

**LORETTA E. LYNCH**

February 9, 2015

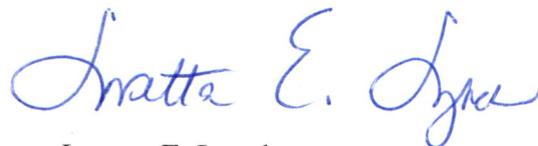
The Honorable Charles E. Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Patrick J. Leahy  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Leahy:

Thank you again for giving me the opportunity to appear before the Senate Judiciary Committee on January 28, 2015. Enclosed please find my responses to the Questions for the Record that I received from you, as well as Senators Hatch, Sessions, Graham, Cornyn, Lee, Cruz, Flake, Vitter, Perdue, Tillis, Feinstein, Schumer, Durbin, Whitehouse, and Franken.

Sincerely,



Loretta E. Lynch

Enclosure

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

**QUESTIONS FROM CHAIRMAN GRASSLEY**

1. As you know, the Senate is constitutionally obligated to fulfill its duty to provide advice and consent on the President's nominees. That process is always lengthy and involved, for good reason. It is of course especially important for the Senate to fulfill its responsibilities with care for Cabinet level positions, such as the Attorney General of the United States. Nonetheless, throughout this process, my primary concern is not only that your nomination was thoroughly vetted by the Senate, but also that throughout the process you were treated fairly and with respect. I have publicly outlined the process going forward in the Committee. Do you believe the United States Senate, and in particular the Senate Judiciary Committee, has treated you and your nomination in a fair and appropriate way?

**RESPONSE:** Yes, and I would like to thank you in particular for the respectful and courteous way that you chaired my confirmation hearing.

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

**RESPONSE:** I support efforts to engage with state and local law enforcement partners to achieve consistent policies for the apprehension, detention, and removal of undocumented aliens. If I am confirmed as Attorney General, I will continue the Department's efforts to work closely with the Department of Homeland Security and state and local law enforcement partners to ensure that national security and public safety are our top priorities in the enforcement of our immigration laws. I will also evaluate state enactments on a case-by-case basis pursuant to the Supreme Court's recent decision addressing this issue.

3. While the 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.
  - a. In your view, are sanctuary communities that ignore federal immigration detainers a threat to national security or public safety?
  - b. What steps would you take to encourage sanctuary communities to reverse their ordinances?

**RESPONSE:** As noted above, 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 Attorney General, I will continue the Department's efforts to work closely with the Department of Homeland Security and state and local law enforcement partners to ensure that national security and public safety are our top priorities in the enforcement of our immigration laws.

4. While sanctuary communities refuse to cooperate with the federal government, they continue to collect money from DOJ grant programs. Would you instruct the Department of Justice to withhold grant money for sanctuary communities that refuse to comply with our immigration laws?

**RESPONSE:** The Department of Justice provides grants to communities for a variety of reasons, ranging from 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 law must be balanced against the purpose for which it is receiving funds from the Department of Justice. As such, if I am confirmed as Attorney General, I would consider all options on how to respond to sanctuary communities.

5. The administration has acknowledged that over 36,000 convicted criminals were released from ICE custody in fiscal year 2013. Many of these criminals were guilty of heinous crimes, including homicide, sexual assault, abduction, and aggravated assault. Yet, Immigration and Customs Enforcement 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, homicide, sexual assault, abduction, and aggravated assault?

**RESPONSE:** I believe that the government's removal efforts should be targeted at the most dangerous of the undocumented immigrants in this country, particularly those involved in terrorist activity, violent crime, gang activity, and those with criminal records. In the Eastern District of New York, we have frequently pursued federal criminal prosecutions of dangerous undocumented immigrants, prioritizing prosecution of those with a violent criminal record and those engaged in gang activity. Regarding the specific exercise of discretion by Immigration and Customs Enforcement (ICE), I believe that question is 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.

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

7. 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?
  - 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 Attorney General Holder to express their concern with the holding and ask whether he would appeal or seek review of the decision. However, Attorney General Holder did not appeal or seek review of this dangerous decision.
    - i. Would you agree that the DOJ, under Attorney General Holder, should have appealed the 4th circuit decision?
    - ii. Because the decision was not appealed, what, in your view, is the remedy for this problem?

**RESPONSE:** In my role as the United States Attorney for the Eastern District of New York, I was not involved with this case. It is my understanding that many factors go into the decision whether to seek review of a court of appeals decision. It is my further understanding that the Department continues to litigate this issue in other cases. If I am confirmed as Attorney General, I will work to ensure that national security and public safety are our top priorities in the enforcement of our immigration laws.

8. 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. Consequently, 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 Eastern District of New York, I have had no role in addressing ICE's implementation of the 287(g) program. I look forward to learning more about the 287(g) program and other ICE programs directed at public safety, if I am fortunate enough to be confirmed as Attorney General.

- 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 respond further. I am committed, however, to fostering public safety through the enforcement of federal immigration laws and to working with federal and state law enforcement partners in continuing efforts to secure our borders and protect our national security.

- 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 your predecessor has?

**RESPONSE:** I am committed to enhancing public safety through the enforcement of federal immigration laws and to working with federal and state law enforcement partners in continuing efforts to secure our borders and protect our national security.

9. In June 2014, DOJ announced its program Justice Americorp 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:** As the United States Attorney for the Eastern District of New York, I am not familiar with the particulars of the Justice AmeriCorps program or with the statutory provision to

which your question refers. If I am confirmed as Attorney General, I look forward to learning more about this important issue.

10. 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:** As mentioned above, I am not personally familiar with any of the particulars of the Justice AmeriCorps program. If I am confirmed as Attorney General, however, I look forward to learning more about the program and the significant questions that you raise.

11. 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:** I agree that the government does not have a constitutional obligation to provide counsel in this context. I am not personally familiar with programs or policies through which the government provides counsel in removal proceedings. If I am confirmed as Attorney General, I look forward to learning more about this important issue.

12. 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?
- b. Do you agree that individuals whom a judge has ordered removed, should, in fact, be removed?

**RESPONSE:** As United States Attorney, I have worked to enforce our nation's immigration laws. If I am confirmed as Attorney General, I would do the same, understanding that limited prosecutorial resources are best used to focus on the removal of criminals and those who pose a threat to the safety of our nation.

13. Does the U.S. Constitution confer a right to abortion? If so, what clauses confer that right?

**RESPONSE:** The Supreme Court has recognized that the Constitution protects the right of a woman to choose to terminate her pregnancy before viability, and to do so without undue influence from the government; the Court located this right primarily in the Due Process Clause of the Fourteenth Amendment. After viability, the Court has held that a State may restrict or even proscribe abortion except where the procedure is necessary to preserve the mother's life or health.

- a. Does the U.S. Constitution compel taxpayer funding of abortion? Why or why not?

**RESPONSE:** In my role as United States Attorney, I have not had occasion to become familiar with circumstances in which the Constitution could require taxpayer funding of abortion.

- b. Do you believe that the U.S. Constitution permits taxpayer funding of abortion? If so, based on what clause?

**RESPONSE:** In my role as United States Attorney, I have not had occasion to become familiar with circumstances in which the Constitution would permit taxpayer funding of abortion.

- c. Does the U.S. Constitution prohibit informed-consent and parental involvement provisions for abortion? Why or why not?

**RESPONSE:** In my role as United States Attorney, I have not had occasion to become familiar with the constitutionality of informed-consent and parental involvement provisions for abortion.

14. In your view, is diversity a valid institutional interest for a government entity, consistent with the Equal Protection Clause? What other compelling justifications exist for government to make racial distinctions?

**RESPONSE:** The Supreme Court has recognized that diversity can be one factor considered in certain governmental decision-making, such as academic admissions decisions. At the same time, the Department of Justice must use its enforcement authority to ensure that equal opportunities are available to all citizens without artificial barriers to those opportunities.

15. In *McCutcheon v. FEC*, Justice Breyer's dissenting opinion stated that "the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*" (emphasis in original).

- a. Do you agree that the First Amendment protects "collective" rights as well as individual rights?

b. If so, what other collective rights does the Bill of Rights protect?

**RESPONSE:** I understand Justice Breyer, in this excerpt, to be addressing the importance of an open and public forum in our representative democracy. I have not had the opportunity to delve into the academic debate about whether certain constitutional rights are individual or collective. There undoubtedly are certain rights that are fundamental to our democracy that can only be meaningfully exercised with other people, such as the right to assemble and other associational rights.

16. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court held that a right to assisted suicide was not protected by the Due Process Clause. The Court reasoned: “[W]e have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, we, to a greater extent, place the matter outside the arena of public debate and legislative action. We must therefore ‘exercise the utmost care whenever we are asked to break new ground in this field,’ lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.” Do you agree with the Court’s assessment of the importance of public debate and legislative action?

**RESPONSE:** I believe firmly in the importance and value of public debate concerning difficult and fundamental questions that may arise under our Constitution.

17. Do you believe that the Supreme Court’s decision in *Morrison v. Olson*, which ruled that the independent-counsel statute did not violate the constitutional separation of powers, was correctly decided? Please explain.

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I have not had occasion to reach a considered view on whether *Morrison v. Olson* was correctly decided. I support and follow the Supreme Court’s binding decisions now as the law of the land, and if confirmed, I would continue to do so as Attorney General.

18. Do you believe that the Supreme Court’s decision in *Boumediene v. Bush*, which conferred constitutional habeas rights to aliens detained as enemy combatants at Guantanamo, was correctly decided? If so, how does that square with *Johnson v. Eisentrager*, which Justice Scalia, in his *Boumediene* dissent, said “held—held beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign”?

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I have not had occasion to reach a considered view on whether *Boumediene v. Bush* was correctly decided. I support and follow the Supreme Court’s binding decisions now as the law of the land, and if confirmed, I would continue to do so as Attorney General.

19. What is your understanding of the constitutional duty of the Executive to “take Care that the Laws be faithfully executed” as contained in Article II, sec. 3 of the U.S. Constitution?

**RESPONSE:** The President has the constitutional obligation to take care that the Constitution and laws of the United States are faithfully executed by the Executive Branch.

20. Do you believe that the Supreme Court’s decision in *Zelman v. Simmons-Harris*, which held that school-choice programs that include religious schools do not violate the Establishment Clause, was correctly decided? Please explain.

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I have not had occasion to reach a considered view on whether *Zelman v. Simmons-Harris* was correctly decided. I support and follow the Supreme Court’s binding decisions now as the law of the land, and if confirmed, I would continue to do so as Attorney General.

21. The Supreme Court has held that the Federal Sentencing Guidelines are advisory and persuasive, but not binding. Do you believe *Booker* and *Fanfan* were correctly decided?

**RESPONSE:** As indicated above, I support and follow the Supreme Court’s binding decisions now as the law of the land, and if confirmed, I would continue to do so as Attorney General.

22. The U.S. Supreme Court has repeatedly upheld obscenity laws against First Amendment challenges. To my knowledge, not one new adult obscenity case has been initiated against commercial distributors of hard core adult pornography during the Holder years. Research has linked the consumption of obscenity to sexual exploitation and violence against women, and to demand for sex trafficking and child pornography. If confirmed, what is your commitment to vigorously enforcing the federal adult obscenity laws?

**RESPONSE:** I agree that obscenity is not protected by the First Amendment. My understanding is that the Department has brought significant obscenity prosecutions in recent years, and I look forward to ensuring that the Department remains committed to bringing obscenity cases where appropriate.

23. Do you think that it is constitutional for a university to have racially exclusive internships or scholarships or summer programs, as some have in the past? My question goes not go to racially preferential programs, but ones in which a person cannot even apply based on their color. The Supreme Court held in the *Grutter* and *Gratz* cases that schools cannot use race mechanically, but must give “individualized consideration” to students. How can a racially exclusive program provide students with individualized considerations?

**RESPONSE:** In *Grutter*, the Supreme Court ruled that a university has a compelling interest in achieving diversity and can take steps to lawfully pursue that interest. Scholarship and other support programs can play an important role in promoting and sustaining a diverse student body, by helping to retain students who may need financial assistance or additional assistance in academic or other areas to succeed. I am not in a position to comment generally on the steps that a university may take to achieve diversity; as the Supreme Court noted in *Grutter*, context matters. However, I share your concern that all university programs, including scholarship and other support programs, be administered in a manner consistent with the Constitution and the laws of our nation.

24. Do you believe racial profiling in the context of the War on Terrorism is unconstitutional?

**RESPONSE:** National security is of utmost importance to the Department, the nation, and to me. Federal law enforcement has used, and will continue to use, every legitimate tool to keep the nation safe. The Constitution guides the Department's activities in the use of all of its tools and protects individuals against the invidious use of irrelevant individual characteristics.

25. In his opening statement at the confirmation hearing of Alberto Gonzalez to be Attorney General, Senator Leahy remarked, "The Attorney General is about being a forceful, independent voice in our continuing quest for justice and in defense of the constitutional rights of every single American."

- a. Do you believe the Attorney General should be a forceful, independent voice for justice and in defense of the constitutional rights of all Americans? If so, how do you intend to accomplish this?

**RESPONSE:** I agree that the Attorney General must be a forceful, independent voice of justice and a fierce defender of the constitutional rights of all Americans. I have devoted my professional life to the pursuit of justice and the defense of the ideals and principles set forth in the Constitution of the United States of America. If I am confirmed as Attorney General, I pledge to Congress and the American people that the Constitution—the bedrock of our system of justice—will be my lodestar as I exercise the power and responsibility of that position. I will never forget that I serve the American people from every walk of life.

- b. Can you provide examples of how you have been an independent voice during your government service? Are there any examples from your private practice?

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I have been entrusted with a profound duty to bring independence and integrity to every investigation and prosecution and exercise the significant authority of the office completely free of bias, fear, or favor. My record demonstrates my unwavering commitment to fulfilling that duty. In the field

of public corruption, for example, my Office has never hesitated to pursue investigations and prosecutions of corrupt public officials, no matter how powerful they might be. Under my leadership, the Office has pursued corruption taking place in offices and backrooms in New York's City Hall, the Nassau County legislature, the Capitol building in Albany, and even Washington, DC. Our prosecutions have resulted in convictions of Democrats and Republicans alike, including a sitting United States Congressman, the New York State Senate's Majority and Minority leaders, and officials from every level of government. If I am fortunate enough to be confirmed, I will bring that same steadfast commitment to independence and integrity to the position of Attorney General.

You also asked me about any examples from my time in the private sector where I was able to provide an independent voice. In 2005, I was appointed Special Counsel in the Office of the Prosecutor for the International Criminal Tribunal for Rwanda (ICTR), for the express purpose of conducting an independent, sensitive investigation into allegations of witness interference and perjury in one of their cases. I interviewed numerous genocide survivors who witnessed and managed to live through unimaginable atrocities as part of my investigation in order to make impartial recommendations to the ICTR Prosecutor. This opportunity to provide independent scrutiny necessary to ensure the rule of law and the integrity of the court system was one of the most meaningful experiences of my professional life.

26. The Affordable Care Act states that the employer mandate applied "after December 31, 2013." Notwithstanding this clear statutory command, the President postponed the employer mandate. Furthermore, according to the Wall Street Journal, the President has delayed aspects of the law some 38 times.

Under our Constitution, the President must take care that the laws are faithfully executed. He can decide how to enforce the laws, but not whether to enforce them. What are the outer limits of the President's authority to suspend, alter or otherwise change statutory language? What's the limiting principle?

**RESPONSE:** Under our system of separated powers, it is the President's obligation to take care that the laws be faithfully executed, and he cannot abdicate his responsibility to enforce duly-enacted law. Nor can he, consistent with the Constitution and its allocation of powers between the two branches, attempt to, in effect, legislate or to rewrite laws under the pretense of exercising his enforcement discretion.

27. The President offered no legal support when he delayed the employer mandate despite the law. It is not clear if the Office of Legal Counsel did not review his action or could not offer legal support for it. In the Justice Department under Attorney General Holder, the Office of Legal Counsel has lost its former role as a guarantor that presidential acts are legal. Either it is not consulted, or the President takes action without seeking its approval, or the Office will not say "no" to illegal actions, or it issues cursory approvals like it did with an email when the President unilaterally released 5 terrorists from Guantanamo. Any of these possibilities is a threat to the rule of law.

What will you do to ensure that office objectively and thoroughly evaluates proposed presidential actions before they occur so the President conforms to the laws and the Constitution?

**RESPONSE:** If confirmed as Attorney General, it is my intention to meet regularly with the Office of Legal Counsel. In the course of those meetings, I would make clear my expectation that the Office provide soundly reasoned, candid, and objective assessments of the law.

28. In 2008, the Justice Department brought suit against the New Black Panther Party and two of its members for voter intimidation. The defendants did not contest the claims. But when the Obama Administration took over, they would not allow career litigators to move for a default judgment. The career litigators have stated that political appointees would not allow a case to be brought against Black citizens for intimidation of White voters. Internal investigations of misconduct have led nowhere after all these years. The Civil Rights Commission has criticized the Department for not cooperating with its investigation into the matter.

