of the largest in the country, that refuse to honor ICE detainers, while some have also denied ICE access to their jails and prisons." At that same hearing Director Saldaña was asked: "Would it help you if we clarified the law to make it clear that it was mandatory that those local communities cooperate with you?" Director Saldaña immediately replied: "Thank you, amen, yes."**

   Would you, like Director Saldaña, also support legislation requiring state and local law enforcement to comply with immigration detainer requests by the feds, especially if the individuals in question are criminals? If no, how would you, as a liaison to law enforcement officials in states, get them to comply with detainers?

RESPONSE: If confirmed as Deputy Attorney General, I 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. Moreover, I will continue to engage with state and local law enforcement partners to achieve consistent policies for the apprehension, detention, and removal of undocumented aliens. 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.

6. **Since October 2013, I have three times requested from the Department information on its handling of twelve specific instances of misconduct by employees of the National Security Agency. It has been reported that these employees intentionally and willfully abused the agency's surveillance authorities by spying on private citizens, many of whom were their spouses or significant others. When the Attorney General testified before the Judiciary Committee on January 29, 2014, he promised to provide a "fulsome response to indicate how these cases were dealt with by the Justice Department" and that he would "do that soon."**

Almost a year and a half later, the Department has provided me only the most cursory information – that it "declined to prosecute these individuals for varying reasons, including issues with jurisdiction and venue."[14] The Department also indicated that prosecuting these cases would risk disclosing sensitive and classified information in open court, but this isn't a sufficient response.

Will you arrange to have my staff briefed, in a classified setting if necessary, on the details of why these individuals have not been held criminally accountable for abusing these surveillance authorities?

RESPONSE: Generally speaking, prior to seeking charges in a matter, prosecutors evaluate the facts and the law, and make decisions about whether evidence supports guilt of a crime beyond a reasonable doubt, which is the burden of proof to obtain a conviction on criminal charges. Charging decisions in specific cases are made in accordance with the Principles of Federal Prosecution. See United States Attorneys' Manual 9-27.000, http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution.

With respect to the matters you refer to, 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. Still, we appreciate your interest in this issue and have provided the following information to address your request for information consistent with our law enforcement and litigation responsibilities. As the Department noted in letters dated November 10, 2014 and March 9, 2015, NSA Inspector General Dr. George Ellard identified seven reports of possible wrongdoing by individuals that had been sent to, or discussed with, the Department since 2004.

According to the available records, the Department declined to prosecute these individuals for varying reasons, including issues with jurisdiction and venue. We have not identified a record why one matter from 2005 was declined. As we previously described to you and as you note above, in some of these instances, significant concerns were raised that pursuing these matters in open criminal proceedings would risk disclosing sensitive information about highly classified systems.

If it would be helpful, please have your staff contact the Department's Office of Legislative Affairs to schedule a briefing on this topic.

7. **On March 9, 2015, I was joined by 52 of my Senate colleagues in a letter to the Director of ATF regarding ATF's actions to limit access to rifle ammunition. One day after the letter, ATF withdrew the ammunition ban proposal. The Second Amendment is a fundamental right and as such it requires not only access to firearms but to ammunition. If law-abiding gun owners cannot obtain rifle ammunition, or face substantial difficulty in finding ammunition available and at reasonable prices because**

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[14] Letter from Assistant Attorney General Peter J. Kadzik to Senator Charles E. Grassley (March 9, 2015).

government entities are banning it, then the fundamental nature of the Second Amendment is at risk.

a. **Do you agree that the Second Amendment, as a fundamental right, requires access to ammunition?**

RESPONSE: I was not involved in the initial review of ATF's proposed framework, but I support ATF's decision to refrain from issuing a final framework at this time. My understanding is that ATF will process the comments it received, further study the issues raised therein, and provide additional open and transparent process (for example, through additional proposals and opportunities for comment) before proceeding with any framework.

As the Acting Deputy Attorney General, and if confirmed, I will review any future proposal to ensure it maintains fidelity to the statute and strikes an appropriate balance for all of the important interests involved, including those of law enforcement and sportsmen.

As with any issue within the purview of the Department of Justice, I will ensure that any proposal is lawful under the Constitution, including the Second Amendment, and federal law.

b. **Do you believe that the ATF can regulate ammunition out of existence? If so, are there no limits on ATF regulating ammunition? If there are limits, what are they?**

Response: As explained above, I believe that any proposed ATF regulation must be consistent with the statute and strike an appropriate balance for all of the important interests involved, including those of law enforcement and sportsmen. As with any issue within the purview of the Department of Justice, I will ensure that any proposed regulation is lawful under the Constitution, including the Second Amendment, and federal law.

c. **If confirmed, what will you do to ensure that the federal government does not limit access to ammunition, such as M855, a steel-core bullet, as a pretext for limiting the exercise of the Second Amendment?**

RESPONSE: As explained above, I believe that any proposed ATF regulation must be consistent with the statute and strike an appropriate balance for all of the important interests involved, including those of law enforcement and sportsmen. As with any issue within the purview of the Department of Justice, I will ensure that any proposed regulation is lawful under the Constitution, including the Second Amendment, and federal law.