- a. If confirmed, will you conduct a thorough and fair investigation of this matter and apply any appropriate disciplinary action?

**RESPONSE:** I am not personally familiar with the details of this case. My general understanding is that there have been extensive internal Department reviews of this case, but I am not personally familiar with those reviews or their outcome. If I am confirmed as Attorney General, I will ensure there has been a fair and impartial consideration of the results of those internal reviews, and will take any appropriate action based on that consideration.

- b. Is it your position that the Voting Rights Act applies in a race neutral way to voter intimidation?

**RESPONSE:** If I am confirmed as Attorney General, I am committed to enforcing all the federal laws within the Department's jurisdiction, including the Voting Rights Act, according to their specific terms and applicable case law, in an even-handed manner.

29. The President remarked in his State of the Union address that voting should be as easy as possible. But fraud exists and it will get worse if the only response is denial. Not long ago, the Pew Center on the States issued a report that found there are 24 million voter registrations in this country that are no longer valid or are inaccurate. It concluded that there are almost 3 million individuals who are registered to vote in multiple states. Tens of thousands are registered to vote in three or more states.

The study also identified close to 2 million dead people on the voter rolls. NBC News found 25,000 names of likely deceased voters on the California rolls. Some voted years

after they died. One woman who died in 2004 voted in 2008 and 2012. A man who died in 2001 has voted eight times since 2005. The New York Times has written that in Florida, “absentee ballot scandals seem to arrive like clockwork....”

Do you agree that voter fraud is a significant problem? Do you agree that the states should be allowed to take actions, such as requiring voters to show photo identification, especially when there is no charge for obtaining that identification, to ensure the integrity of the voting process without running afoul of the Justice Department’s Civil Rights Division?

**RESPONSE:** I am not personally familiar with the specifics of any studies regarding these issues, nor do I have any categorical views on these issues in the abstract. My general understanding is that the Department considers questions of the validity of voting practices, such as state voter identification laws, based on the particular requirements of the federal law being enforced, based on the particular facts of the practice being investigated, and based on the particular laws and facts in the jurisdiction.

As the Supreme Court held in *Crawford v. Marion County Election Board*, voter identification laws are not per se unconstitutional. Nor do they necessarily violate the Voting Rights Act. I understand that before the *Shelby County* decision, the Department did preclear some voter identification laws, such as in Virginia and New Hampshire.

The analysis of a voter ID law is very specific to the particular law, the particular jurisdiction, and a wide range of factors that Congress has identified as relevant to determining whether a particular voting practice comports with the Voting Rights Act. As such, it is difficult for me to comment on the merits of any law (or in the abstract) without a full understanding of how the law actually operates in a particular jurisdiction.

I would also note that the Department of Justice has a number of important law enforcement responsibilities in this area. These responsibilities include investigating and prosecuting violations of the federal criminal laws, such as election frauds that violate the federal criminal statutes. These responsibilities also include investigating and bringing suit to prevent violations of the federal voting rights laws. If I am confirmed as Attorney General, I am committed to enforcing all of the federal laws within the Department’s jurisdiction, including the federal criminal laws that criminalize various types of election fraud, and the federal voting rights laws such as the Voting Rights Act, according to their terms, in a fair and even-handed manner.

30. Voter fraud also includes the registration to vote and illegal voting by people who are ineligible to vote. That means that the right to vote is being diluted by illegal votes canceling legal ones. In Iowa, a state investigation from 2012 to 2014 identified 117 illegal votes that were cast. The Secretary of State’s investigation of these cases resulted in 27 criminal charges against suspected fraudulent voters and six criminal convictions. The three categories of illegal votes cast were from non-citizens, felons whose right to vote had not been restored, and miscellaneous offenses. Investigators were careful and determined that about half of the suspected non-citizen voters were actually citizens. But

88 cases were turned over to county attorneys and at least 10 of these cases have resulted in charges. The evidence of care in the investigation was demonstrated in the 16 cases brought against felons whose right to vote had not been restored, while 20 felons were identified whose rights should have been restored but had been denied when trying to vote. And there were 100 instances in which voters in Iowa also cast ballots in the same election in another state.

There is much voter fraud if only election and law enforcement officials will actually seek it. That many prosecutors do not search for it does not mean it does not exist. The public needs confidence in the integrity of its elections, and that only eligible voters actually vote.

If you are confirmed, what would you plan to do to stop voter fraud?

**RESPONSE:** As noted above, one of the important responsibilities of the Department of Justice is to investigate and prosecute violations of the federal criminal laws, including those federal laws that criminalize various types of election fraud. If I am confirmed as Attorney General, I am committed to enforcing all of the federal laws within the Department's jurisdiction, including the federal criminal laws regarding election fraud, according to their terms, in a fair and even-handed manner.

31. The Obama Administration has sought to ban the importation of shotguns and ammunition. The Administration has even argued that shotguns lack any sporting purpose.

- a. Do you agree that shotguns do not have any sporting purpose and that their importation should be banned?

**RESPONSE:** I am not aware of any statement that "shotguns lack any sporting purpose." Shotguns have long been used in shooting and hunting sports, and my understanding is that numerous shotguns may be lawfully imported under federal law.

- b. Federal law requires the attorney general to determine whether or not certain types of firearms have a "sporting purpose" before they can be lawfully imported or sold. How is this consistent with the core purpose of the Second Amendment, which, according to the U.S. Supreme Court, is self-defense?

**RESPONSE:** The Supreme Court has made clear that the Second Amendment protects the individual right of law-abiding citizens to keep and bear arms for self-defense in the home. To my knowledge, the Court has not opined on the constitutionality of the federal law with regard to firearm importation. If confirmed, I will ensure that the actions of the Department of Justice are consistent with the Constitution, including the Second Amendment.

32. The Justice Department is tasked with maintaining two important criminal databases. One is used when a Brady Act criminal background check is conducted on a prospective gun purchaser. The other is used by employers to check the criminal history of job applicants they intend to hire. These databases depend on records provided by the states that reflect criminal cases. Both databases have inaccuracies that cause serious problems. For instance, people convicted of domestic violence aren't allowed to purchase firearms. But many states have submitted none or very few records of such convictions. A background check for someone from these states won't keep a convicted domestic abuser from buying a gun.

Similarly, states have done a poor job with the records that are used for employment checks. Today, 32% of adult Americans have a criminal record, either a conviction or an arrest. The database contains many arrests that never led to any conviction. But when a search is done, those arrests come up, and the person may be denied a job as a result. If confirmed, what will you do to improve the accuracy of the records in these databases?

**RESPONSE:** I agree that it is important for databases that contain criminal records to be accurate for purposes of conducting background checks. Although in my capacity as the United States Attorney for the Eastern District of New York I have not studied this issue in detail, if confirmed as Attorney General, I would support efforts to improve and ensure accuracy of criminal records, particularly those records used in background checks by employers and for firearms purchases.

33. One of the bills proposed in Congress and in a number of states would expand existing background check requirements that currently pertain to licensed retail sales of firearms to all firearm transfers. If such a bill were enacted, how would DOJ enforce it in the majority of states where firearms are not licensed or registered to specific individuals?

**RESPONSE:** I am not familiar with the details of the proposed legislation you reference, but if confirmed I would work to enforce all legislation passed by Congress, consistent with the authorities provided by that legislation and the Department's resources.

34. Do you believe the Supreme Court correctly decided *District of Columbia v. Heller*? Do you believe the individual right to keep and bear arms is a fundamental right?

**RESPONSE:** The Supreme Court has made clear that the Second Amendment protects the individual right of law-abiding citizens to keep and bear arms for self-defense in the home. If I am confirmed as Attorney General, I will ensure that the actions of the Department of Justice are consistent with the Constitution, including the Second Amendment.

35. The Supreme Court held in *Heller* that the Second Amendment protects an individual's right to possess a firearm, regardless of their participation in a "well regulated militia." In 2009, the U.S. Supreme Court expanded that right in *McDonald v. Chicago* by finding that the Due Process Clause of the Fourteenth Amendment incorporated the Second

Amendment. What is your personal opinion of the rights afforded by the Second Amendment?

**RESPONSE:** As noted above, the Supreme Court has made clear that the Second Amendment protects the individual right of law-abiding citizens to keep and bear arms for self-defense in the home. If I am confirmed as Attorney General, I will ensure that the actions of the Department of Justice are consistent with the Constitution, including the Second Amendment.

36. A bipartisan consensus is growing in Congress that civil asset forfeiture has increased incentives for abuse. In that process, law enforcement can seize property without any finding that the person has committed a crime. And financial incentives exist for law enforcement to pursue asset forfeiture aggressively—maybe too aggressively.

Recently, Attorney General Holder accepted the proposal that I and several members of Congress asked of him: to eliminate adoptive seizures and equitable sharing. Under those procedures, state and local law enforcement had incentives to pursue seizures to keep the money for their own use. However, Attorney General Holder's order still permits equitable sharing when state and local authorities work with federal law enforcement in a joint task force, and in joint federal-state operations.

I do not read these exceptions as narrowly as you characterized them at the hearing. For instance, I am not aware that an actual case must be filed for them to apply.

- a. Haven't a large number of investigations in your office been conducted through a joint task force or joint federal-state operation? And doesn't the exception for equitable sharing for these operations swallow this rule? What would happen if a state law enforcement officer saw a car that it suspected had cash obtained from drug trafficking and called a DEA agent, asking whether the local agency and DOJ jointly combated drugs?
- b. Are further reforms necessary for asset forfeiture, and will you commit to working to supporting legislation to prevent injustice and enhance procedural rights in this area?

**RESPONSE:** I understand that following the issuance of the Attorney General Holder's January 16, 2015, policy generally prohibiting the practice of federal adoptions of assets seized by state and local law enforcement, the Department has been engaged in extensive communication with both federal and state and local law enforcement about implementation of the new policy. I expect that if the Department determines that further guidance is necessary, including to clarify circumstances that constitute joint investigations or joint task forces, it will respond accordingly.

The adoption order came as a result of the Department's comprehensive review of all aspects of the Asset Forfeiture Program. The goal of this review, as I understand it, is to ensure that federal asset forfeiture authorities are used effectively and appropriately to take the profit out of crime and return assets to victims, while safeguarding civil liberties and the rule of law. If confirmed as Attorney General, I look forward to ensuring that this review is thoughtfully and thoroughly undertaken and to working with Congress on these issues.

37. The Justice Department did not, in the words of the New York Times, “prosecute a single prominent banker or firm in connection with the subprime mortgage crisis that nearly destroyed the economy.” I am concerned that this will happen again if DOJ does not hold the perpetrators responsible. Many people were prosecuted in connection with the failed savings and loan scandals of the 1990s.
- a. Why did the Department of Justice fail in bringing these criminals to Justice? Do you believe this impedes its ability to credibly deter others from committing similar crimes in the future?
  - b. If confirmed, what will you do to pursue prosecution for any of these crimes that are still within the statute of limitations?

**RESPONSE:** If confirmed, I intend to vigorously pursue perpetrators of fraud and financial abuse, including, where appropriate, by prosecuting crimes related to the 2008 financial crisis. It is important to note, however, that criminal prosecution is not the only available means to seek redress for financial improprieties. Not every case can, or should, be resolved through criminal prosecution, as, for example, in cases where the evidence does not meet the high burden of proving criminality beyond a reasonable doubt. In these instances, the Department may be able to pursue civil remedies, as it has in multiple cases involving fraud in the sale of residential mortgage backed securities, reaching record settlements that, among other provisions, have extended consumer relief to those hurt most by the financial crisis.

I know from experience that making full use of civil remedies, including redress under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), is an effective means of tackling financial abuses. For example, my office led the investigation into Bank of America that resulted in a historic settlement which included the payment of \$16.65 billion for financial fraud leading up to and during the financial crisis. That was the largest civil settlement with a single entity in American history and resolved federal and state claims against Bank of America and its former and current subsidiaries, including Countrywide Financial Corporation and Merrill Lynch. In addition to a record penalty, Bank of America agreed to provide billions of dollars of relief to struggling homeowners, including funds that will help defray tax liability as a result of mortgage modification, forbearance or forgiveness. The settlement did not release individuals from civil charges, nor did it absolve Bank of America, its current or former subsidiaries and affiliates or any individuals from potential criminal prosecution.

As another example, my office also participated in an investigation that resulted in a \$7 billion global settlement with Citigroup for misleading investors about residential mortgage backed securities containing toxic mortgages. That settlement included a \$4 billion civil penalty—at the time, the largest penalty at the time under FIRREA. The resolution also required Citigroup to provide relief to underwater homeowners, distressed borrowers, and affected communities through a variety of means including financing affordable rental housing developments for low-income families in high-cost areas. The settlement did not absolve Citigroup or its employees from facing any possible criminal charges, nor did it release any individuals from civil liability.

In short, I am committed to using all of the Department's enforcement tools, whether civil or criminal, and to working with all of our partners, whether federal, state, local, tribal, territorial, or foreign, to combat fraud and financial abuse. I am confident that we will succeed in restoring the integrity of our markets, preserving taxpayers' resources, and protecting the vast majority of hardworking Americans, investors, and businesses who play by the rules and adhere to the law.

38. As United States Attorney for the Eastern District of New York, you helped secure nearly \$2 billion from HSBC over its failure to establish proper procedures to prevent money laundering by drug cartels and terrorists. You were quoted in a DOJ press release saying, "HSBC's blatant failure to implement proper anti-money laundering controls facilitated the laundering of at least \$881 million in drug proceeds through the U.S. financial system."

You stated that the bank's "willful flouting of U.S. sanctions laws and regulations resulted in the processing of hundreds of millions of dollars in [Office of Foreign Assets Control]-prohibited transactions." Still, no criminal penalties have been assessed for any executive who may have been involved.

- a. Did you make any decision or recommendation on charging any individual with a crime?
  - i. If so, please describe any and all decisions or recommendations you made.
  - ii. Please explain why such decisions or recommendations were made.
- b. If you did not make any decision or recommendation on charging any individual with a crime, who made the decision not to prosecute?

**RESPONSE:** On December 11, 2012, the Department filed an information charging HSBC Bank USA with violations of the Bank Secrecy Act and HSBC Holdings with violating U.S. economic sanctions (the two entities are collectively referred to as "HSBC"). Pursuant to a deferred prosecution agreement ("DPA"), HSBC admitted its wrongdoing, agreed to forfeit \$1.256 billion, and agreed to implement significant remedial measures, including, among other things, to follow the highest global anti-money laundering standards in all jurisdictions in which it operates. As the United States District Judge who approved the deferred prosecution found, "the DPA imposes upon HSBC significant, and in some respect extraordinary, measures" and the "decision to approve the DPA is easy, for it accomplishes a great deal." Although grand jury secrecy rules prevent me from discussing the facts involving any individual or entity against whom we decided not to bring criminal charges, as I do in all cases in which I am involved, I and the dedicated career prosecutors handling the investigation carefully considered whether there was sufficient admissible evidence to prosecute an individual and whether such a prosecution otherwise would have been consistent with the principles of federal prosecution contained in the United States Attorney's Manual.

I want to reiterate, particularly in the context of recent media reports regarding the release of HSBC files pertaining to its tax clients, that the Deferred Prosecution Agreement reached with HSBC addresses only the charges filed in the criminal information, which are limited to

violations of the Bank Secrecy Act for failures to maintain an adequate anti-money laundering program and for sanctions violations. The DPA explicitly does not provide any protection against prosecution for conduct beyond what was described in the Statement of Facts. Furthermore, I should note the DPA explicitly mentions that the agreement does not bind the Department's Tax Division, nor the Fraud Section of the Criminal Division.

39. Recent press reports have tracked the disturbingly large numbers of witnesses in federal criminal cases who have been murdered to prevent their testimony. It is often difficult to get witnesses to testify against dangerous criminals. They rightly fear for their safety and the Justice Department has to ensure they are protected.

I know that sometimes witnesses decline protection. And sometimes protected witnesses ignore sound advice to stay away from their former residences to avoid the defendant and others. But it is clear that the Department is not offering protection to quite a few witnesses who need it.

And I am particularly incensed that on several occasions, when the Department has confidentially informed defense counsel in advance of trial who a witness will be, defense counsel have tipped off their client, who then appear to arrange for the witness to be murdered.

If confirmed, what will you do as Attorney General to make sure that witnesses who need protection receive it? Will you ensure that federal prosecutors seek protective orders to relieve them of the obligation of disclosing the names of vulnerable witnesses to defense counsel?

**RESPONSE:** As United States Attorney for the Eastern District of New York, I am deeply familiar with the challenges associated with ensuring both the cooperation and safety of witnesses in federal prosecutions—particularly prosecutions of violent offenders and organized crime defendants. I also am familiar with the various tools that the Department may use, including but not limited to participation in the Witness Security Program or other relocation assistance, to ensure the safety of witnesses and their family members. Effective use of those tools has been a critical component in my Office's historic and groundbreaking convictions of the leaders of the five La Cosa Nostra families in New York City and numerous ultra-violent gangs. If confirmed as Attorney General, I will support the continued use of these tools. I also will work with federal prosecutors to ensure that the Department both meets its discovery obligations and protects witnesses from retaliation by seeking protective orders to safeguard the identities of witnesses, where appropriate.