8. **Recently, it was reported that Lois Lerner's missing emails in the IRS targeting scandal may have been stored in storage sites in Pennsylvania and West Virginia. Amazingly, the IRS never looked for the missing emails at these sites. But what was perhaps even more disturbing, however, is that when one of the parties affected by IRS targeting asked the District Court to appoint an independent investigator to look for these emails at these storage sites, Department of Justice lawyers objected.**

a. **Why did the Department object to independent investigators having access to these off-site storage facilities?**

RESPONSE: The plaintiffs in *True the Vote, Inc. v. Internal Revenue Service* (D.D.C.), *appeal pending*, asked the District Court to authorize a third party forensic expert to search all IRS computers for Ms. Lerner's missing emails. In denying plaintiff's request on August 7, 2014, Judge Walton shared the government's concerns that allowing the search would compromise the tax return information of third parties in violation of the tax confidentiality protections of 26 U.S.C § 6103. The court also noted that ". . . while the recovery of the emails at issue is certainly in the public interest to the extent that government records were included among those emails, the public interest is already being served through the ongoing TIGTA investigation."

b. **What has the Department done to rectify the situation?**

RESPONSE: Throughout my career at the Department of Justice, I have developed tremendous faith in the ability of career prosecutors and professional law enforcement agents to conduct investigations in a fair, objective, professional, and impartial manner, without regard to politics or other outside influence. I can assure you that the Department is conducting a thorough, fair, and impartial investigation of the IRS targeting matter.

9. **I have serious concerns about how DOJ whistleblowers are treated. Under federal law, "the right of employees… to petition Congress … or to furnish information to either House of Congress… may not be interfered with or denied."**

   To give you one example, I wrote to DOJ regarding allegations that the Office of Justice Programs, or OJP, knowingly granted millions of taxpayer dollars to states that incarcerated vulnerable minors in violation of federal funding requirements. Additionally, I requested that OJP notify employees of their rights to cooperate with the Judiciary Committee's inquiry.

   In response, DOJ asserted that its "current procedures for advising employees of their rights regarding whistleblower protections are sufficient." However, there are allegations that OJP management has impeded this Committee's inquiry by physically moving individuals with knowledge to other departments, preventing suspected whistleblowers from applying for positions, and allowing individuals within the Office of General Counsel to improperly influence a review of this matter.

   a. **As acting Deputy Attorney General, what steps have you taken to ensure that DOJ personnel – and OJP employees in particular – understand their rights to cooperate with the Judiciary Committee?**

RESPONSE: As the Department has explained in its letter to you, we regularly advise Department personnel of their rights with respect to disclosures of information regarding waste, fraud, abuse, or misconduct. This includes through required No Fear Act training and through public postings available to all employees and to the public at large.

b. **Will you ensure that all DOJ personnel properly notify employees of their rights to cooperate with congressional inquiries?**

RESPONSE: As stated above, the Department regularly advises Department personnel of their rights with respect to disclosures of information regarding waste, fraud, abuse, or misconduct.

c. **Can you state with complete confidence that OJP has not punished whistleblowers or wrongfully impeded this Committee's right to the juvenile justice grant inquiry?**

RESPONSE: I believe that the Department has responded to the allegations you have cited above, both in a briefing on March 27, 2015, and in a letter dated April 1, 2015.

d. **Are you aware of whistleblowers being silenced within the DOJ? If so, what steps will you take to ensure whistleblowers are treated fairly under the law?**

RESPONSE: I am not aware of whistleblowers being silenced within DOJ, but if the Committee believes that it has information to the contrary, I would appreciate the chance to review it and ensure that whistleblowers are treated fairly.

10. **As you know, in 2013, the Department of Justice decided that it would not seek to strike down state laws in Colorado, Washington, and elsewhere that have legalized the recreational use of marijuana, so long as these states implement effective regulatory regimes that protect key federal interests. This policy is outlined in the August 29, 2013 Cole Memorandum.**

a. **In some of these states, like Colorado, businesses are currently advertising the availability of recreational marijuana on websites and on television news programs such as 60 Minutes. Do you believe that individuals that manufacture and distribute marijuana in that state are breaking federal law, no matter what state law permits?**

RESPONSE: The Department and the Administration do not support the legalization of marijuana, nor do I. I have been committed to enforcing the Controlled Substances Act (CSA) throughout my career as a prosecutor, and that commitment will continue if I am confirmed as Deputy Attorney General.

The Department remains committed to enforcing the CSA and federal money laundering laws in a way that most efficiently uses its limited resources to address the most significant threats to public health and safety, particularly with respect to violent offenders and gang activity, among other key priorities outlined in the Department's August 2013 and February 2014 guidance to all United States Attorneys on these issues.

a. **I understand the Department of Justice is not gathering data on the federal priorities identified in the Cole Memorandum to evaluate whether that policy needs re-visiting. Yet these priorities are already being negatively affected,**

including through the increasing diversion of recreational marijuana to nearby states like Iowa. This sounds to me like the Department does not want to know how its policy is functioning. Even the New York Times has editorialized that it's important to evaluate whether the states are "holding up their end of the bargain." Do you believe the Department should be systemically collecting data related to these federal priorities in a centralized place, establishing metrics, and analyzing the data for the purpose of evaluating whether the policy outlined in the Cole Memorandum is working, and if you are confirmed will you commit to taking these steps?