40. Increasingly, law enforcement is using drones for domestic law enforcement purposes. Drones enable more surveillance of citizens to occur. They are more mobile. They are cheaper to pay than police officers. And they can hover over homes and peer through windows, observing what humans cannot.

I am concerned that as law enforcement employs more drones, the security of the people in their persons, papers, and effects could be compromised. Meanwhile, despite a hearing the Judiciary Committee held, the Justice Department has not issued any guidelines on how the Fourth Amendment's prohibition on unreasonable searches and seizures, and its warrant requirement, apply to drones.

If confirmed, will you commit that the Department of Justice will issue specific guidelines on how the Fourth Amendment restricts law enforcement's domestic use of drones?

**RESPONSE:** I understand that the Department currently uses unmanned aircraft systems (UAS) in limited circumstances and only when there is a specific operational need. If confirmed, I will ensure that when the Department uses unmanned aircraft, its use will continue to be guided by all applicable constitutional, statutory, and regulatory provisions—including privacy and civil rights and civil liberties protections.

The Department of Justice Inspector General recommended that the Department come up with a uniform system of rules and regulations to control how these devices are used. I understand there is a Department of Justice Working Group, which includes privacy, policy, legal, law enforcement, and grant-making components, to identify and address policy and legal issues pertaining to the use of UAS. The Department is also participating in an interagency process that is considering UAS-related policy issues that are shared across departments and agencies. If confirmed, I look forward to carefully examining the Department's efforts in this area.

41. The House Oversight and Government Reform Committee issued a report last year finding that a banking enforcement program involving DOJ is in fact aimed at depriving legal but politically-disfavored business sectors of access to the financial services businesses need to survive in the modern economy. The name of the program is Operation Choke Point. You were asked about Operation Choke Point at your hearing, but you seemed unfamiliar with the fact that the program's targets include legal sellers of firearms and ammunition, among other industries. Internal investigators at both DOJ and FDIC are conducting formal inquiries into the program and the officials and employees involved.
  - a. Would you agree that DOJ should not use its authority to discourage legal enterprises from operating, even if some administration officials consider them "morally unacceptable"?

**RESPONSE:** I understand that the purpose of Operation Chokepoint is to target financial institutions that are involved in perpetrating frauds upon consumers—where, for example, a financial institution is facilitating the looting of consumer bank accounts.

The role of the Department of Justice is to enforce the law and as a career prosecutor and the United States Attorney for the Eastern District of New York, I can assure you that I, and my

fellow prosecutors and law enforcement partners, take this role seriously. Our job is to investigate specific evidence of unlawful conduct and enforce the law.

The Department works every day to uphold the law and protect the American people. To ensure that our efforts are effective, the Department also must make sure to prevent any potential misunderstanding of its efforts that could be detrimental to lawful businesses. Thus, if confirmed as Attorney General, I will make clear that it is imperative that we inform financial institutions that any investigations are based on specific evidence that a financial institution is breaking the law, and not on the institution's relationships with lawful industries or companies.

- b. Would you support appointment of a special counsel to hold accountable any DOJ official who is found to have abused his or her authority under this program to close down lawful businesses?

**RESPONSE:** If I am confirmed as Attorney General, I can commit to you that I will take seriously every allegation of abuse of power brought to my attention. And in conjunction with career prosecutors and Congress where appropriate, I will make the best decision about how to handle such an investigation. If a member of the Department of Justice is found to have crossed the line, that individual must be dealt with swiftly and according to law.

42. On Election Day last year—3 years after the House subpoena was issued and 2 years after the contempt vote—Attorney General Holder finally delivered 64,000 pages of documents to the House. Those documents were only provided to the House. The Justice Department failed to deliver them to this Committee, despite the agreement I made with Attorney General Holder to release my hold on Deputy Attorney General Cole's nomination. The Senate Judiciary Committee was supposed to receive all the same Fast and Furious documents delivered to the House throughout the investigation. The subpoena is still being litigated, so the court may order more documents to be provided in the future.

Will you commit that, if confirmed, you will ensure that this committee receives any future Fast and Furious documents provided in the litigation with the House?

**RESPONSE:** If I am confirmed as Attorney General, I will ensure that any future documents provided to the U.S. House of Representatives in this litigation are also provided to the Senate Judiciary Committee.

43. The Department has argued in the Fast and Furious litigation that executive privilege is more than just a Presidential privilege, but that it also establishes a constitutional shield for the "deliberative process" of lower level agency officials. However, the deliberative process privilege is traditionally a common law doctrine and one of the exemptions in the Freedom of Information Act—not a constitutional privilege of equal standing with the inherent Constitutional power of Congress to conduct oversight inquiries. Deliberative

process also traditionally applies only to content that is deliberative and pre-decisional.<sup>1</sup> It does not shield material created after a decision is made, or that is purely factual.

Moreover, the Attorney General has sought to use this exceedingly broad notion of privilege to justify withholding documents that he has stated *are not privileged*. On November 15, 2013, the Attorney General acknowledged in the Fast and Furious litigation that he was withholding documents responsive to the House subpoena that “do not . . . contain material that would be considered deliberative under common law or statutory standards.”<sup>2</sup> Furthermore, the OLC opinion on the President’s assertion of executive privilege suggests that the privilege applies “*regardless* of whether a given document contains deliberative material.”<sup>3</sup>

Yet, the Department *did* produce deliberative, pre-decisional material prior to the Feb. 4, 2011 gunwalking denial letter to me, despite its claim now that such material is privileged. The Department conceded that Congress had a clear interest in finding out whether officials knew before it was sent that the Feb. 4th letter was false. It provided pre-Feb. 4th material—even though it was pre-decisional and deliberative. However, the Department still refuses to concede that Congress has an interest in discovering how officials learned that the letter was false *after it was sent*. It refused to provide post-Feb. 4th material—even though it is post-decisional and factual in nature. The Department categorically withheld *all* records from after the Feb. 4th letter until Election Day 2014. Only then, after a court order, did it finally produce to the House Committee post-Feb. 4th documents that contained purely factual, post-decisional material.

- a. What is the scope of executive privilege, particularly over agency documents unrelated to the President?

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I have not had occasion to study the doctrine of Executive Privilege, but my understanding is that the doctrine is constitutionally-based. To preserve and protect the Executive Branch’s proper functioning under the Constitution, some materials need to remain confidential. In some instances, it becomes necessary for the President to assert Executive Privilege in order to preserve the separation of powers.

- b. Does the President have an executive privilege to withhold documents subpoenaed by Congress that have nothing to do with advice or communications involving the White House? If so, what is the legal basis for that claim?

**RESPONSE:** As noted above, as the United States Attorney for the Eastern District of New York, I have not had occasion to study the doctrine of Executive Privilege, but my understanding

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<sup>1</sup> *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997).

<sup>2</sup> Def.’s Mot. For Certification of Sept. 30, 2013 Order for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) at 8-9, *Committee on Oversight and Government Reform, U.S. House of Representatives v. Holder*, 1:12-cv-1332 (D.D.C. Nov. 15, 2013).

<sup>3</sup> 36 Op. O.L.C. 1, 3 (June 19, 2012) (emphasis added).

is that the doctrine is constitutionally-based. I also understand that the scope of the privilege is the subject of ongoing litigation, and that the Department of Justice has taken the position that Executive Privilege is necessary to protect the President's broad Article II functions, a position accepted by the district court.

- c. Congress created a statutory deliberative process exemption for documents subject to Freedom of Information Act requests. Do you believe a similar exception applies to congressional subpoenas, or are requests from Congress entitled to more weight?

**RESPONSE:** I commit that, if I am confirmed as Attorney General, I would work closely with Congress to accommodate its legislative interests. I would hope that these efforts would eliminate the need for a congressional subpoena.

- d. Are deliberative documents just as immune from Congressional scrutiny as they are from FOIA requestors?

**RESPONSE:** It is my understanding that the President's assertion of Executive Privilege is at issue in the ongoing Fast and Furious litigation. If I am confirmed as Attorney General, I will work to accommodate Congress's legislative and oversight interests.

- e. Can the President assert executive privilege over deliberative material, as the Office of Legal Counsel opinion suggested, "regardless of whether a given document contains deliberative content," and even where the material is post-decisional?

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I have not had occasion to study the doctrine of Executive Privilege, but my understanding is that the doctrine is constitutionally-based. It is my understanding, however, that Executive Privilege may be appropriately asserted over a wide variety of information, and that the exact scope of the privilege is the subject of ongoing litigation. If I am confirmed as Attorney General, I will work to accommodate Congress's legislative and oversight interests.

- f. The OLC opinion also claims that providing Congress with non-deliberative or purely factual agency documents would raise "significant separation of powers concerns." Do you agree, and if so, why?

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I have not had occasion to study the doctrine of Executive Privilege, but my understanding is that the doctrine is constitutionally-based. To preserve and protect the Executive Branch's proper functioning under the Constitution, some materials need to remain confidential. In some instances, it becomes necessary for the President to assert Executive Privilege in order to preserve the separation of powers.

- g. Given that non-deliberative, purely factual agency documents are clearly not considered part of any protected “deliberative process” under common law or statute, what is the legal justification for withholding such documents under Congressional subpoena?

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I have not had occasion to study the doctrine of Executive Privilege, but my understanding is that the doctrine is constitutionally-based. It is my understanding, however, that Executive Privilege may be appropriately asserted over a wide variety of information, and that the exact scope of the privilege is the subject of ongoing litigation.

44. In the Fast and Furious litigation, the Department has relied on an extremely broad notion of executive privilege in its refusal to produce non-deliberative, post-decisional documents that would help Congress understand when and how the Department came to know that its Feb. 4, 2011 letter to me denying gunwalking was false. Specifically, the Department categorically refused, until Election Day last year, to produce *64,000 documents*—even though the Attorney General recognized that at least some of those documents “[did] not . . . contain material that would be considered deliberative under common law or statutory standards.”<sup>4</sup> The OLC opinion on the matter suggests that assertion of privilege is proper “regardless of whether a given document contains deliberative material.”<sup>5</sup>

The Department relied on this overbroad view of executive privilege when it declined to bring the congressional contempt citation of Attorney General Holder before a grand jury.<sup>6</sup> The Department sent this denial letter to the Speaker of the House before the contempt citation even reached the U.S. Attorney.<sup>7</sup> The U.S. Attorney failed to answer my questions seeking an explanation of the facts and circumstances sufficient for Congress to determine whether he made an independent judgment regarding the refusal to present the citation.<sup>8</sup>

The law states that it is the “*duty*” of the U.S. Attorney “to bring the matter before the grand jury for its action.”<sup>9</sup>

- a. What does it mean for the U.S. Attorney to have a “duty” to present a congressional contempt citation to a grand jury?

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<sup>4</sup> Def.’s Mot. For Certification of Sept. 30, 2013 Order for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) at 8-9, *Committee on Oversight and Government Reform, U.S. House of Representatives v. Holder*, 1:12-cv-1332 (D.D.C. Nov. 15, 2013).

<sup>5</sup> 36 Op. O.L.C. 1, 3 (Jun 19, 2012).

<sup>6</sup> Letter from Senator Charles E. Grassley to U.S. Attorney Ronald Machen (June 29, 2012), at 2.

<sup>7</sup> *Id.* at 1.

<sup>8</sup> *Id.* at 1-2.

<sup>9</sup> 2 U.S.C. § 194 (emphasis added).

- b. If the U.S. Attorney has any discretion in cases where there is a claim of Executive Privilege, does he also have an obligation to make an independent evaluation of such a claim? If not, please explain why not.
- c. Under the Department's interpretation of the statute, what is left of the Congressional contempt power against any agency able to convince the President to assert executive privilege?
- d. Under the Department's interpretation of the statute, what safeguards against a President's improper claims of executive privilege if not the independent legal judgment of the U.S. Attorney charged by statute with presenting the contempt citation to a grand jury?
- e. The Department relies on its own OLC opinions, which claim, among other things, that the Department should not prosecute officials for contempt at least in part because Congress can resort to civil litigation to enforce its subpoenas. However, it is clear from the delays in the Fast and Furious litigation that this enforcement tool is insufficient to ensure that Congress has adequate access to information to carry out its oversight responsibilities. The House Committee has had to re-issue the subpoena twice to avoid the case being mooted at the beginning of each new Congress. This gives the impression that the Department is delaying the process in hopes that political events may allow it to avoid a judicial resolution. What steps would you take to counter that appearance and resolve the dispute in a more timely way?

**RESPONSE:** I have not had occasion as the United States Attorney for the Eastern District of New York to acquaint myself with this dispute. My understanding is that a 1984 opinion signed by Theodore Olson, the head of the Office of Legal Counsel under President Reagan, sets forth the longstanding Department of Justice position with respect to 2 U.S.C. § 194. That said, I believe it is important for the Executive Branch to work with Congress to accommodate its legitimate oversight interests, and if confirmed as Attorney General, I will work to invigorate this tradition of collaboration.

45. If confirmed, will you pledge to personally re-evaluate the Department's litigation strategy in the fast and furious matter, the merits of its positions, and refusal to settle the case up to this point—and provide your conclusions to this Committee?

**RESPONSE:** As United States Attorney, I am not personally familiar with the Department's litigation strategy in the Fast and Furious matter or the particulars of the ongoing litigation. If I am confirmed as Attorney General, I look forward to learning the status of this litigation.

46. Josephine Terry sent a letter to you dated January 26, 2015, informing you that Department of Justice officials had lied to her regarding the source of the weapons found at her son's murder scene and withheld key information from the lead FBI investigator on the case. In spite of the findings and recommendations by the DOJ OIG and the ATF

Professional Review Board, many of the officials involved remain employed by the Department or ATF. Ms. Terry asks that you review the conduct and performance of those officials and examine whether the ATF obstructed the FBI's investigation of her son's murder.

As Ms. Terry asks:

- a. Will you "review the conduct and performance of the Justice Department and ATF . . . to determine whether the discipline or other administrative action with regard to each employee was appropriate"?
- b. "[I]f ATF's Professional Review Board did in fact recommend certain discipline such as termination for certain employees, [will you] determine why this has not occurred"?
- c. Ms. Terry also asks about evidence that officials may have initially concealed from the FBI agent investigating her son's murder the fact that the weapons found at the scene traced back to Fast and Furious. Do you agree with Ms. Terry that, if this is true, these officials may have hindered and obstructed a federal criminal investigation? If so, and if confirmed, will you look into it? If not, please explain why not.

**RESPONSE:** If I am confirmed as Attorney General, I look forward to educating myself on these important questions and will take appropriate actions.

47. In November 2014, the Department delivered to the House 64,000 pages of documents related to Fast and Furious that it had withheld for three years, even though the Attorney General admitted that they were not all privileged. One of the documents is an email that shows that the Justice Department and the White House press offices attempted to stop CBS News from reporting on Fast and Furious.

In an email dated October 4, 2011, the Attorney General's top press aide, Tracy Schmalzer, claimed that CBS News reporter Sharyl Attkisson was "out of control."<sup>10</sup> The Attorney General's press aide also told White House Deputy Press Secretary Eric Schultz that she planned on calling CBS News anchor Bob Schieffer to pressure the network to block Ms. Attkisson's Fast and Furious reporting. The White House Deputy Press Secretary replied, "Good. Her piece was really bad for the AG."

The White House Deputy Press Secretary also told Attorney General Holder's press aide that he was working with reporter Susan Davis to target Rep. Darrell Issa. In the same email chain, the White House Deputy Press Secretary tells Attorney General Holder's press aide that he would provide Susan Davis with "leaks." Ms. Davis wrote a critical piece on Representative Issa a few weeks later.

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<sup>10</sup> E. Schulz and T. Schmalzer e-mail chain (Oct. 4, 2011), available at <http://www.judicialwatch.org/document-archive/control/>; see also K. Pavlich, Document Dump Shows DOJ Worked With White House To Target 'Out of Control' Sharyl Attkisson For Fast and Furious Coverage, Townhall.com (Nov. 21, 2014).

Ms. Attkisson also testified before the Committee that the Department physically barred her from attending a Fast and Furious briefing in a public building, while handpicking other reporters who were allowed to get past building security for the briefing.

- a. Do you believe the job of the taxpayer-funded press office at the Department of Justice should include pressuring networks not to run news stories that the Attorney General does not like?

**RESPONSE:** If confirmed as Attorney General, I will work to ensure the Department conducts its work as transparently as possible. The Department's Office of Public Affairs (OPA) plays a critical role in fulfilling this goal by communicating information about the Department's overall mission and daily activities to the public. In doing this, I believe OPA should strive to provide journalists covering the Department with the most information possible on any given issue so that the Department's work can be reported accurately and fairly. Moreover, I believe that OPA must interact with all journalists courteously and professionally at all times, even if there is disagreement about the accuracy of a story that has been published.