RESPONSE: The Department of Justice currently possesses and utilizes quantitative and qualitative measurements to inform federal drug enforcement efforts. The Drug Enforcement Administration publishes an annual National Drug Threat Assessment (NDTA) Summary, which provides timely strategic drug-related intelligence. The 2014 NDTA Summary addressed emerging developments related to the trafficking and use of primary illicit substances of abuse, including marijuana, and the nonmedical use of controlled prescription drugs. The Executive Office for United States Attorneys compiles U.S. Attorneys' Offices case-related data through the Legal Information Online Network System and regularly provides statistical information that reflects the efforts of the United States Attorneys' Offices in prosecuting violations of federal law. The Organized Crime Drug Enforcement Task Force (OCDETF) Executive Office collects data on OCDETF cases on a national, regional, and district level through the Management Information System. The OCDETF strategy aims to reduce the availability of drugs by disrupting and dismantling major drug trafficking organizations and money laundering organizations and related criminal enterprises.

These data collection systems collectively assist in informing the Department's counterdrug policy, establishing law enforcement priorities, and making resource allocations. The Department of Justice also relies on other federal agencies and programs, such as the High Intensity Drug Trafficking Area program and the National Institute on Drug Abuse, to conduct public safety and public health studies.

The Department will continue to consider data of all forms—including existing federal surveys on drug usage, state and local research, and, of course, feedback from the community and from federal, state, and local law enforcement—on the degree to which existing Department policies and the state systems regulating marijuana-related activity protect federal enforcement priorities and the public. The Department will continue to collect data and make these assessments through its various components and will continue to work with the Office of National Drug Control Policy and other partner agencies throughout the government to identify other mechanisms by which to collect and assess data on the effects of these state systems.

b. **In some of these states there is a specific problem presented by edible marijuana products falling into the hands of children. Some of these marijuana products, as well as other products containing different illegal drugs like methamphetamine, are marketed and packaged like candy. Would you support legislation to address this problem by increasing the penalties for those manufacturers or distributors of controlled substances that know, or have reasonable cause to**

believe, that their controlled substances will be distributed to minors? If confirmed, would you commit to working with me on such legislation?

RESPONSE: I share your concern about edible marijuana products and the possibility that these products could fall into the hands of children. These concerns are reflected by the Department's explicit enforcement priority of preventing the distribution of marijuana to minors, as well as the Department's enforcement priority of addressing threats to public health. I can assure you that our federal prosecutors, in every part of the country, will not hesitate to prosecute individuals and businesses whose conduct involves distribution to minors or poses serious public health risks due to the dangers associated with consumption – accidental or intentional – by minors. If I am confirmed as Deputy Attorney General, I look forward to continuing to work with this Committee to address this issue in a comprehensive manner that most effectively protects public health and safety.

c. **Attorney General Holder has indicated that he believes that marijuana businesses in states like Colorado should have access to the U.S. banking system. Do you agree? If so, doesn't depositing the proceeds of marijuana businesses into banks violate the federal laws prohibiting money laundering, and do you believe it is appropriate for the nation's top law enforcement officer to advocate for conduct that violates those laws?**

RESPONSE: I remain committed to enforcing the Controlled Substances Act (CSA) and federal money laundering laws in a manner that efficiently applies the Department's limited resources to address the most significant threats to public health and safety.

Pursuant to the Department's February 14, 2014 guidance, investigations and prosecutions of offenses related to financial transactions based upon marijuana-related activity are focused on using the Department's limited investigative and prosecutorial resources to address the most significant public health and public safety threats. Accordingly, in determining whether to charge individuals or institutions with offenses related to financial transactions based upon marijuana-related activity, prosecutors should assess this activity in light of the Department's stated enforcement priorities. Further, as made clear in the Department's February 14, 2014 guidance, financial institutions must continue to apply appropriate risk-based anti-money laundering policies, procedures, and controls sufficient to address the risks posed by customers engaged in marijuana-related activity, including by conducting customer due diligence designed to identify conduct that implicates any of the eight priority factors. As the Department of Justice's and the Department of the Treasury's FinCEN guidance are designed to complement each other, it also is essential that financial institutions adhere to guidance issued by FinCEN on this subject.

11. **I have four times requested from the Department of Justice the Office of Legal Counsel ("OLC") opinion advising the President's decision to exchange five senior Taliban commanders (the "Taliban 5") for Sgt. Bowe Bergdahl. During your testimony, you stated your reluctance to "revisit the issue." But, of course, this Committee has an important oversight function of the Department, and simply choosing not to answer is not sufficient.**

According to testimony by 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.

a. **Is this accurate?**

RESPONSE: OLC plays a vital role within the Executive Branch in providing unbiased, thorough advice with respect to the legal questions its clients ask the Office to consider. In order to ensure that OLC attorneys continue to provide full and frank advice that considers all sides of every issue, and that agencies and the President continue to trust OLC to provide confidential and unvarnished advice, the Department's longstanding practice across administrations of both parties has generally been to disclose OLC opinions only through the formal publication process and not to disclose less formal forms of confidential legal advice. Therefore, to preserve and protect the Executive Branch's proper functioning under the Constitution, some materials need to 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 understand the Department previously provided to you a memorandum that was provided to the Government Accountability Office (GAO).

If confirmed as Deputy Attorney General, I will continue to be committed to ensuring that where possible, consistent with national security and other confidentiality interests, this Committee has the information it needs to understand the basis for the Department's actions.

b. **If accurate, please provide the email correspondence providing the advice.**

RESPONSE: As explained above, in order to ensure that OLC attorneys continue to provide full and frank advice that considers all sides of every issue, and that agencies and the President continue to trust OLC to provide confidential and unvarnished advice, the Department's longstanding practice across administrations of both parties has generally been to disclose OLC opinions only through the formal publication process and not to disclose less formal forms of confidential legal advice. Therefore, to preserve and protect the Executive Branch's proper functioning under the Constitution, some materials need to remain confidential.

c. **If not accurate, please provide the document that was furnished to the President before he released the Taliban 5.**

RESPONSE: As explained above, in order to ensure that OLC attorneys continue to provide full and frank advice that considers all sides of every issue, and that agencies and the President continue to trust OLC to provide confidential and unvarnished advice, the Department's longstanding practice across administrations of both parties has generally been to disclose OLC opinions only through the formal publication process and not to disclose less formal forms of confidential legal advice. Therefore, to preserve and protect the Executive Branch's proper functioning under the Constitution, some materials need to remain confidential.

d. **Notwithstanding your responses to Questions (b) and (c), please provide the dates when the advice was sought by the administration and when it was provided.**

RESPONSE: As explained above, in order to ensure that OLC attorneys continue to provide full and frank advice that considers all sides of every issue, and that agencies and the President continue to trust OLC to provide confidential and unvarnished advice, the Department's longstanding practice across administrations of both parties has generally been to disclose OLC opinions only through the formal publication process and not to disclose less formal forms of confidential legal advice. Therefore, to preserve and protect the Executive Branch's proper functioning under the Constitution, some materials need to remain confidential.

12. **In a 2010 memorandum on the best practices for OLC legal advice and written opinions, Acting Assistant Attorney General David J. Barron wrote, "[I]n deciding whether an opinion is significant enough to merit publication . . . the Office [of Legal Counsel] operates from the presumption that it should make its significant opinions fully and promptly available to the public." In fact, "[T]his presumption furthers the interests of Executive Branch transparency, thereby contributing to accountability and effective government, and promoting public confidence in the legality of government action," he stated.**

    The OLC released its legal advice to the public regarding the President's executive amnesty action the day before the President announced his order, but the Office still has not released its advice on the President's exchange of the Taliban 5 for Sgt. Bowe Bergdahl. Clearly, the Department of Justice deemed its advice on executive amnesty as "significant" enough to warrant contemporaneous release with the execution of the order.

    Whatever opinion the Department offered to the President on releasing five senior Taliban commanders is clearly a matter of significant public interest since these terrorists will likely return to the battlefield, and the President released them in exchange for a soldier who has since been charged with deserting his unit. All of this was done in the face of a statute that was written to prevent enemy combatants from being released from Guantanamo Bay and returning home to plan further attacks against the United States and our allies.

    In light of the Department's own presumption on the importance of releasing those OLC opinions that are "significant," please explain why either the Department does not consider its advice on the exchange of terrorists for Sgt. Bergdahl to be one of its "significant opinions" deserving of public disclosure, or, alternatively, what factors lead the Department to believe the presumption has been overcome.

RESPONSE: As I stated in my testimony before the Committee, it is important that Congress and the public understand the legal basis for actions by the Government. As noted above, OLC plays a vital role within the Executive Branch in providing unbiased, thorough advice with respect to the legal questions its clients ask the Office to consider. In order to ensure that OLC attorneys continue to provide full and frank advice that considers all sides of every issue, and that agencies and the President continue to trust OLC to provide confidential and unvarnished advice, the Department's longstanding practice across administrations of both parties has generally been to disclose OLC opinions only through the formal publication process and not to disclose less formal forms of confidential legal advice.

Although the Department now favors publication of significant OLC opinions where possible, as the OLC best practices memorandum signed by Acting Assistant Attorney General David J. Barron ("Best Practices Memo") explains, countervailing considerations—such as the preservation of internal Executive Branch deliberative processes; protecting the confidentiality of information covered by the attorney-client relationship between OLC and its Executive Branch clients; and protecting classified and other sensitive information relating to national security—may make it improper or inadvisable to publish OLC legal advice. In such circumstances, it is customarily up to the agency that received the legal advice to explain the legal basis for any action it ultimately takes. If confirmed as Deputy Attorney General, I will continue to be committed to ensuring that where possible, consistent with national security and other confidentiality interests, this Committee has the information it needs to understand the basis for the Department's actions.