- b. Is it appropriate for that press office to coordinate with the White House on "leaks" of negative information about a Committee Chairman conducting aggressive oversight of the Justice Department?

**RESPONSE:** I am not familiar with the incident you mention. In general, I would expect the work of OPA to be focused on communicating information related to the Department's core law enforcement responsibilities and legal casework, as opposed to anything else.

- c. If confirmed, what would you do to curb this kind of activity in your press office?

**RESPONSE:** As noted above, if I am confirmed as Attorney General, my approach will be to ensure that OPA is focused on advancing the Department's overall mission by communicating the facts of its law enforcement work to the American people. In its dealings with journalists, I would expect OPA to provide as much information as possible to ensure timely and accurate reporting, and to maintain a professional and courteous approach at all times. To the extent that I observe that OPA is in any way deviating from these standards, I would not hesitate to address the situation swiftly.

48. If confirmed, what steps would you take to ensure that reporters are not barred from briefings simply because they report on stories unfavorable to the Attorney General?

**RESPONSE:** During my time as the United States Attorney for the Eastern District of New York, we routinely invited all interested media to our press conferences, and sought to respond to all media inquiries, regardless of the particular outlet that was posing the question. If I am confirmed as Attorney General, I will strive to ensure that OPA adheres to this same approach.

49. On December 30, 2014, former CBS News reporter Sharyl Attkisson — who reported on Operation Fast and Furious and Benghazi — filed a complaint in court alleging that the government had conducted “unauthorized and illegal surveillance” of her computers and telephones.<sup>11</sup> It is unclear so far whether the surveillance was conducted by the government, but it does seem clear that there was a hack of her CBS computers. CBS News issued a press release confirming that there was a hack.<sup>12</sup>

Ms. Attkisson’s complaint alleges that her forensics experts found that propriety federal government software had been used to accomplish an intrusion on her work computer, though that is unconfirmed.<sup>13</sup> In addition, both her work and personal computers allegedly showed evidence of attacks that were coordinated and highly-skilled.<sup>14</sup> Ms. Attkisson filed a complaint with DOJ-OIG *and* the FBI regarding this matter, but the FBI never even interviewed her about her claim.<sup>15</sup> In a letter to Sen. Coburn, DOJ sought to blame Ms. Attkisson for failing to “follow up” with the FBI regarding her complaint.<sup>16</sup> Ms. Attkisson also has filed a FOIA request with the FBI, and received only a few pages in response so far. The documents indicate knowledge of the hack, but it is unclear what, if any, investigative steps the FBI took to pursue a case.

- a. Given the growing importance of cybersecurity as a priority for the Department and the chilling effects that politically motivated hacking could have on the First Amendment activities of news organizations, do you believe the FBI should find out who hacked into CBS News, regardless of who is responsible?

**RESPONSE:** I share your concerns about cybersecurity and the need to be vigilant against hacking, politically motivated or otherwise. It is my understanding that the Department’s Office of Inspector General conducted an investigation into Ms. Attkisson’s allegations and concluded that it could not substantiate the allegations that her computers were subject to remote intrusion by the FBI, any other government personnel, or otherwise.

- b. In light of the allegation that a government agency or a contractor for a government agency may be responsible, if confirmed, what steps would you take to ensure that there is a thorough and independent investigation of the CBS hack?

**RESPONSE:** If confirmed, I will ensure that the Department carefully considers credible allegations of wrongdoing that are brought to our attention. With respect to the particular matter you have described, it is my understanding that the Department’s Office of Inspector General has conducted an independent investigation of this matter.

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<sup>11</sup> Complaint at ¶ 1, *Attkisson v. Holder*, 2014-CA-8321 (D.C. Super. Ct. Dec. 30, 2014).

<sup>12</sup> See E. Wemple, CBS News confirms multiple breaches of Sharyl Attkisson’s computer, Washington Post Blog (June 14 2013).

<sup>13</sup> Compl. ¶ 44.

<sup>14</sup> *Id.* ¶ 45.

<sup>15</sup> *Id.* ¶¶ 47, 54; L. Grove, Ex-CBS Reporter Sharyl Attkisson’s Battle Royale With the Feds, The Daily Beast (Jan. 9, 2015).

<sup>16</sup> Letter from P. Kadzik to T. Coburn (Dec. 12, 2013), at 2.

- c. If confirmed, how would you deal with the inherent conflict in the Department's interest in both defending itself against litigation alleging some government liability and its interest in ensuring that there is a thorough and independent inquiry to find out who was responsible for the CBS hack?

**RESPONSE:** I understand that in this case, the Department of Justice Inspector General performed an investigation of Ms. Attkisson's allegations, and I have confidence in the Inspector General's ability to conduct thorough and independent inquiries.

- d. The Department also has allegedly failed to respond to related FOIA requests in a timely and appropriate way. If confirmed, will you pledge to re-evaluate the Department's FOIA responses on this matter to date and seek to avoid costly FOIA litigation by being as transparent as possible? If not, please explain why not.

**RESPONSE:** The Freedom of Information Act (FOIA) is a vital part of our democracy, and if confirmed, I commit to working with the FBI, as well as the rest of the Department and Executive Branch, to ensure an appropriate response to this and other FOIA requests.

- e. If confirmed, will you cooperate fully with this committee's inquiry into the Department's response to the CBS hack— including providing internal documents about efforts to find out who was responsible? If not, please explain why not.

**RESPONSE:** If confirmed, I commit to working with this Committee as it exercises its duty to conduct oversight of the Department. I believe that we will be able to work together to ensure the Committee has the documents and information it needs to conduct oversight while also protecting the Department's law enforcement and confidentiality interests.

50. The FBI is exempt from the normal protections that apply to other law enforcement agencies under the Whistleblower Protection Act.<sup>17</sup> Operating outside of the traditional whistleblower protection framework, the Department's record of actually guarding whistleblowers from retaliation is historically weak.

For example, regulations designate specific individuals to whom FBI employees may make protected disclosures.<sup>18</sup> Those individuals include

the Department of Justice's (Department's) Office of Professional Responsibility (OPR), the Department's Office of Inspector General (OIG), the FBI Office of Professional Responsibility (FBI OPR), the FBI Inspection Division (FBI-INSD) Internal Investigations Section (collectively, Receiving Offices), the Attorney General, the Deputy

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<sup>17</sup> 28 C.F.R. Part 27.

<sup>18</sup> 28 C.F.R. § 27.1(a).

Attorney General, the Director of the FBI, the Deputy Director of the FBI, or to the highest ranking official in any FBI field office . . . .<sup>19</sup>

The regulations do *not* protect whistleblowers from retaliation when they make initial disclosures of wrongdoing to their direct or immediate supervisors.

In 2012, the President tasked the Attorney General to report on the effectiveness of the FBI whistleblower regulations.<sup>20</sup> The Department submitted its report a year late.<sup>21</sup>

In that report, the Department noted that of 89 reviewed cases of whistleblower complaints, 69 were found to be “non-cognizable.” Further, a “significant portion” of those deemed “non-cognizable” involved disclosures that were “not made to the proper individual or office under 28 C.F.R. § 27.1(a).”<sup>22</sup>

The Department recommended expanding the number of designated officials to whom whistleblowers may make a protected disclosure, but only to include the second-in-command of a field office, such as the Assistant Special Agent in Charge of a smaller field office or the Special Agent in Charge of a larger field office.<sup>23</sup> The Department declined to expand the category of designated officials to include an employee’s direct or immediate supervisor, even though, as the Department noted, “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.”<sup>24</sup>

Notably, PPD-19 specifically defined a “protected disclosure” within the intelligence community, of which the FBI forms a part, as “a disclosure of information by the employee to a supervisor in the employee’s direct chain of command *up to and including* the head of the employing agency . . . .”<sup>25</sup> The FBI thus remains the *only agency* in the Executive Branch that does not protect disclosures made by employees to their direct or immediate supervisor.

Unfortunately, this inadequate regulatory framework is not the sole culprit for the weak protections afforded to FBI whistleblowers. I have personally spoken to current and former FBI employees whose cases languished anywhere between *nine and eleven years* before those employees won relief for retaliatory acts and practices committed against them for reporting waste, fraud, and abuse in the FBI.

- a. Why shouldn’t whistleblowers in the FBI who report waste, fraud, and abuse to their direct supervisors be protected?

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<sup>19</sup> *Id.*

<sup>20</sup> The White House, Presidential Policy Directive/PPD-19 (Oct. 10, 2012), at 5 [“PPD-19”].

<sup>21</sup> Department of Justice Report on Regulations Protecting FBI Whistleblowers (Apr. 2014) [“DOJ FBI Whistleblower Report”].

<sup>22</sup> DOJ FBI Whistleblower Report at 7.

<sup>23</sup> *Id.* at 13.

<sup>24</sup> *Id.* at 14.

<sup>25</sup> PPD-19 at 7 (emphasis added).

**RESPONSE:** I believe that whistleblowers play a vital role in protecting against waste, fraud, and abuse of taxpayer funds. As you have described above, I understand that the Department recently released a lengthy report analyzing the system in place to protect FBI whistleblowers, and made a number of recommendations to improve that process. If I am confirmed as Attorney General, I will be committed to reviewing those recommendations and working to ensure that the system to protect FBI whistleblowers is fair, effective, and properly protects whistleblowers against prohibited retaliation.

- b. Do you believe that there is anything unique about the FBI that suggests its policy on this issue should be different from the rest of the law enforcement and intelligence communities? If so, please explain why.

**RESPONSE:** While I am aware that the Department recently released a report on how best to protect FBI whistleblowers, I am not familiar with its details or recommendations. If I am confirmed as Attorney General, I am committed to reviewing this issue.

- c. If confirmed, will you commit to personally reviewing any changes the Department makes to its policies and procedures in handling FBI whistleblower complaints?

**RESPONSE:** Yes.

- d. If confirmed, will you provide this committee with regular updates on the Department's progress in improving the effectiveness and timeliness of its policies and procedures for addressing these claims?

**RESPONSE:** If I am confirmed as Attorney General, I hope to have an ongoing dialogue with the Committee not just about the issue of FBI whistleblower policies but also about the other important issues raised in my hearing and in these questions.

51. On September 5, 2014, I wrote to the Office of Juvenile Justice and Delinquency Prevention (OJJDP) within the Office of Justice Programs (OJP) regarding allegations that OJJDP knowingly granted millions of taxpayer dollars to states that incarcerated runaway youth, foster youth, and other vulnerable minors in violation of the Juvenile Justice and Delinquency Prevention Act (JJDP). OJJDP's responses to my inquiry confirmed whistleblowers' accounts of compliance monitoring failures at OJJDP.<sup>26</sup> The Inspector General has also detailed some of these failures in a January 2014 report.<sup>27</sup>

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<sup>26</sup> Letter from Sen. Charles E. Grassley, Chairman, S. Comm. on the Judiciary, to Hon. Karol Mason, Assistant Attorney General, U.S. Department of Justice (January 14, 2015), <http://www.grassley.senate.gov/sites/default/files/news/upload/CEG%20to%20OJP%20%28JJDP%20Act%20Grant%20Fraud%29%2C%201-14-15.pdf>.

<sup>27</sup> *Id.*

The core problem appears to be OJJDP's failure to understand or implement its separate and distinct compliance monitoring obligations under the law:

- OJJDP is required to reduce a state's funding for a given year by 20 percent for each core requirement violated in the previous fiscal year.<sup>28</sup>
- OJJDP is *also* required to ensure that such a state does not receive *any* JJDP funds for the year, unless that state meets one of two criteria, including a showing of subsequent, substantial compliance with the requirement(s) it was violating.<sup>29</sup>

Yet, OJJDP has admitted and defended a policy that appears to conflate these two obligations, by allowing non-compliant states to avoid the 20 percent reductions so long as they are able to demonstrate subsequent, substantial compliance with the non-compliant requirement(s).<sup>30</sup>

Moreover, OJJDP admitted that "this [policy] does not appear to have been reduced to writing" even though "it has been the common practice since at least 1986."<sup>31</sup> In addition, OJJDP explained that "[it] has not historically maintained a comprehensive record of all communications with the 55 participating states and territories."<sup>32</sup>

This gives rise to a concern that this policy, questionable on its face, may be arbitrary as applied. Moreover, there is a growing concern as to just how many taxpayer dollars OJJDP has awarded to states that imprisoned vulnerable youth in violation of the JJDP since then.

- a. Do you agree that it is an inappropriate use of taxpayer dollars to reward states that lock up foster youth and runaways in violation of the Juvenile Justice Delinquency Prevention Act?

**RESPONSE:** I believe that all federal employees share an obligation to protect taxpayer dollars from misuse. This is especially true for the grant-making components of the Department of Justice. If I am confirmed as Attorney General, I will work with the Office of Justice Programs to ensure that funds dispensed by the Office of Juvenile Justice and Delinquency Prevention are distributed consistent with the restrictions of the Juvenile Justice and Delinquency Prevention Act.

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<sup>28</sup> 42 U.S.C. § 5633 (c)(1).

<sup>29</sup> 42 U.S.C. § 5633 (c)(2). Significantly, subsections (c)(1) and (c)(2) are conjoined by the operative "and."

<sup>30</sup> Letter from Hon. Peter J. Kadzik, Assistant Attorney General, U.S. Department of Justice, Office of Legislative Affairs, to Sen. Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary (October 28, 2014).

<sup>31</sup> Email from U.S. Department of Justice, Office of Legislative Affairs, to Staff of Sen. Charles E. Grassley, Ranking Member, and Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary (November 21, 2014).

<sup>32</sup> *Id.*

- b. If confirmed as Attorney General, will you personally look into this issue and cooperate fully with our inquiry—including ensuring that the replies to our letters are timely?

**RESPONSE:** If I am confirmed as Attorney General, I will work with the Office of Justice Programs to ensure that funds dispensed by the Office of Juvenile Justice and Delinquency Prevention are distributed consistent with the restrictions of the Juvenile Justice and Delinquency Prevention Act, and that the Committee receives information to perform its oversight function.

52. In 2013, the Government Accountability Office (GAO) reported that Attorney General Holder took 366 flights for non-mission purposes aboard Department aircraft at a cost of \$5.8 million.<sup>33</sup> This report also states that in 2009 the FBI stopped reporting to the General Services Administration (GSA) flights taken by senior federal officials aboard its aircraft, although reporting is required by Office of Management and Budget (OMB) Circular A-126.<sup>34</sup> Circular A-126 states that agencies must report semiannually to GSA each use of such aircraft for non-mission travel by senior executives.<sup>35</sup>

- a. As it stands now, the Department does not report the Attorney General’s travel as other agencies do under OMB Circular A-126. If you were confirmed as Attorney General, would you commit to publicly reporting the amount of your travel on FBI jets? If not, why not?

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I have not had occasion to study this issue and am not familiar with the specific reporting requirements for official travel on government aircraft.

- b. If confirmed, would you limit your travel in order to save taxpayer money and ensure that the FBI aircraft are always available for counter-terrorism operational flights? If not, why not?

**RESPONSE:** It is my understanding that all Department of Justice aircraft, including the FBI’s fleet, are always used for mission purposes first. If I am confirmed as Attorney General, I am committed to utilizing the Department’s aircraft resources in a way that supports the Department’s mission and is a cost-effective, appropriate use of taxpayer dollars.

- c. If confirmed, would you be willing to develop internal guidance or policies that would help guide and regulate the extent to which “required use” travelers do not inappropriately or overly use government aircraft for personal reasons? If not, please explain why.

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<sup>33</sup> GAO, *Executives’ Use of Aircraft for Nonmission Purposes*, GAO-13-235 (Washington, D.C : February 2013).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I am not familiar with Department policies and guidance regarding “required use” travelers’ use of government aircraft. As noted above, if confirmed as Attorney General, I am committed to utilizing the Department’s aircraft resources in a cost-effective and mission-supportive manner.

53. Although administrative leave is not authorized by statute, precedent allows it as an exercise of agency discretion, but only for occasional, short periods of time and only when it is in the best interests of the taxpayer.<sup>36</sup> In a 2002 Department of Justice (DOJ) memorandum on administrative leave, DOJ acknowledged that “components too frequently are placing employees on administrative leave rather than utilizing other more appropriate options.”<sup>37</sup> As a result, DOJ changed its policy to limit the use of administrative leave to 10 work days unless approved by the assistant attorney general for administration or his designee for a longer period.<sup>38</sup>

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<sup>36</sup> To the Chairman, U.S. Civil Service Commission, 38 Comp. Gen. 203 (1958) (where removal of an employee is necessitated by safety concerns, only 24 hours administrative leave is appropriately authorized, and extensive paid leave pending an investigation does not qualify as a proper use of “administrative leave,” but rather “immediate” steps should be taken to reduce time during which an employee is on paid leave); Navy Department-Reduction In Force-Administrative Leave During 30-Day Notice Period, 66 Comp. Gen. 639, 640 (1987) (holding that decisions of the Comptroller General and the guidelines of the Office of Personnel Management limit an agency’s discretion to grant administrative leave to situations involving brief absences); Ricardo S. Morado – Excused Absence, 1980 WL 17293, 1 (1980) (when it became clear that an employee would not be returning to work, an agency was not authorized to grant administrative leave pending the separation); Miller v. Department of Defense, 45 M.S.P.R. 263, 266 (MSPB, 1990) (a settlement agreement was declared invalid as the Merit Systems Protection Board determined that the Department of Defense did not have the authority to grant an employee nine months of paid administrative leave, where said employee was to be removed at the end of the period of administrative leave, because there was no statutory provision that authorized the agency to grant paid administrative leave for such an “extended period of time”); *pet. for rehearing denied by Miller v. Dep’t of Defense*, 1992 U.S. App. LEXIS 2457 (Fed. Cir. Feb. 18, 1992); In the Matter of the Grant of Administrative Leave Under Arbitration Leave, 53 Comp. Gen. 1054, 1056-57 (the Comptroller General refused to grant an employee thirty days of administrative leave, where that employee was injured on the job and unable to work in his full capacity, as the grant of administrative leave constituted an “extended period of excused absence” that was not permitted under any statute); Nina R. Mathews-Age Discrimination/Title VII Resolution Agreement-Compensatory Damages, 1990 WL 278216, 1-2 (where an employee was granted twenty-two weeks of administrative leave pay in settlement of a personnel claim, the agreement was deemed invalid by the GAO, as the Comptroller determined that there was no relevant legal basis by which the employee could be placed on extended administrative leave with pay); Excused Absence for Bar Examination Preparation, 1975 WL 8763, 1 (1975) (periods of 14, 28 and 31 days did not constitute “periods of brief duration” under which an agency had authority to grant administrative leave for employees to take their Bar examinations); Department of Housing and Urban Development Employee-Administrative Leave, 67 Comp. Gen. 126, 128 (1987) (The Comptroller General held that the agency’s “decision to allow the employee to participate in a NIH therapeutic trial for 3 days a month in a cancer research effort being run by the National Cancer Institute is consistent with the broad framework of decisions of this Office and the FPM Supplement addressing the discretionary agency review of administrative leave requests”); Frederick W. Merkle, Jr. – Administrative Leave, 1980 WL 14633, 1 (1980) (an eight-week period could not constitute administrative leave for an employee awaiting a decision on his eligibility for early retirement, as it constituted an “extended period of time”); Gladys W. Sutton-Administrative Leave in Lieu of Leave Without Pay, 1983 WL 27142, 1 (a five-week period constituted an “extended period” where administrative leave could not be properly granted by an agency so that an employee could preserve her eligibility for a discontinued service retirement program).

<sup>37</sup> Diegelman, R. *Proper Use of Administrative Leave* [Memorandum]. (Washington, DC: September 27, 2002) Department of Justice

<sup>38</sup> *Id.*

However, an October 2014 Government Accountability Office (GAO) report found that from fiscal years 2011 to 2013, DOJ placed 1,849 employees on paid administrative leave for one month to one year.<sup>39</sup> The average number of days on administrative leave for these 1,849 employees was 38 days, which is significantly higher than the 10 work day limit stated in DOJ policy.<sup>40</sup> Moreover, 23 employees were on paid administrative leave for six months or more.<sup>41</sup> It appears that DOJ is approving much more administrative leave than its policy suggests is appropriate.

In November 2014, I wrote Attorney General Holder about this issue. Given significant costs to the taxpayer for salaries and benefits and the fact that DOJ has an administrative leave policy that purports to limit its use to 10 days or less absent unusual circumstances—it is unclear why so many DOJ employees are taking so much administrative leave.

- a. If confirmed, how would you ensure that the Department actually limits its use of administrative leave?

**RESPONSE:** In my tenures as the United States Attorney for the Eastern District of New York, I have managed a large number of Department employees and found that administrative leave is appropriate in some circumstances. In addition, Department policies and procedures govern the use of and approval process for administrative leave to ensure proper and limited use. I do not, however, have a nationwide perspective on this issue. If I am confirmed as Attorney General, I will commit to ensuring that the leave policy is being administered appropriately.

- b. How would you strengthen the Department's 10-day administrative leave policy to ensure that DOJ employees are not sitting at home for a six months or more collecting a check for not working?

**RESPONSE:** If I am confirmed as Attorney General, I will commit to ensuring that the leave policy is being administered appropriately.

- c. If confirmed, will you to respond to my letter promptly and thoroughly so that this Committee can examine the detailed facts and circumstances that led to each of these employees being on leave for such extended periods of time?

**RESPONSE:** If I am confirmed as Attorney General, I will review your letter and ensure that you receive a response that is thorough and timely.

54. On November 19, 2013, and again on September 9, 2014, Inspector General Michael Horowitz testified that the Department is improperly impeding his access to grand jury

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<sup>39</sup> GAO, *Use of Paid Administrative Leave*, GAO-15-79 (Washington, D.C : October 2014).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

records, Title III electronic surveillance documents, and Fair Credit Reporting Act consumer credit information.<sup>42</sup>

Recognizing that Inspectors General cannot fulfill their statutorily-mandated duty to conduct oversight without access to Department records, Section 6(a)(1) of the Inspector General Act authorizes Inspectors General to access:

*all* records, reports, audits, reviews, documents, papers, recommendations or other material available to the applicable establishment which relates to programs and operations with respect to which that Inspector General has responsibilities under this Act.<sup>43</sup>

In certain limited circumstances, the law does allow the Attorney General to “prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpoena.”<sup>44</sup> However, the Attorney General is required to provide written notice to the Inspector General of the reasons for doing so and to forward a copy of that written notice to Congress.<sup>45</sup>

Yet, the statutory procedure for written notice by the Attorney General and a report to Congress were not followed when the Department withheld grand jury records, wiretap documents, and consumer credit information from the Inspector General.<sup>46</sup> Eventually, the Inspector General obtained these records after the Attorney General and the Deputy Attorney General granted written permission.<sup>47</sup>

Under the Act, however, the Attorney General is required to write to the Inspector General not when *permitting* access to records, but when *preventing an OIG review, altogether*.<sup>48</sup> In other words, the burden is placed on the Attorney General to explain in writing why the Inspector General’s work should be impeded, not *vice versa*. Under the statute, the Attorney General’s blessing on the IG’s work is not required. That is the essence of independence.

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<sup>42</sup> U.S. Senate Committee on Homeland Security and Government Affairs, Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce; *Strengthening Government Oversight: Examining the Roles and Effectiveness of Oversight Positions Within the Federal Workforce*, (November 19, 2013) [hereinafter Senate Homeland Security Hearing]; <http://www.hsgac.senate.gov/subcommittees/fpfw/hearings/strengthening-government-oversight-examining-the-roles-and-effectiveness-of-oversight-positions-within-the-federal-workforce>; accessed March 5, 2014; see also U.S. House of Representatives Committee on the Judiciary: *Access to Justice?: Does DOJ’s Office of Inspector General Have Access to Information Needed to Conduct Proper Oversight?* (September 9, 2014); <http://judiciary.house.gov/index.cfm/2014/9/hearing-access-to-justice-does-doj-s-office-of-inspector-general-have-access-to-information-needed-to-conduct-proper-oversight>; accessed September 23, 2014.

<sup>43</sup> 5 U.S.C. App. § 6(a)(1).

<sup>44</sup> 5 U.S.C. App. § 8E(a)(1), (2).

<sup>45</sup> 5 U.S.C. App. § 8E(a)(3).

<sup>46</sup> See Senate Homeland Security Hearing.

<sup>47</sup> *Id.*

<sup>48</sup> 5 U.S.C. App. § 8E(a)(3).

Last May, the Department's leadership asked the Office of Legal Counsel to issue an opinion on this topic. In October, I asked that this opinion specifically address the legality of the Attorney General's current practice. House Judiciary Committee Ranking Member, John Conyers, joined me in this request. We are still waiting for the OLC Opinion.

On February 3, 2015, the Inspector General issued a report pursuant to Section 218 of the Department of Justice Appropriations Act, 2015,<sup>49</sup> stating that the Federal Bureau of Investigation (FBI) has failed – for reasons unrelated to any express limitation in Section 6(a) of the Inspector General Act (IG Act) to provide the Office of the Inspector General with timely access to certain records.<sup>50</sup>

Section 218 provides that no appropriated funds shall be used to deny the Inspector General timely access to all Department records, or to impede his access to such records, unless in accordance with an express limitation of Section 6(a) of the IG Act.<sup>51</sup> Section 218 also requires the Inspector General to report to Congress within five calendar days of any failures to comply with this requirement.<sup>52</sup>

According to the February 3, 2015 report, the unfulfilled document requests were made on September 26, 2014 and October 29, 2014 as part of two investigations being conducted by the OIG under the Department's Whistleblower Protection Regulations for FBI employees, 28 C.F.R. pt. 27.<sup>53</sup>

The main reason for the FBI's unwillingness to produce the requested records by the deadline requested by the Inspector General is the FBI's desire to continue its review of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access, such as grand jury, wiretap, and consumer credit information.<sup>54</sup> Further, the FBI further informed the OIG that the FBI would need the approval of the Attorney General or Deputy Attorney General in order to produce the requested records.<sup>55</sup>

However, as noted above, the Attorney General's blessing on the IG's work is not required.

- a. If confirmed as Attorney General, will you commit to providing the OLC opinion to the Committee by a date certain?<sup>56</sup>

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<sup>49</sup> Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014).

<sup>50</sup> Letter from Michael Horowitz, Inspector General, U.S. Department of Justice, to Sen. Thad Cochran and Sen. Barbara Mikulski, Sen. Comm. on Appropriations, and Rep. Harold Rogers and Rep. Nita Lowey, House Comm. on Appropriations (February 3, 2015) [hereinafter February 3 Report].

<sup>51</sup> Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014).

<sup>52</sup> *Id.*

<sup>53</sup> February 3 Report.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> In January 2012, OLC issued an opinion one month after it was requested, defending the power of the President to make recess appointments even when the Senate convenes for pro forma sessions. Of course,

**RESPONSE:** I believe strongly in the independence of the Inspector General, and share his goal of ensuring a well-functioning Department of Justice. I understand that the Office of Legal Counsel is currently working on an opinion that would address the interpretation of the Inspector General Act. Regardless of the outcome of this review, if confirmed, I will commit to providing the Inspector General with the documents necessary for him to complete his reviews.

- b. Given the clear language of the Inspector General Act, will you give me your commitment that, if confirmed, you will not stonewall the Inspector General or delay his work?

**RESPONSE:** If confirmed, I will commit to providing the Inspector General with the documents necessary for him to complete his reviews.

- c. And if you do find it necessary to delay an inquiry for legitimate reasons, will you commit to immediately provide the written notice required by Section 8E(a)(3) of the Inspector General Act?

**RESPONSE:** If confirmed, I will commit to providing notifications to Congress consistent with Section 8E(a)(3) of the Inspector General Act.

- d. If you believe a clarification to the law is necessary to ensure unlimited access to records for the Inspector General, would you support adding “notwithstanding any other provision of law” to the access statute as a solution adequate to prevent further access denials and delays? If not, please explain why not?

**RESPONSE:** As noted above, I believe strongly in the independence of the Inspector General, and share his goal of ensuring a well-functioning Department of Justice. I understand that the Office of Legal Counsel is currently working on an opinion that would address the differences of opinion between the FBI and the Inspector General regarding the interpretation of the Inspector General Act. Regardless of the outcome of this review, if I am confirmed as Attorney General, I will commit to providing the Inspector General with documents necessary for him to complete his reviews. If necessary, I will also work with Congress on any appropriate legislation.

- e. Given the FBI’s ongoing impediment of the Inspector General’s independence and timely access to records, as detailed in the February 3, 2015 report, will you commit to resolving this dispute as soon as possible according to the explicit provisions of the Inspector General Act, should you be confirmed?

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the Supreme Court unanimously struck down OLC’s erroneous interpretation. But this shows that OLC can issue opinions rather quickly when it wants to.

**RESPONSE:** I am confident that the Inspector General and I will form a good working relationship, as we share the goal of a well-functioning Department of Justice. I understand that the Office of Legal Counsel is currently working on an opinion that would address the differences of opinion between the FBI and the Inspector General regarding the interpretation of the Inspector General Act. Regardless of the outcome of this review, if I am confirmed as Attorney General, I will commit to providing the Inspector General with documents necessary for him to complete his reviews.

55. Department of Justice attorneys have a great deal of power and discretion but I am concerned that without proper oversight, this power and authority can be abused without consequences. For example, the Department of Justice's Inspector General (IG) does not have the ability to investigate attorney misconduct. Rather, attorney misconduct is currently investigated by the Office of Professional Responsibility but this office does not have the same strong statutory independence as the IG. Currently, there are at least three examples of attorneys who remain employed by the Department despite evidence that these attorneys committed serious misconduct.

- a. A Federal judge found that Karla Dobinski, a trial attorney in the Civil Rights Division, engaged in a "wanton reckless course of action" when she posted comments to Nola.com news stories under a pseudonym about a trial where she provided evidence as a disinterested expert witness.<sup>57</sup> If confirmed, what steps will you take to ensure that appropriate disciplinary action is taken in this case, and will you pledge to provide updates to this committee about the status?

**RESPONSE:** Consistent with the positions taken by previous Attorneys General, across Administrations, I support the role of the Office of Professional Responsibility (OPR) in investigating attorney misconduct. OPR has been recognized consistently as a strong, independent entity within the Department that has a long and distinguished history of investigating allegations of attorney misconduct and recommending appropriate punishment. I understand that OPR is unique in that it has a singular focus on investigating attorney misconduct. If confirmed, I will commit to ensuring that the Department holds accountable any employees who are found to have committed misconduct.

- b. Stephanie Celandine Gyamfi, an attorney with the Department's Voting Rights section, was found to have engaged in perjury during a 2013 DOJ IG investigation. In addition, Ms. Gyamfi posted comments regarding an ongoing matter at the Voting Rights section suggesting that the State of Mississippi should change its motto to "disgusting and shameful."<sup>58</sup> If confirmed, what steps will you take to ensure that appropriate disciplinary action is taken in this case, and will you pledge to provide updates to this committee about the status?

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<sup>57</sup> [http://www.nola.com/crime/index.ssf/2013/09/doj\\_prosecutor\\_karla\\_dobinski.html](http://www.nola.com/crime/index.ssf/2013/09/doj_prosecutor_karla_dobinski.html)

<sup>58</sup> [http://www.wtok.com/home/headlines/Comment\\_Flap\\_Continues\\_150703975.html](http://www.wtok.com/home/headlines/Comment_Flap_Continues_150703975.html)

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I am not familiar with the details of this matter, so I am not in a position to know what personnel actions have taken place to date or whether they were appropriate. If I am confirmed as Attorney General, I will commit to ensuring that the Department holds accountable any employees who are found to have committed misconduct.

- c. A Federal judge wrote that DOJ attorneys attempted to perpetrate a “fraud upon the court” in a case involving Bureau of Alcohol, Tobacco, and Firearms Agent Jay Dobyns. U.S. District Court Judge Francis Allegra also took the unusual step of submitting these findings to Attorney General Holder.<sup>59</sup> If confirmed will you personally review Judge Allegra’s submission to ensure that appropriate disciplinary action is taken in this case, and will you pledge to provide updates to this committee about the status?

**RESPONSE:** As noted above, as the United States Attorney for the Eastern District of New York, I am not familiar with the details of this matter, so I am not in a position to know what personnel actions have taken place to date or whether they were appropriate. If I am confirmed as Attorney General, I will commit to ensuring that the Department holds accountable any employees who are found to have committed misconduct.

- d. On January 22, 2015, the District Court of the Southern District of Georgia received a letter from the U.S. Attorney’s Office informing it that Assistant U.S. Attorney Cameron Ippolito and ATF Special Agent Lou Valoze engaged in an improper relationship and provided potentially false or misleading information to a government agency in order to secure a visa for an informant. This has compromised cases in which Ms. Ippolito and Mr. Valoze collaborated and has already required Giglio disclosures in four separate cases. Ms. Ippolito and Mr. Valoze’s actions have harmed the Federal government and the Department of Justice. If confirmed, what steps will you take to ensure that appropriate disciplinary action is taken in this case, and will you pledge to provide updates to this committee about the status?

**RESPONSE:** As noted above, As the United States Attorney for the Eastern District of New York, I am not familiar with the details of this matter, so I am not in a position to know what personnel actions have taken place to date or whether they were appropriate. If I am confirmed as Attorney General, I will commit to ensuring that the Department holds accountable any employees who are found to have committed misconduct.

- e. What steps would you take to create a more independent and credible system of attorney discipline at the Department?