13. As specified below, please explain the discrepancy between (a) and (b).

a. **As mentioned in Question 13, the Acting Assistant Attorney General's 2010 memorandum continues:**

   Timely publication of OLC opinions is especially important where the Office concludes that a federal statutory requirement is invalid on constitutional grounds and where the Executive Branch acts (or declines to act) in reliance on such a conclusion . . . so that Congress can consider those reasons and respond appropriately, and so that the public can be assured that Executive action is based on sound legal judgment and in furtherance of the President's obligation to take care that the laws, including the Constitution, are faithfully executed.

b. **In addition, according to Department of Defense General Counsel, Stephen Preston's testimony, "The administration sought the guidance from the Department of Justice on the applicability and impact of the 30-day notice requirement . . . and received guidance from the Department of Justice." He stated, "The question was the constitutional implications of its application in the [Bergdahl exchange]. And the administration determined that it was necessary to forego the full 30-day formal notice." He further stated that "the exercise of [the President's] constitutional authority is in tension with [the National Defense Authorization Act of 2014] . . . [so] the statute yields to the constitutional authority either as a matter of interpretation or through the application of separation of powers principles."**

   The Acting Assistant Attorney General's own reasoning was that "[t]imely publication of OLC opinions is especially important where the Office concludes that a federal statutory requirement is invalid on constitutional

grounds and where the Executive Branch acts (or declines to act) in reliance on such a conclusion."
Moreover, Mr. Preston stated that the administration received legal advice from the Department, and given that advice, the administration determined that the 30-day notice statutory requirement was invalid in this circumstance on constitutional grounds.

Please explain how the Department can reconcile the refusal to release this legal advice with its own internal guidelines on the release of opinions which invalidate laws based on constitutional grounds.

RESPONSE: As noted above, OLC plays a vital role within the Executive Branch in providing unbiased, thorough advice with respect to the legal questions its clients ask the Office to consider. In order to ensure that OLC attorneys continue to provide full and frank advice that considers all sides of every issue, and that agencies and the President continue to trust OLC to provide confidential and unvarnished advice, the Department generally does not disclose OLC opinions except through the publication process described in the Best Practices Memo and generally does not disclose less formal forms of confidential legal advice.

Although the Department favors publication of significant OLC opinions where possible, as the Best Practices Memo explains, countervailing considerations—such as the preservation of internal Executive Branch deliberative processes; protecting the confidentiality of information covered by the attorney-client relationship between OLC and its Executive Branch clients; and protecting classified and other sensitive information relating to national security—may make it improper or inadvisable to publish OLC legal advice. In such circumstances it is customarily up to the agency that received the legal advice to explain the legal basis for any action it ultimately takes. This practice is consistent with the Best Practices Memo, which recognized that some Department legal advice is not appropriate for release outside of the Executive Branch and is designed to ensure that Congress can receive explanations of the legal basis for Executive Branch conduct while preserving the confidentiality of the attorney-client communications of Executive Branch lawyers. If confirmed as Deputy Attorney General, I will continue to be committed to ensuring, where possible consistent with national security and other confidentiality interests, that this Committee has the information it needs to understand the basis for those Department's actions.

14. **During my years in the Senate, I have been committed to combating fraud, waste, and abuse in the government and government programs. I believe that the False Claims Act has proved to be the most effective tool in the effort to prevent fraud and abuse against the government and has enabled the government to recover over $40 billion since 1986. The *qui tam* provisions of the False Claims Act encourage citizens, who have knowledge and evidence of false claims of fraud, to report the illegal activity. These patriotic whistleblowers are the federal government's greatest allies in the fight against fraud.**

    As the Senate author of the 1986 Amendments to the False Claims Act, I am one of the Act's biggest supporters and defenders. It is my hope that as the Deputy Attorney

General, you will also vigorously support the False Claims Act and its *qui tam* provisions.

a. **As Deputy Attorney General, will you vigorously enforce the False Claims Act?**

RESPONSE: Yes. I am committed to enforcing the False Claims Act and will continue that commitment if confirmed as Deputy Attorney General. As you are aware, the False Claims Act plays a critical role in the Department's ability to ensure honest and accurate conduct on the part of those doing business with the Government. As you may know, the Department recovered nearly $6 billion in settlements and judgments in Fiscal Year 2014. We are proud to note that this marks the fifth straight year that False Claims Act recoveries have exceeded $3 billion. Since 1986, the Department, working with United States Attorneys' Offices, government agencies, and private citizens, has returned more than $45 billion in public monies to government programs and the Treasury. I thank you for your continued leadership on this issue over three decades.

In addition, nearly $3 billion of the nearly $6 billion recovered by the Department this past Fiscal Year were associated with *qui tam* cases. Since 1986, the Department has recovered over $30 billion in *qui tam* cases. If I am confirmed as Deputy Attorney General, I will continue my longstanding, robust use of the False Claims Act and its *qui tam* provisions, including by ensuring that the Department has adequate resources to investigate and pursue FCA cases.

b. **Do you have any question as to the constitutionality of the FCA and the *qui tam* provision?**

RESPONSE: No, I do not have any question as to the constitutionality of the False Claims Act and the *qui tam* provisions.

c. **Will you oppose efforts by industry groups, including the health care industry and the defense industry, to weaken the False Claims Act and the *qui tam* provisions of the FCA?**