**RESPONSE:** OPR has been recognized consistently as a strong, independent entity within the Department that has a long and distinguished history of investigating allegations of attorney

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<sup>59</sup> <http://www.foxnews.com/politics/2015/01/29/federal-judge-blasts-doj-lawyers-in-case-fast-furious-whistleblower/>

misconduct and recommending appropriate punishment. If I am confirmed as Attorney General, I commit to ensuring that OPR continues to be a strong, independent entity, within the Department of Justice.

- f. Would you support transferring the DOJ/OPR function to the Inspector General so that there can be an independent reviews of attorney misconduct allegations at the Department?

**RESPONSE:** As I described above, consistent with the positions taken by previous Attorneys General, across Administrations, I support the role of the Office of Professional Responsibility in investigating attorney misconduct.

- g. If not, please explain what is special or unique about attorney misconduct that should shield it from oversight by the Department's Inspector General like all other types of misconduct?

**RESPONSE:** It is my understanding that OPR's extensive experience and singular focus is in investigating attorney misconduct related to the exercise of their authority to investigate and litigate, including by analyzing conduct through the lens of relevant state bar rules.

56. According to media reports, in Fairfax County, Virginia, an unarmed man, John Geer, was shot by a police officer while standing in his home, and while, according to other police officers who were present at the scene, his arms were raised above his shoulders, and he was then left unattended for an hour where he bled to death.<sup>60</sup>

In December 2014, the Department's Civil Rights Division found the Cleveland Division of Police engaged in a pattern or practice of unreasonable and unnecessary use of force.<sup>61</sup> The investigation was launched in March 2013 following a number of high-profile use of force incidents and requests from the community and local government to investigate.<sup>62</sup>

On January 21, 2015, the Department of Justice confirmed that the following investigations are still ongoing at the Civil Rights Division,<sup>63</sup>

- Shooting death of Mike Brown (Ferguson, Missouri) – initiated August 11, 2014
- Shooting death of Eric Garner (Staten Island) – initiated July 18, 2014
- Shooting death of John Geer (Fairfax County, Virginia) – initiated February 11, 2014

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<sup>60</sup> Tom Jackman, "John B. Geer had hands up when shot by police, four officers say in documents," The Washington Post, January 31, 2015, [http://www.washingtonpost.com/local/crime/officer-who-shot-john-geer-says-he-moved-hands-toward-waist-3-other-officers-say-no/2015/01/31/7cc2c0da-a7f6-11e4-a06b-9df2002b86a0\\_story.html](http://www.washingtonpost.com/local/crime/officer-who-shot-john-geer-says-he-moved-hands-toward-waist-3-other-officers-say-no/2015/01/31/7cc2c0da-a7f6-11e4-a06b-9df2002b86a0_story.html).

<sup>61</sup> U.S. Department of Justice, *Justice Department and City of Cleveland Agree to Reform Division of Police After Finding A Pattern or Practice of Excessive Force*, December 4, 2014, <http://www.justice.gov/usao/ohn/news/2014/04deccpd.html>.

<sup>62</sup> *Id.*

<sup>63</sup> Email from U.S. Department of Justice, Office of Legislative Affairs, to Staff of Sen. Charles E. Grassley, Chairman, S. Comm. on the Judiciary (January 21, 2015).

- a. It is imperative that cases of alleged police misconduct are handled on a fair, impartial, and timely manner so that officers who have used force in an inappropriate way are held accountable and those who have acted lawfully are swiftly exonerated so that they may reclaim their reputations and resume their duties. If confirmed as Attorney General, will you ensure the thorough and timely resolution of these cases?

**RESPONSE:** We must ensure that these and other cases of alleged misconduct by law enforcement are handled in a fair, impartial, and timely manner. Similarly, we must ensure that pattern and practice investigations of police departments are conducted in a fair, impartial, and timely manner.

- b. If confirmed as Attorney General, what would you do to ensure more transparency and better statistics on law enforcement's use of deadly force *nationwide*?

**RESPONSE:** I understand that the FBI and the Department's Bureau of Justice Statistics carry out statistical work in this area. If I am confirmed as Attorney General, my goal will be to conduct a comprehensive review of these data collection efforts, identify information gaps, and develop plans to ensure that the Department collects and makes public accurate and timely information on all uses of force by law enforcement.

57. On December 23, 2014 Senator Leahy and I sent Attorney General Holder a letter concerning the use of cell-site simulators by law enforcement agencies.<sup>64</sup> According to information provided to Judiciary Committee staff by the Federal Bureau of Investigation, these devices can capture the serial numbers of thousands of cell-phones in its vicinity by mimicking cell-phone towers.

The FBI is in a unique position to shape how the device is used by law enforcement, because state and local police departments are required to coordinate their use of the device with the FBI.<sup>65</sup> The FBI only recently began requiring its agents to obtain a search warrant whenever the device is used as part of an FBI operation, but there are several broad exceptions that may swallow this rule.<sup>66</sup>

For example, the FBI's new policy does not require a search warrant in cases in which the technology is used in public places or other locations at which the FBI deems there is no reasonable expectation of privacy.<sup>67</sup>

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<sup>64</sup> Letter from Sen. Charles E. Grassley, and Sen. Patrick Leahy, S. Comm. on the Judiciary, to Hon. Eric Holder, Attorney General, and Hon. Jeh Johnson, Secretary of Homeland Security, (December 23, 2014), <http://www.leahy.senate.gov/download/12-23-14-pjl-and-ceg-to-doj-and-dhs1>.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

I am concerned about whether the FBI and other law enforcement agencies at the Justice Department have adequately considered the privacy interests of other individuals who are not the targets of the interception, but whose information is nevertheless being collected when these devices are being used. I understand that the FBI believes it can address these interests by maintaining that information for a short period of time and purging the information after it has been collected.<sup>68</sup> But there is a question as to whether this sufficiently safeguards privacy interests if there is insufficient oversight and transparency regarding the use of this type of technology.

- a. If confirmed as Attorney General, will you commit to reviewing the legal authority used to collect information from the cell phones of innocent third parties who are not the targets of an interception order to ensure that it meets constitutional requirements and protects their privacy interests?

**RESPONSE:** The Department is committed to using all law enforcement resources in a manner that is consistent with the requirements and protections of the Constitution and other legal authorities, and with appropriate respect for privacy and civil liberties. If I am confirmed as Attorney General, I will uphold that commitment.

- b. What steps would you take to strengthen oversight to ensure that there is no unauthorized retention of data collected by these devices?

**RESPONSE:** From my work as a United States Attorney, I know that the Department takes seriously its responsibilities concerning any data that is collected during lawful investigations. If I am confirmed as Attorney General, I am committed to taking any necessary steps to ensure that the Department's practices concerning the collection or retention of such data are lawful and respect the important privacy interests of the American people.

- c. Given the FBI's role in making the devices available to state and local authorities, do you believe the Department has any responsibility to ensure that state and local authorities have sufficient oversight and safeguards in place to prevent abuses? If so, what steps would you take to do so if confirmed?

**RESPONSE:** I understand the Department works with its state and local law enforcement partners and provides technological assistance under certain circumstances. In all cases, law enforcement authorities in the United States must conduct their missions lawfully and in a manner that respects the rights of the citizens they serve. The Department has a responsibility to ensure that its resources are employed to advance lawful and legitimate public safety and national security objectives. If confirmed as Attorney General, I will commit to ensuring that the Department's technological practices and its partnerships with other agencies and state and local authorities are approached with due consideration for the harmful consequences of any potential misuse of Department resources.

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<sup>68</sup> *Id.*

58. According to the State Department, “[t]hose who patronize the commercial sex industry form a demand which traffickers seek to satisfy.”<sup>69</sup> Attorney General Holder has identified human trafficking and sexual exploitation of children as priority goals for investigation and litigation at the Justice Department.<sup>70</sup> In December 2012, Inspector General Michael Horowitz reported that three Drug Enforcement Administration agents admitted to having used their DEA Blackberry devices to arrange for paid sexual services while stationed in Cartagena, Colombia.<sup>71</sup>

These actions were an embarrassment to our nation, but the true victims are the children, women, and other vulnerable individuals who are trafficked into prostitution to satisfy this demand. In the Inspector General’s words:

Even where prostitution is legal, it is often an abusive activity that involves coercive relations and it can contribute to human trafficking, a crime that DOJ seeks to eradicate. [E]mployees who engage in the solicitation of prostitution while on official travel or when stationed in foreign countries undermine their own credibility and DOJ’s effectiveness in addressing this priority.<sup>72</sup>

For this reason, I am deeply troubled to learn that the Department of Justice does not have a zero-tolerance policy requiring the dismissal of employees who engage in the solicitation of prostitution.<sup>73</sup> The Department currently employs more than 1,200 permanent positions abroad, and employees go on more than 6,100 trips a year to more than 140 countries.<sup>74</sup>

According to a 2012 State Department cable on human trafficking:

It is the position of the U.S. government that the procurement of commercial sex can fuel the demand for sex trafficking. Women, children, and men are trafficked into the commercial sex trade *regardless of whether prostitution is legal or criminalized in a country*, and thus, the procurement of commercial sex runs the risk of facilitating or supporting human trafficking.

There are concerns that prostituted youth, including LGBT youth, are especially vulnerable to human trafficking and other forms of exploitation. Department employees should understand that a victim of sex trafficking may not appear to be under duress, given that coercion and threats of violence are often used to hold people in servitude. Indeed, there is a good chance that a sex trafficking victim will appear to be engaging in a commercial sex transaction willingly . . . .

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<sup>69</sup> U.S. Department of State, Trafficking in Persons Report (June 2008), 24.

<sup>70</sup> U.S. Department of Justice, Strategic Plan, Fiscal Years 2014-2018 (February 2014), 2.

<sup>71</sup> Letter from Michael Horowitz, Inspector General, U.S. Department of Justice, to Sen. Joe Lieberman, Chairman, and Sen. Susan Collins, Ranking Member, Sen. Comm. on Homeland Sec. and Gov. Affairs (Dec. 20, 2012), 3.

<sup>72</sup> 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* (January 2015), 7.

<sup>73</sup> *Id.* at 48-50.

<sup>74</sup> *Id.* at ii.

Further, assumptions based on appearances as to whether or not an individual is 18 years old are frequently erroneous, as many brothel managers and pimps dress minors to look older. Purchasing sex from a minor is a serious crime under U.S. law.<sup>75</sup>

Given the gravity of these concerns, it is unclear why the Department has *not* instituted a policy that incentivizes employees to *steer well clear* of facilitating or committing these heinous crimes.

If confirmed as Attorney General, will you implement a zero-tolerance policy that requires the dismissal of any employee who engages in the solicitation of prostitution, without exception? If not, please explain why.

**RESPONSE:** I believe that all government employees have a responsibility to hold themselves to the highest standards of conduct both within and outside of the workplace. This is especially true for the employees of the Department of Justice who are entrusted to enforce the law. If I am confirmed as Attorney General, I will commit to reviewing the Department’s policies and procedures regarding off-duty conduct to ensure that we hold accountable those employees who do not meet these high standards.

59. The incumbent Attorney General criticized state so-called “stand your ground” laws under which a person who otherwise has a legitimate claim of self-defense is not required to flee before exercising the option of defensive force. This rule is also part of federal common law, as articulated by the U.S. Supreme Court in cases such as *Beard v. U.S.*, 158 U.S. 550, 564 (1895) and *Brown v. U.S.*, 256 U.S. 335, 343 (1921).
- a. What is your position on state stand your ground laws? If you oppose such laws, do you believe DOJ has a role in opposing such laws? If you believe that DOJ has such a role, what is it?
  - b. Under what circumstances do private citizens have the right to use force, including deadly force, to defend themselves and others from imminent threats of unlawful, deadly harm?

**RESPONSE:** The determination of whether a private citizen has the right to use force to defend against an imminent threat of unlawful, deadly harm is a fact-based inquiry made pursuant to state law. States have the lead in pursuing criminal offenses, and I have not had occasion to consider state “stand your ground” laws sufficiently to take a position.

60. I believe we should do everything in our power to stop the poaching of elephants, as well as the illicit trade of ivory and other wildlife products. It is my understanding that the administration is moving forward with a regulation that would make it illegal to sell items containing ivory in the United States unless the owner can prove with documentation the

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<sup>75</sup> *Id.* at 40-41.

item is more than 100 years old. The administration claims this regulation would reduce poaching and international illicit trade in ivory.

Ivory is commonly found in chess sets, tea pots, firearms, musical instruments and myriad other objects. Can you please explain how banning the domestic sale of these legally possessed items – most of which were acquired long ago when documentation was not required – would help achieve the administration’s goals? Don’t you believe the Department of Justice should be directing resources to combat actual wildlife traffickers, much like you have done in New York?

**RESPONSE:** I applaud and share your commitment to protecting endangered species, like elephants and rhinos, by prosecuting those who kill and traffic in these animals. As you recognize, prosecutors in my office and throughout the Department of Justice have worked on a group of recent prosecutions involving the black market trade of rhinoceros horn, which causes similar harms as the illicit trade in elephant ivory. I understand that the Fish and Wildlife Service is working to update the regulations that govern sales of elephant ivory in the United States, but I am not familiar with the details of that process. I am confident, however, that the regulatory process will allow for broad public input in accordance with the usual process for agency rulemaking so that the Service can consider the issues you identify.

61. The Executive Office for U.S. Attorneys (EOUSA) is responsible for the administration of FOIA requests for records held by the 94 U.S. Attorneys Offices (USAOs). Annual FOIA statistics are presented in aggregate by EOUSA and do not provide FOIA performance data on individual USAOs. EOUSA reported that it had 1,525 pending FOIA requests at the start of fiscal year 2014. How many of those pending requests were pending with the Eastern District of New York?

**RESPONSE:** I have been informed that of EOUSA’s 1,525 total pending FOIA requests at the start of Fiscal Year 2014, 49 remained pending with the Eastern District of New York.

62. EOUSA reported in aggregate that only 191 (7%) of the 2,729 FOIA requests processed in fiscal year 2014 were “fully granted.” How many FOIA requests were processed by the Eastern District of New York and how many of them were “fully granted”?

**RESPONSE:** I have been informed that the Eastern District of New York processed a total of 29 FOIA requests in Fiscal Year 2014, a total of five of which were fully granted.

63. EOUSA reports the aggregate response time for all processed perfected FOIA requests. In fiscal year 2014, the median number of days for response was 90 and the average number of days was 132. What was the Eastern District of New York’s median and average number of days for response?

**RESPONSE:** I have been informed that this information is not readily available.

64. EOUSA reported that 1,783 FOIA requests were “backlogged” at the end of fiscal year 2014. How many FOIA requests were “backlogged” with the Eastern District of New York?

**RESPONSE:** At the end of Fiscal Year 2014, a total of 47 FOIA requests were “backlogged” with the Eastern District of New York.

65. As you know, the Judiciary Committee has oversight responsibility over the Department of Justice. And to help fulfill those responsibilities, last fall, one of the attorneys on my committee staff, a former Department prosecutor, traveled to Iowa to meet with federal law enforcement.

While there, he spent time in both judicial districts in Iowa. He met with the FBI, the DEA, with local law enforcement, and with the U.S. Marshals. But he was told by the Department of Justice here in Washington that the Department would not make anyone from either of the United States Attorney’s Offices in Iowa available for a meeting with him, even as a courtesy.

Are you committed to making sure Congressional staff can meet, as appropriate, with local Department of Justice personnel in the states, while of course observing all ethical rules about discussing specific cases or investigations? I think most Americans would be surprised that local U.S. Attorney’s offices are not allowed to speak with their Senator’s staff under this administration.

**RESPONSE:** As I testified before the Committee, if I am confirmed as Attorney General, I look forward to fostering a new and improved relationship with this Committee, the United States Senate, and the U.S. House of Representatives, and will do what I can to forge a relationship based on mutual respect and constitutional balance. In particular, I believe the oversight role of the Senate Judiciary Committee is important. If I am confirmed, I commit to you to work together to allow appropriate contacts between Congressional staff and Department officials in the field.

66. In September 2014, it was reported that the President was expected to sign an executive order that would require the Pentagon, the Justice Department, the Department of Homeland Security and other agencies to reveal more details about the size and surveillance capabilities of their drone programs. The order would also reportedly require these agencies to reveal the policies they have in place to protect privacy and civil liberties in connection with their use of drones.

The President, however, has not yet issued this executive order. Do you support the issuance of such an order, and if you are confirmed, will you commit to both explaining this delay to me and for advocating for one?

**RESPONSE:** I am unfamiliar with the White House’s specific plans for executive action in this area. If I am confirmed as Attorney General, I look forward to studying these issues further and working together with you to identify any unresolved concerns.

67. I wrote to the Department of Justice back in October 2013 concerning its handling of a small number of cases referred to it in which National Security Agency employees intentionally and willfully abused surveillance authorities, in many cases to spy on their significant others. The press calls these cases “LOVEINT.” I also spoke to Attorney General Holder about the request when he was before the committee last January. He told me he would respond soon.