RESPONSE: As stated above, the False Claims Act is one of the government's most effective tools for combatting fraud, protecting taxpayers and supporting the integrity of government programs. The Department's enforcement of the FCA has unquestionably deterred additional potential fraud schemes that would have otherwise had an impact on the federal fisc. I will oppose efforts to weaken the Act, including its *qui tam* provisions.

d. **Will you ensure that Civil Division attorneys aggressively enforce the False Claims Act, and will you work with the U.S. Attorneys to ensure their vigorous support and enforcement of the False Claims Act and the *qui tam* provisions of the FCA?**

RESPONSE: Yes. I will ensure that Civil Division attorneys aggressively enforce the False Claims Act, and I am committed to working with the U.S. Attorneys to ensure their vigorous support and enforcement of the False Claims Act and the *qui tam* provisions.

e. **Will you agree to promote a close working relationship between *qui tam* relator's counsel and the Justice Department for the purpose of establishing the public/private relationship envisioned when the FCA was signed into law by President Reagan?**

RESPONSE: Yes. I will promote a close working relationship between *qui tam* relator's counsel and the Justice Department for the purpose of establishing the public/private relationship.

15. **Starting in 2010, the Department of Justice (DOJ) filed complaints against Arizona, Alabama, South Carolina, and Utah because of their pro-enforcement immigration laws. If confirmed, would you support the continuance of this policy of filing complaints against states that have passed such laws?**

RESPONSE: I believe that coordination and engagement between law enforcement entities is critical in our efforts to enforce our immigration laws. 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 I am confirmed as Deputy Attorney General, I 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 the enforcement of our immigration laws. In considering questions of the validity of state laws seeking to regulate immigration, I will evaluate them on a case-by-case basis under the principles set forth by the Supreme Court in its 2012 decision in *Arizona v. United States*.

16. **While Department of Justice filed lawsuits against states that enacted pro-enforcement immigration laws, other cities enacted policies that expressly prohibited law enforcement from cooperating with the federal government on undocumented immigrant issues. What steps would you take to encourage sanctuary communities to reverse their ordinances?**

RESPONSE: As noted above, I believe that coordination and engagement between law enforcement entities is critical in our efforts to enforce our immigration laws. 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 I am confirmed as Deputy Attorney General, I 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 the enforcement of our immigration laws.

17. **While Sanctuary Communities refuse to cooperate with the federal government, they continue to collect money from DOJ grant programs. Would you advise the Attorney General to instruct the Department to withhold grant money for sanctuary communities that refuse to comply with our immigration laws?**

RESPONSE: Our priority is keeping the public safe. The Department's grant programs can play a critical role toward this end. For instance, we provide key grants to communities, ranging from support for new law enforcement personnel, law enforcement technology and equipment, and many forms of assistance for victims and at-risk youth. Any penalty for a community's failure to enforce U.S. immigration laws must be balanced against the important public safety function that grant funds play. As such, if I am confirmed as Deputy Attorney General, I would consider all options on how to respond to communities that fail to enforce U.S. immigration laws in a manner consistent with federal priorities.

18. The administration has acknowledged that over 36,000 convicted criminals were released from ICE custody in fiscal year 2013, and an additional 30,000 were released in fiscal year 2014. Many of these criminals were guilty of heinous crimes, including homicide, sexual assault, abduction, and aggravated assault. Yet, Immigration and Customs Enforcement (ICE) used its discretion and released these criminals back into the community. Do you believe the government, unless ordered by a court, should release convicted criminal aliens guilty of dangerous crimes, such as murder, rape, and kidnapping?

RESPONSE: As United States Attorney in the Northern District of Georgia, my office pursued federal criminal prosecutions of dangerous undocumented aliens, prioritizing prosecution of those with violent criminal records and those engaged in gang activity. I believe that the government's removal efforts should prioritize the most dangerous undocumented aliens, particularly those involved in terrorist activity, violent crime, gang activity, and those with criminal records. Questions concerning the exercise of discretion by Immigration and Customs Enforcement (ICE) are best directed to the Department of Homeland Security, which administers the immigration detention system and is responsible for determining whether to release particular aliens from its custody.

19. DHS cited the 2001 Supreme Court decision *Zadvydas v. Davis*, 533 U.S. 678 (2001), as another reason so many illegal aliens with criminal records were released. In *Zadvydas*, the court held that immigrants admitted to the United States that are subsequently ordered removed could not be detained for more than six months. Four years later, the Court extended this decision to people here illegally in *Clark v. Martinez*, 543 U.S. 371 (2005). Since *Zadvydas,* Congress has tried to pass legislation to require DHS to detain criminal aliens beyond six months. Would you support such legislation?

RESPONSE: While I cannot comment on specific legislation I have not yet reviewed, if confirmed as Deputy Attorney General, I would certainly look forward to working with the Committee on any legislation that would help to fix our country's immigration system. This would include proposals that are 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.

20. The Fourth Circuit Court of Appeals issued a decision in 2014 that provides a loophole for violent gang members who are here illegally to remain in the United States. In *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014), Martinez appealed a Board of Immigration Appeals decision that denied him "withholding of removal" relief because he was a former member of the violent MS-13 gang in El Salvador. The Fourth Circuit reversed the decision holding that Martinez's former gang membership was "immutable" and met the "particular social group" element of the statute.

a. **Do you agree that the Fourth Circuit decision creates a dangerous threat to national security?**

RESPONSE: I understand that finding that an alien falls under a "particular social group" is only one of several elements that the alien has to meet under the law to qualify for withholding of removal. Apart from the specifics of this case, I believe that the government's removal efforts should prioritize the most dangerous aliens, including members of criminal gangs.

b. **After the Fourth Circuit handed down its decision, concern was expressed over the effect this decision could have on national security and public safety. Chairman Goodlatte of the House Judiciary Committee along with Representative J. Randy Forbes wrote a letter to AG Holder to express their concern with the holding and ask whether he would appeal or seek review of the decision. However, Holder did not appeal or seek review of this dangerous decision.**

i. **Would you agree that the DOJ, under AG Holder, should have appealed the 4th circuit decision?**

RESPONSE: Decisions in the matter described in this question took place while I was United States Attorney for the Northern District of Georgia. As such, I was not involved in this case. However, having spent over two decades as a prosecutor, I know firsthand that many factors go into the decision whether to seek review of a court of appeals decision. It is my understanding that the Department continues to litigate this issue in other cases. If I am confirmed as Deputy Attorney General, I will work to ensure that national security and public safety are our top priorities in the enforcement of our immigration laws.

ii. **Since it wasn't appealed, what do you see as a remedy to the problem?**

RESPONSE: I believe that when it comes to immigration policy, the Government's removal efforts should prioritize the most dangerous undocumented aliens, including members of criminal gangs, along with those involved in terrorist activity and violent crime.

21. **The 287(g) program allows ICE to delegate some of its immigration enforcement authority to participating states. In 2012, ICE announced that it would no longer renew its 287(g) agreements stating, "other enforcement programs, including Secure Communities, are a more efficient use of resources." However, Secure Communities serves a completely different function. The 287(g) program trains local officers to determine whether a person is lawfully in the country, whereas Secure Communities only allows local law enforcement to identify undocumented aliens after their incarceration. Secretary Johnson has announced that the Secure Communities program is being discontinued, and replaced by another program. So, statutory authority exists for the administration to elicit state and local cooperation with the federal government; nevertheless, this administration refuses to use it.**

a. **Do you support the 287(g) program, and similar programs, that authorize the federal government to allow states to participate in enforcing federal law?**

RESPONSE: In my position as the United States Attorney for the Northern District of Georgia, I had no role in addressing ICE's implementation of the 287(g) program and have not yet had occasion to consider the issue in my current role as Acting Deputy Attorney General. This said, if I am confirmed as Deputy Attorney General, I will continue the Department's efforts to work closely with our partners to foster public safety, secure our borders, and protect our national security through the enforcement of federal immigration laws.

b. **In your opinion, should the 287(g) program be made available to local law enforcement agencies that want to protect their communities and participate in immigration enforcement?**

RESPONSE: As indicated above, the 287(g) program is not one that I have had any role in implementing. The question appears to involve matters within the purview of the Department of Homeland Security and I am not in a position to comment further. I am committed, however, to the Department's efforts to work closely with our partners to foster public safety, secure our borders, and protect our national security through the enforcement of federal immigration laws.

c. **As states and local law enforcement approach you for help in enforcing federal law, will you find a way to work with them, or will you ignore them, as the current Attorney General has?**

RESPONSE: As stated above, I am committed to the Department's efforts to work closely with our partners to foster public safety, secure our borders, and protect our national security through the enforcement of federal immigration laws.

22. **In June 2014, DOJ announced a program, justice Americorps, where it will issue $2 million in grants to lawyers to represent unaccompanied minors who crossed the borders illegally. Under current law, there is no right to a lawyer in a removal proceeding. The law provides only that an immigrant may obtain a lawyer, "at no expense to the government." Do you agree that the statutory language is clear: the government may not provide a lawyer to immigrants in a removal proceeding at the expense of the taxpayers?**

RESPONSE: Although I was not involved in the development or implementation of this program, I understand that it is designed to provide funding for legal representation to certain unaccompanied alien children in immigration proceedings in order to increase the efficient and effective adjudication of those proceedings. I believe that the law to which this question refers is 8 U.S.C. § 1362, which provides that an alien's right to counsel in immigration proceedings does not include a right of representation at the government's expense. It does not appear that the statute bars the government from exercising its discretion to fund legal representation in certain of those proceedings.

23. **By its very nature, justice Americorps has due process and equal protection issues. The Department is treating similar people in similar situations differently. How can the**

administration avoid due process and equal protection issues if it provides lawyers to some immigrants in removal proceedings, but not to others? Couldn't such a policy lead to the requirement of providing a lawyer to all immigrants in removal proceedings?

RESPONSE: I understand that aliens in removal proceedings have only the right to a full and fair hearing, a guarantee that does not require the appointment of taxpayer-funded counsel. The Department has not identified any due process or equal protection issues with the program.