It has been over a year, and I have not received a response. I understand that the overwhelming majority of those who work in our national security and intelligence communities are dedicated, law-abiding people who deserve our profound thanks for helping to keep us safe. Nonetheless, there must be appropriate accountability for those few who violate the trust placed in them.

Can you commit to me that if you are confirmed, you will respond to my letter within 30 days?

**RESPONSE:** Yes, if I am confirmed as Attorney General, I will commit to responding to your letter within 30 days.

68. FBI Director Comey has been talking a lot recently about the increasing inability of law enforcement officers to be able to access evidence on computers, cell phones and other devices because of encryption, even when they have obtained a valid search warrant. He is clearly worried about what he calls “Going Dark,” and I hear the same from state and local law enforcement in Iowa.

On the other hand, the civil liberties community and technology companies argue that building in a door for law enforcement to bypass this encryption on their products, even when law enforcement has obtained proper legal authority, will weaken the encryption and make their customers more vulnerable to being hacked. That would obviously be a serious problem as well.

Do you have a perspective on this problem and any potential solutions? Have you felt the effects of the “Going Dark” issue in cases your office has handled?

**RESPONSE:** I know from my time as a United States Attorney how important lawfully authorized electronic surveillance can be. Sometimes, it is the only way to obtain evidence of terrorist or criminal activity. Lawful electronic surveillance can help law enforcement prevent crime and save lives. If I am confirmed as Attorney General, I would welcome the chance to study the issue further and to work with you and others to identify potential solutions.

69. In December 2014, President Obama announced that the administration would begin to normalize diplomatic relations with Cuba. However, it is estimated that as many as 70 fugitives from our criminal justice system are being provided political asylum there. Among them are a number of accused killers of law enforcement officers, including Joanne Chesimard, who was convicted of executing a New Jersey police officer in 1977. She subsequently escaped from prison, and is currently on the FBI's list of Ten Most Wanted Terrorists. But almost immediately after President Obama announced the change in U.S. policy toward Cuba, the Cuban government made clear that there would be no change in their refusal to hand over fugitives like Chesimard.

- a. Do you think it was appropriate for the President to change U.S. policy toward Cuba, and to provide that government the benefit of increased trade and contact with the United States, without that government agreeing to return these fugitives to our criminal justice system to face justice?

**RESPONSE:** I was not privy to the communications and factors considered leading up to the President's decision to change U.S. policy toward Cuba, and I am thus unable to comment on this action.

- b. If confirmed, what will you do to bring these fugitives to justice in the United States?

**RESPONSE:** Apprehending fugitives who are abroad is a high priority of the Department of Justice. If I am confirmed as Attorney General, I would continue to make that a top priority, whether the fugitives are in Cuba or elsewhere.

70. I was glad to hear you say during your hearing that you do not support the legalization of marijuana. 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 that drug, 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. To be clear, do you agree that individuals that manufacture and distribute marijuana in that state are breaking federal law, no matter what state law permits?

**RESPONSE:** The manufacture and distribution of marijuana is prohibited by federal law, specifically, the Controlled Substances Act (CSA), except as authorized pursuant to limited exceptions within the CSA concerning research and related activities.

- b. 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:** If I am confirmed as Attorney General, I will commit that 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 communities 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.

- c. As you also mentioned in your testimony, 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:** As I stated in my testimony before the Committee, the issue of edible marijuana products and the possibility of these products falling into the hands of children is of particular concern, as 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. If I am confirmed as Attorney General, I look forward to working with this Committee to address this issue in a comprehensive manner that most effectively protects public health and safety.

- d. 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:** 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 relates to 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.

71. I have concerns with this Administration's preference to treat al-Qaeda terrorists as criminal defendants with the same rights as U.S. citizens, as opposed to unlawful combatants subject to military detention and prosecution under the law of war. Below is a hypothetical situation that could well present itself to you if you are confirmed.

If on your first day as Attorney General, the U.S. military captured Ayman Al-Zawahiri, the current leader of Al-Qaeda, and transported him to a ship in the Mediterranean Sea or the Persian Gulf, what advice would you give the President about his detention, interrogation, and possible trial, and what factors would you would weigh in formulating that advice?

- a. Specifically, would you recommend that he be sent to Guantanamo Bay for detention and interrogation with those who planned the 9/11 attacks? If not, where would you advise that this detention and interrogation take place? And by whom? Why?
- b. When, if at all, would you recommend that he be read Miranda rights? Why?
- c. Would you advise that he be tried in civilian court or through the military commissions system, and why?

**RESPONSE:** Every case presents its own unique set of facts that would bear on the decision about the appropriate trial venue of a terrorist; therefore, I cannot comment on this specific hypothetical without additional information. If I am confirmed, I can assure you that I would support the careful evaluation and use, as appropriate, of all lawful options in the fight against terrorism, including military, diplomatic, economic, law enforcement, and intelligence activities,

and including law of war detention and prosecutions in federal courts or in military commissions in appropriate cases. From my firsthand experience as a United States Attorney, I can attest to the ability of our criminal justice system to serve as one effective tool among many to address the threat posed by terrorists and to gather valuable intelligence that aids in the disruption of terrorist organizations.

I agree with the President's commitment not to add to Guantanamo's population. I am concerned about the adverse effect of Guantanamo on our national security interests and cooperation with our allies, as identified by the President and the Department of Defense. As a United States Attorney, I have experienced firsthand the concerns Guantanamo raises in the context of trying to secure the cooperation of foreign governments in terrorist cases.

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

72. Law enforcement and national security officials have discussed how critical the surveillance authorities under Section 702 of the Foreign Intelligence Surveillance Act were to stopping a plot by Najibullah Zazi, an American who was born in Afghanistan, to bomb the New York City subway in 2009. Your office, the Eastern District of New York, handled that case.

How important were these authorities to that case, and how were they used to identify and stop Mr. Zazi from killing an untold number of Americans?

**RESPONSE:** It is my understanding that Section 702 authorities played an important role in uncovering Najibullah Zazi's plot to bomb the New York City subway. In 2009, using Section 702 to target the email of a Pakistan-based al-Qaida terrorist, the National Security Agency (NSA) discovered that the terrorist was communicating with an unknown person located in the United States about a plot involving explosives. NSA provided this information to the FBI, which used its investigative tools to identify the unknown person as Mr. Zazi. The FBI then tracked Mr. Zazi as he left Colorado a few days later to drive to New York City, where he and co-conspirators were planning to detonate explosives in the New York City subway system in Manhattan. Law enforcement apprehended Mr. Zazi and his coconspirators, and Mr. Zazi pleaded guilty in the United States District Court for the Eastern District of New York to

conspiracy to use weapons of mass destruction against persons or property in the United States, conspiracy to commit murder in a foreign country, and providing material support to al-Qaeda. Zazi's New York City-based co-conspirators were later convicted for their roles in the plot as well. Without the original tip from NSA to the FBI, the plot might not have been disrupted.

73. As you probably know, I've been extremely concerned about increased agribusiness concentration, reduced market opportunities, fewer competitors, and the inability of family farmers and producers to obtain fair prices for their products. I've also been concerned about the possibility of collusive and anti-competitive business practices in the agriculture sector. Do I have your commitment that the Antitrust Division will pay close attention to agribusiness competition matters? Can you assure me that agriculture antitrust issues will be a priority for the Justice Department if you are confirmed to be U.S. Attorney General?

**RESPONSE:** Agriculture is an important part of the nation's economy. I fully support the Antitrust Division's (Division) resources that are used to police those markets. I understand that the Division has a number of attorneys who focus on agricultural matters, including mergers and conduct aimed at acquiring or exercising market power. I also understand that the Division has a dedicated Special Counsel for Agriculture, who engages in outreach with the agricultural community, including the Department of Agriculture and the state attorneys general, to uncover potential anticompetitive activity, and who works with the litigating sections to evaluate and investigate complaints. If I am confirmed as Attorney General, I will be committed to ensuring that the Antitrust Division remains vigilant in policing anticompetitive mergers and conduct in agricultural markets.

74. Historically, the Justice Department has not paid much attention to monopsony (buyer power) issues, focusing more on monopoly (seller power) and consumer effects. Do you intend to use your antitrust authorities to look into monopsony issues in the agriculture sector? Please explain.

**RESPONSE:** My understanding is that the antitrust laws cover buyer power, also known as monopsony power, and the 2010 revision to the Horizontal Merger Guidelines issued by the Department and the Federal Trade Commission includes a separate section on buyer power. I am also aware that in conjunction with the Department requiring Tyson Foods to divest its sow purchasing business in order to proceed with an acquisition in 2014, Assistant Attorney General for the Antitrust Division, William J. Baer, noted that, "farmers are entitled to competitive markets for their products." I agree with that statement and believe that abuse of monopsony power is an appropriate area for antitrust enforcement.

75. In 1986, Congress amended the Lincoln-era False Claims Act to strengthen the right and incentives of private citizens to help the federal government hold contractors accountable for submitting false and fraudulent claims. Those whistleblowers, called relators, uncover the vast majority of incidents of waste, fraud, and abuse in federal contracting. In Fiscal

Year 2013, relators accounted for 89 percent of new FCA actions.<sup>76</sup> And the FCA overall has been hugely successful in recovering funds for the federal government. In Fiscal Year 2014 alone, the FCA was responsible for nearly \$6 billion in recovered funds.<sup>77</sup> Because the FCA is so effective, well-funded interests in various industries are always attempting to undermine it.

- a. How many FCA complaints have you received during your tenure as U.S. Attorney for the Eastern District of New York? In how many of those cases did your office intervene? What policies and procedures did you look to in reaching these intervention determinations?

**RESPONSE:** According to the records from my Office, from May 2010 to date, 94 qui tam cases were filed in the Eastern District of New York. During the same time period, my Office intervened or partially intervened in six of those qui tam matters. In addition, during this time period our Office intervened in cases that were filed before I took office, and in some of the 94 cases filed after I took office, the government is still considering whether intervention is warranted. When making decisions on whether to intervene, or to recommend intervention, in a qui tam case, I evaluate many factors, including the potential merits of the case, the potential damages involved, and whether there are other reasons to dedicate resources to the matter.

- b. If confirmed, will you vigorously enforce the provisions of the False Claims Act, and will you devote adequate resources to investigating and prosecuting FCA cases?

**RESPONSE:** The False Claims Act, and its qui tam provisions, play a critical role in the Department's ability to ensure that those who do business with the Government do so honestly and accurately. As your question notes, the Department recovered nearly \$6 billion in settlements and judgments in Fiscal Year 2014, which marks the fifth straight year that False Claims Act recoveries have exceeded \$3 billion. Moreover, 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.

Of the nearly \$6 billion recovered by the Department this past Fiscal Year, nearly \$3 billion were associated with qui tam cases. Since 1986, the Department has recovered over \$30 billion in qui tam cases. If I am confirmed as 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.

- c. What should DOJ's policy be with respect to the settlement of False Claims Act cases which the Justice Department does not join, where the law provides that the qui tam plaintiff may prosecute the action? For example, is it the policy of the

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<sup>76</sup> Department of Justice, Civil Division, Fraud Statistics – Overview (Oct. 1, 1987 – Sept. 30, 2013).

<sup>77</sup> Press Release, Department of Justice, Justice Department Recovers Nearly \$6 Billion from False Claims Act Cases in Fiscal Year 2014 (Nov. 20, 2014).

DOJ to undertake direct negotiations with the defendant without qui tam counsel in such cases? Are there any circumstances in which it would be appropriate for the Justice Department to negotiate settlement of a non-intervened FCA case without qui tam counsel's involvement?

**RESPONSE:** The United States is the real party in interest in every qui tam case, including cases in which it may not elect to intervene (at least initially). Accordingly, it is my understanding that the Department continues to monitor such matters and may, in appropriate circumstances, further investigate, seek to intervene for good cause, and/or attempt to negotiate a settlement.

It is my further understanding that, in determining whether to settle a False Claims Act case, including a qui tam case, the Department evaluates whether it would be in the public interest to reach an out-of-court resolution. As in all investigations, the factors considered as part of such an evaluation will depend on the particular facts and circumstances of each case.

76. What should DOJ's policy be with respect to the settlement of False Claims Act cases which the Justice Department does not join, where the law provides that the qui tam plaintiff may prosecute the action? For example, is it the policy of the DOJ to undertake direct negotiations with the defendant without qui tam counsel in such cases? Are there any circumstances where it would be appropriate for the Justice Department to negotiate settlement of a non-intervened FCA case without qui tam counsel's involvement?

**RESPONSE:** As noted above, the United States is the real party in interest in every qui tam case, including cases in which it may not elect to intervene (at least initially). Accordingly, it is my understanding that the Department continues to monitor such matters and may, in appropriate circumstances, further investigate, seek to intervene for good cause, and/or attempt to negotiate a settlement.

It is my further understanding that, in determining whether to settle a False Claims Act case, including a qui tam case, the Department evaluates whether it would be in the public interest to reach an out-of-court resolution. As in all investigations, the factors considered as part of such an evaluation will depend on the particular facts and circumstances of each case.

77. What should DOJ's policy be with respect to multipliers on single damages in False Claims Act cases? Are there ever instances where the Justice Department should seek to collect less than single damages?

**RESPONSE:** As noted above, there may be times when the public interest is served by reaching an out-of-court resolution in a particular case. The factors supporting such a result may, in some circumstances, counsel in favor of a resolution that is less than the Government's potential loss, including, for example, where the defendant lacks the resources to pay a higher amount.

78. On August 1, 2013, you wrote to me in your capacity as the U.S. Attorney for the Eastern District of New York seeking information in connection with an investigation conducted by your office. The request was signed on your behalf by Assistant U.S. Attorney James D. Gatta. Your letter sought copies of two letters and their attachments from my office—one letter addressed to Representative Elijah Cummings and the other addressed to me and Representative Darrell Issa.

The letters your office sought copies of were written by Joshua Levy, the attorney for David Voth. Mr. Voth was the ATF Group Supervisor responsible for Fast and Furious. The letters from Mr. Levy contained numerous attachments of internal ATF and DOJ documents in an attempt to defend Mr. Voth's role in Fast and Furious and attack the whistleblowers who eventually exposed the operation. It is unclear how Mr. Levy or Mr. Voth came into possession of some of the documents. In addition to Mr. Levy providing his letter and attachments to my office, it appears someone provided them to the press as well.<sup>78</sup>

Following receipt of your letter, Mr. Gatta also contacted the Office of Senate Legal Counsel seeking permission to conduct an interview with members of my staff. Following a cordial and cooperative discussion, there was no further follow-up from your office.

- a. Were you personally aware of this document request or interview request at the time, and did you approve either of them?
- b. What potential crime was your office investigating?
- c. What were the facts and circumstances that served as the predicate for the investigation?
- d. What nexus to the Eastern District of New York justified the involvement of your office?
- e. What is the current status of the investigation?
- f. In your testimony before the Committee, you indicated that your involvement with Fast and Furious-related matters was limited to your service on the Attorney General's Advisory Committee, which focused on disseminating lessons learned from the flawed investigative techniques to your U.S. Attorney colleagues. Yet your August 2013 letter request to me suggests that your office investigated something involving the ATF Group Supervisor in Phoenix most directly responsible for the operation. Please explain the apparent discrepancy.

**RESPONSE:** Yes, I was aware of the matter and the investigative steps you have referred to in your letter. The inquiry by my Office about which you have inquired did not pertain to any matters investigated during Operation Fast and Furious nor the Department's interactions with Congress in connection with the Congressional investigation of Operation Fast and Furious itself, and it did not result in charges. As you may know, the Department does not disclose information about investigations that do not result in charges because doing so would not be fair to those who may have been investigated.

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<sup>78</sup> Associated Press, "Key ATF agents in Fast and Furious case blame prosecutors," April 16, 2012, <http://azcapitoltimes.com/news/2012/04/16/key-atf-agents-in-fast-and-furious-case-blame-prosecutors/>.

With respect to your question regarding the nexus of the Eastern District of New York, I would note that there need not always be a nexus between a United States Attorney's Office (USAO) and a matter it investigates. For instance, a case in which a USAO with a nexus is recused from a matter, the Department commonly seeks out another office without such a nexus to conduct the investigation.

During my testimony before the Committee, I testified that I was not involved in Operation Fast and Furious or the Department of Justice's response to the Congressional investigation regarding Operation Fast and Furious. The matter about which you have inquired above was, as described here, not related to the underlying investigation of Operation Fast and Furious nor the Department's interactions with Congress. Accordingly, there was no discrepancy between my testimony and the fact of the investigation you have referenced.

79. The Firearms Owners Protection Act of 1986 amended the Gun Control Act of 1968 by adding the following language, now located in 18 U.S.C. 926(a):

No...rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.

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During the course of my investigation into ATF's Operation Fast and Furious, my office received allegations from multiple gun dealers in Arizona that ATF personnel routinely photocopy all ATF form 4473s (Firearms Transaction Record) and book bound entries in connection with routine annual inspections of licensed gun dealers. Dealers from other parts of the country have made similar allegations more recently.