24. **Immigration is a civil proceeding, and as a Constitutional matter, the government is not required to provide counsel in civil proceedings. Are you concerned that if the government starts providing counsel to individuals in removal proceedings, the government could be required to provide counsel in other civil proceedings?**

RESPONSE: No. I am not concerned that justice Americorps creates a problematic precedent for other proceedings. The government does not have a constitutional obligation to provide counsel to individuals in removal proceedings.

25. **ICE has brought removal charges against only 143,000 of the 585,000 removable aliens encountered in fiscal year 2014. That's a mere 24 percent of removable aliens that ICE encountered in 2014. What's even more troubling is that nearly 900,000 aliens who have final removal orders still remain in the country. Now, however, all people with final removal orders are encouraged to seek deferred action and other relief made available through the President's recent executive action.**

    a. **Do you support the administration's catch-and-release actions?**

RESPONSE: Throughout my career, I have worked to foster public safety, secure our borders, and protect our national security through the enforcement of federal immigration laws. If I am confirmed as Deputy Attorney General, I would continue these efforts. After a judge has issued a removal order, the matter is within the jurisdiction of the Department of Homeland Security, and I would respectfully direct you to DHS regarding this question.

    b. **Don't you agree that individuals whom a judge has ordered removed, should, in fact, be removed?**

RESPONSE: After a judge has issued a removal order, the matter is within the jurisdiction of the Department of Homeland Security, and I would respectfully direct you to DHS regarding this question.

26. **At your hearing, you stated that your 2010 position on mandatory minimum sentences has changed because of "fiscal reality." You indicated that money for prosecutors and federal agents is being diverted to prisons instead. If money is shifted from prisons to prosecutors and federal agents, who would presumably do their jobs in investigating and prosecuting additional federal crimes, why would the result not be increased numbers of convicted federal offenders who would be sentenced to prison, adding to the cost of the BOP budget?**

RESPONSE: Mandatory minimum sentences are an important tool for prosecutors, and a tool that should be used effectively and efficiently. As I explained both in 2010 and at my confirmation hearing last month, prison spending has increasingly displaced other critical public safety investments, including resources for investigations, prosecutions, prevention, intervention, prison reentry, and aid to local law enforcement. We must find a way to allocate our limited resources without compromising public safety.

Your question asks whether this effort is, essentially, self-defeating—whether better funding for agents and prosecutors will eventually result in more prisoners. I believe the issue is best viewed in the broader context of the Department's Smart on Crime Initiative. One of the goals of the initiative is to encourage prosecutors and agents to focus on the quality of their cases, not simply the quantity. This allows the Department to devote the time and energy needed to prosecute the worst of the worst—and to ensure that these complex, resource-intense cases are resolved successfully and expeditiously. By prioritizing the most dangerous suspects, the Department can better utilize its prosecutors and agents while reducing the burden on BOP's budget.

The initial results are promising. Since the start of the Smart on Crime Initiative, the number of federal drug cases has declined, but the average guideline minimum sentence for drug trafficking cases has risen, indicating a focus on more serious cases and more significant or violent defendants. Moreover, the rate of guilty pleas has risen and, despite concerns raised by some, drug defendants have cooperated with the government at the same rate as before the Initiative. In many ways, the early success of the initiative parallels similar criminal justice reforms in the states—including my home state of Georgia—where the violent crime rate has declined along with a reduction in prison admissions and the cost of incarceration.

27. I don't see how "fiscal reality" can form the basis for the shift in your position on mandatory minimum sentences. You testified at the hearing that BOP "takes up about two-thirds of the Department's budget." That statement seems to bear little relation to reality. According to the Congressional Research Service, in 2014, BOP spending represented 25% of the Department's discretionary budget authority. That is no greater a proportion of DOJ's budget than was true in the 1990's. And in 2010, when you heartily endorsed mandatory minimum sentences and recommended to the Sentencing Commission that additional such sentences be created, BOP spending represented nearly as high a percentage of DOJ's budget then as now, at 23%. Since "fiscal reality" cannot form the basis for your changed view of mandatory minimum sentences, what in fact did?

RESPONSE: At my hearing, I realized that I had inadvertently misspoken moments after giving the two-thirds figure, but did not have a chance to correct my statement. To this end, I appreciate your giving me the opportunity to clarify my testimony here. Today, BOP's budget comprises a little less than one-third of the Department's budget. However, since Fiscal Year 1994, the federal prison population has more than doubled. In Fiscal Year 2015, BOP's budget authority is $6.9 billion, compared to $3.1 billion in 1998 and $3.8 billion in 2000. And, as BOP's budget authority has increased, prison spending has increasingly displaced other critical public safety investments – such as resources for investigation, prosecution, prevention, intervention, prison reentry, and aid to local law enforcement.

To be clear, however, I reiterate a statement I made at my hearing: I believe that mandatory minimum sentences are an effective tool for prosecutors. That was my view in 2010, and continues to be my view now. We simply have an obligation to use that tool as effectively and as efficiently as possible and, as a career prosecutor, I would not support anything that I believe would undermine public safety. As I stated in response to question 26, above, the Department has proven through its criminal justice reforms that conserving the public's precious resources and maintaining public safety are not mutually exclusive. Both of these have been focuses throughout my career, and will continue to be priorities for me, should I be confirmed as Deputy Attorney General.