Although federal firearms licensees felt uncomfortable turning over the records of lawful gun purchases *en masse*, they also felt obligated to comply for fear of regulatory reprisals from ATF. These administrative requirements could be used to create a national gun registry of law-abiding gun owners, which is specifically prohibited by law.

Also in the course of the Fast and Furious investigation, Congress learned about the ATF's use of the Suspect Gun Database, a feature of ATF's Firearms Tracing System. ATF agents added extensive numbers of firearms into the Suspect Gun Database. It is unclear what, if any, administrative guidelines detail when it would be appropriate to do so. The Suspect Gun Database could be used to track information about gun owners even when ATF does not have enough evidence to meet the legal standard for seizing a firearm or any other articulable criteria for entering the information about the gun and the purchaser into a database. With no clear criteria for adding a firearm connected to an

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<sup>79</sup> Firearms Owners Protection Act, 1986; Pub. L. No. 99-308, May 19, 1986; 100 Stat. 449, 459.

investigation to the Suspect Gun Database, the decision appears to be largely up to the discretion of an individual ATF agent.

- a. Does the Suspect Gun Database, which contains purchaser, dealer and transaction information, comply with the Firearms Owners' Protection Act of 1986? If so, what is the legal basis for that claim? And if confirmed, what steps would you take to ensure that ATF only adds information about gun owners into its databases in compliance with the law?
- b. If confirmed, what steps would you take to determine the extent to which ATF is photocopying or photographing all ATF form 4473s and book bound entries in connection with routine annual inspections of licensed gun dealers?
- c. Do you agree that such a practice would be tantamount to a national gun registry of all gun owners who purchased firearms from a licensed dealer? If so, please explain what steps you would take, if confirmed, to ensure that no such practice was sanctioned or permitted by the Justice Department? If not, please explain why not.
- d. Does 18 U.S.C. Section 923(g)(7) govern the addition of data to the Suspect Gun Database and does it impose any limiting criteria or legal standards on the addition of data to the Suspect Gun Database?
- e. What administrative steps would you propose to ATF to ensure that only firearms truly related to a criminal investigation are added to the Suspect Gun Database?
- f. Will you require ATF to purge any purchaser information that is illegally in its databases, including in the Multiple Sales System, which, under ATF's own rules, must be taken out of the system after two years if there is no connection to any firearms trace?

**RESPONSE:** As United States Attorney, I have limited knowledge of the operation of the Suspect Gun Program. If I am confirmed as Attorney General, I look forward to familiarizing myself with the manner in which it is populated, used, and maintained to ensure that it complies with all applicable laws. I am aware that GAO is conducting a review of this program as well, and if confirmed, I look forward to working with the GAO on their review of this issue.

80. In 2012, the Department of Justice and Securities Exchange Commission (SEC) issued joint guidance detailing Foreign Corrupt Practices Act (FCPA) enforcement information and the agencies' enforcement priorities. While the guidance clarified portions of the law and some of the agencies' enforcement theories, many companies and individuals seeking to comply with the FCPA have asked for further, and continued, clarification. This request was expressed to Attorney General Eric Holder and Assistant Attorney General Leslie Caldwell during previous Committee hearings.

- a. If confirmed, will you commit to working with companies and individuals to further improve the Guidance?

**RESPONSE:** If I am confirmed as Attorney General, I look forward to continuing the outreach efforts that the Department has been making with the private sector to understand their needs and concerns and, if necessary, update and/or improve the Guide.

- b. Will you commit to updating the Guidance, when necessary, to reflect changes in DOJ enforcement practices?

**RESPONSE:** If I am confirmed as Attorney General, I look forward to continuing efforts that the Department has been making to provide meaningful guidance in the FCPA context where necessary and appropriate.

81. In the area of FCPA enforcement, there is little guiding case law available for compliance practitioners to rely on. However, the FCPA Guidance that was issued in 2012 took an important first step in helping practitioners understand how the enforcement agencies' interpret the statute. The Guidance includes six anonymized examples of declinations—instances where the DOJ and SEC declined to bring FCPA-related enforcement actions in recognition of the companies' timely voluntary disclosures, meaningful cooperation, and sophisticated compliance policies and controls. The continued publication of FCPA declinations would foster greater FCPA compliance by providing practitioners with a better understanding of how the FCPA is interpreted. If confirmed, would you support increasing DOJ transparency regarding declination decisions?

**RESPONSE:** As you know, the United States Attorney's Manual provides a mechanism to allow for notification to an individual (or entity), where appropriate, that an investigation as to that individual (or entity) is being closed. If I am confirmed as Attorney General, I look forward to continuing the Department's practice of providing meaningful guidance in the FCPA context (such as procedures to respond to opinion requests) and of actively pursuing and implementing means by which declinations and other information about the decision to prosecute, or not, can be responsibly and appropriately shared.

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

**QUESTION FROM RANKING MEMBER LEAHY**

1. In 2008, following thorough congressional hearings, agency consultations, and stakeholder outreach, Congress passed and President George W. Bush signed Public Law 110-344, the Emmett Till Unsolved Civil Rights Crime Act, into law. Throughout its evolution, Pub. L. 110-344 enjoyed broad, bipartisan, bicameral support; the bill passed the U.S. House of Representatives by a vote of 422-2 and was unanimously adopted in the Senate. I was an original cosponsor on the Senate side along with several other senators, while Congressman John Lewis was the lead cosponsor on the House side.

The Emmett Till Unsolved Civil Rights Crime Act established an intensive, 10-year collaborative effort to codify the Department of Justice's Cold Case Initiative. It authorized the designation of a Deputy Chief of the Criminal Section of the Civil Rights Division and a Supervisory Special Agent in the Civil Rights Unit of the Federal Bureau of Investigation to coordinate and lead intensive investigations of open, civil rights cases. These designees would work with the Department of Justice's Community Relations Service and State and local law enforcement officials to thoroughly investigate unsolved civil rights murders and bring closure and justice to the victims' families, friends, loved ones, and communities.

**Will you review the Department's implementation of the bill and work with the bill's sponsors and the Members of this Committee to ensure that the goals of this important law are fully realized?**

**RESPONSE:** Racially motivated murders from the civil rights era constitute some of the greatest blemishes upon our nation's history. I assure you that I fully support the goals of the Emmett Till Unsolved Civil Rights Crime Act of 2007. If confirmed, I will review the Department's implementation of the bill and I look forward to working with the bill's sponsors and the Members of this Committee to achieve the goals of this important law to the greatest extent possible.

My understanding is that the Department has committed considerable efforts to the cold case initiative. FBI agents and attorneys from the Civil Rights Division have traveled to FBI field offices to conduct on-site reviews of cases and to formulate specific investigative plans. Civil Rights Division attorneys have worked alongside FBI agents in conducting interviews of witnesses and combing through available evidence. The FBI has offered rewards for information regarding these crimes. Department officials also have reached out to the community, including groups such as the NAACP, Southern Poverty Law Center, the Cold Case Truth and Justice Project, and others, to enlist their assistance in identifying potential cases and uncovering information that may lead to prosecutions. And considerable resources have been devoted to investigating specific cases.

I understand that the Department has in some cases been successful in bringing cold case prosecutions. But in many cases, the Department cannot bring a prosecution because all subjects are deceased, or subsequent unrelated events have caused evidence to be destroyed, or the passage of time has weakened memories.

Success in this initiative will not be measured in prosecutions alone, but rather in our ability to uncover the truth where possible. For those cases where, for a variety of reasons, a prosecution is not possible, it is important to work to provide closure to affected families and communities. Closure for families, as well as an assurance to the American people that each of these matters has received a full, thorough and independent review, was a significant part of the goal of the Emmett Till Act, and to which, if I am confirmed, I am fully committed.

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

**QUESTIONS FROM SENATOR CORNYN**

1. Please give me three examples of where you disagree with Attorney General Eric Holder's decisions.

**RESPONSE:** Every Attorney General must decide on priorities for the Department of Justice. If I am fortunate enough to be confirmed as Attorney General, I would bring my own personal approach to decisions about the Department's priorities, an approach that would emphasize (1) fostering a new and improved relationship with this Committee, the United States Senate and the entire United States Congress, (2) enhancing the Department's commitment to combating the ever-growing threat of cybercrime, and (3) committing additional attention to the scourge of human trafficking which subjects the most vulnerable among us to a modern-day nightmare of sexual slavery.

2. As U.S. Attorney in the Eastern District of New York, what mistakes have you made?

**RESPONSE:** In July 2012, in response to a pronounced spike in cybercrime, I reorganized the United States Attorney's Office's Criminal Division to expand the Office's extraordinarily successful terrorism unit into a new National Security & Cybercrime Section. In hindsight, given the success of that reorganization in attacking the problem of cybercrime in the Eastern District of New York, through increased investigations, prosecutions, and partnership with the private sector, I have come to believe that the reorganization should have occurred sooner. Drawing on that experience, if I am fortunate enough to be confirmed as Attorney General, I am prepared to ensure that the Department of Justice is proactive and forward-leaning in addressing the threat posed by cybercrime.

3. What assurance can you provide that you will prevent the President from violating the Constitution?

**RESPONSE:** The Attorney General must be a forceful, independent voice of justice and a fierce defender of the constitutional rights of all Americans. I have devoted my professional life to the pursuit of justice and the defense of the ideals and principles set forth in the Constitution of the United States of America. If confirmed as Attorney General, I pledge to Congress and the American people that the Constitution, the bedrock of our system of justice, will be my lodestar as I exercise the power and responsibility of that position. I will never forget that I serve the American people—all of the American people, from every state, every community, and every walk of life.

4. On March 11, 2013, Texas applied to the Department for expedited certification under 28 U.S.C. § 2265. On July 18, 2013, Senator Cruz and I wrote to Attorney General Holder asking him to inform us when he would make a decision. He did not decide, or respond to the letter. Will you commit to approve the § 2265 application submitted by Texas almost two years ago? And, if not, please explain why.

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I have not encountered the certification process under 28 U.S.C. § 2265. My limited understanding is that the certification process under 28 U.S.C. § 2265 has been delayed because of pending litigation challenging that process. If I am fortunate enough to be confirmed, I would expect to learn more about this issue.

5. In Holt v. Hobbs, the Supreme Court ruled unanimously that the Religious Land Use and Institutionalized Persons Act required the Arkansas Department of Corrections to accommodate the religious liberty of a prison inmate and allow him to grow a beard in observance of his religious faith. In her concurrence, Justice Ginsberg wrote: “Unlike the exemption this Court approved in Burwell v. Hobby Lobby Stores, Inc., 573 U. S. \_\_\_\_ (2014), accommodating petitioner’s religious belief in this case would not detrimentally affect others who do not share petitioner’s belief.”

- a. Do you believe the scope of an American’s religious liberty – protected by the Constitution and statutes – is inherently limited by whether or not other Americans might be affected by one person’s religious belief?

**RESPONSE:** The Religious Freedom Restoration Act’s text states that a burden on religious exercise is impermissible if (1) it is a “substantial[] burden” and (2) it is not “in furtherance of a compelling governmental interest” and is not “the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1. The Supreme Court has held that the government does not have “an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals,” but that “courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,” which “will often inform the analysis of the Government’s compelling interest and the availability of a less restrictive means of advancing that interest.” Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2781 (2014) (quoting Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (applying RLUIPA)).

- b. Do you accept Burwell v. Hobby Lobby as binding precedent?

**RESPONSE:** Yes, the decisions of the Supreme Court are binding.

6. The Department is currently suing Texas because of its common-sense requirement that voters show ID to vote. The Supreme Court held in Crawford v. Marion County that voter ID laws are constitutional-and further held that voter ID laws are a legitimate means

of deterring voter fraud, even in States with zero recorded incidents of voter impersonation.

- a. Do you agree with the Supreme Court's decision in Crawford?

**RESPONSE:** The decisions of the Supreme Court represent the law of the land. My general understanding is that in *Crawford* the Supreme Court decided certain facial constitutional challenges to one state's particular voter identification law, based on the facts and arguments in that case. I understand that the Department is addressing the meaning of *Crawford* in certain cases that are currently pending, so I cannot comment further.

7. In its litigation with the State of Texas over voter ID, parties to the action argued that the state's voter ID requirement constituted a "poll tax" barred by the 24th Amendment. The Department of Justice did not take that position in the litigation. Do you agree that the law in question is not a poll tax?

**RESPONSE:** Because these issues are currently pending in the Texas case in which the Department is participating, I cannot comment on this question.

8. In January 2012, the President made appointments to the National Labor Relations Board. The Senate did not consent, so the President purported to use his authority under the Recess Appointments Clause.
  - a. The Supreme Court held that "the President lacked the power to make the recess appointments here at issue." Do you accept the Court's ruling?
  - b. Do you agree with the Court that the President violated the Constitution in making the appointments at issue?

**RESPONSE:** It is my understanding that in *National Labor Relations Board v. Noel Canning*, 573 U.S. \_\_\_, 134 S. Ct. 2550 (2014), the Supreme Court held that the President's appointment under the Recess Appointments Clause of three members of the National Labor Relations Boards during a three-day period between two pro forma sessions of the Senate were not valid. The Court's decision is the law of the land, and such appointments would not be consistent with the Constitution in the future.

9. On April 15, 2009 the Counsel to the President issued an unpublicized memorandum ordering all executive departments and agencies to consult with White House Counsel on any FOIA-requested documents involving "White House equities." This policy permits the White House to filter any FOIA request that might relate to the White House in some fashion. There is no exemption in the Freedom of Information Act for "White House equities," nor does FOIA give White House Counsel the authority to intervene in FOIA requests.

- a. If confirmed as Attorney General, you will have primary authority over agency implementation of FOIA. Will you continue to allow this practice?
- b. If you will not stop this practice, will you commit to making this process more transparent, so that requestors know when their request has been reviewed and/or censored by White House Counsel's office?

**RESPONSE:** The Freedom of Information Act (FOIA) plays a vital part in our democracy. The Department of Justice, in turn, plays a pivotal role in guiding agencies in their administration of this important statute. While I am not familiar with the particular memorandum you reference, I am committed to ensuring that the law is implemented in an efficient and transparent manner, in keeping with its underlying purpose.

10. According to the Center for Effective Government nearly half of the largest agencies in the federal government are failing in their implementation of FOIA. The Associated Press reported last year that the use of the deliberative process exemption to withhold information is at an all-time high. And reporters are expressing mounting frustration at the uselessness of FOIA, leading one reporter to say at your confirmation hearing that FOIA "is pretty much pointless and senseless now in its application at the federal level. It does no good." This is unacceptable.

- a. If confirmed as Attorney General, what will you do to improve FOIA compliance within DOJ and at other agencies? Please list specific measures you will take.

**RESPONSE:** As mentioned above, the FOIA plays a vital part in our democracy, and the Department of Justice, in turn, plays a pivotal role in guiding agencies in their administration of this important statute. I believe that agency personnel involved in any aspect of FOIA administration should receive training regarding their obligations under this statute, should have resources available to them to assist in their day-to-day administration of the law, and should be held accountable for their progress. These are all areas where the Department of Justice can continue its work of encouraging full and proper compliance with the law.

11. The War Powers Resolution requires that the President receive Congressional authorization for any use of military force in hostilities that extends beyond 60 days. We have now been engaged in hostilities with ISIL nearly 6 months—well past the 60-days required by the War Powers Resolution.

- a. Do you believe the War Powers Resolution is binding on the President?
- b. If so, do you think that the conflict with ISIL qualifies as "hostilities" under the War Powers Resolution, such that the President must have Congressional authorization?

**RESPONSE:** The War Powers Resolution is a duly enacted law of the United States and therefore binding on the President to the extent that it is consistent with the Constitution. I have not had the occasion to address the question in my role as a United States Attorney, but it is my understanding that, over the years, there has been public debate about the constitutionality of certain provisions of the War Powers Resolution. It is also my understanding that whether U.S. military forces are engaged in “hostilities” as used in the War Powers Resolution is a highly fact-specific question, and I am not at present fully informed about the nature and scope of our military operations against ISIL. Regardless of whether the War Powers Resolution imposes a binding requirement for congressional authorization under the present circumstances, and whether the AUMFs to which I refer in my next answer give that authorization, I agree with the President that we are strongest as a Nation when the Executive and the Congress work together on the use of military force abroad, and, should I be confirmed as Attorney General, I would support the President’s efforts to work with Congress to enact a resolution specifically authorizing the use of force against ISIL.

12. The President has claimed varying theories of authority for his use of military force since hostilities began in August, beginning first with Article II of the Constitution, then moving to the 2001 AUMF for al-Qaeda, the on to the 2002 AUMF for Iraq and back again to the 2001 AUMF.
  - a. Under the 2001 AUMF for Al-Qaeda can the President continue the use of force against ISIL indefinitely, without ever seeking Congressional authorization?
  - b. If not, at what point is the President constitutionally and statutorily required to seek Congressional authorization?

**RESPONSE:** Although I have not had the occasion to address the question in my role as a United States Attorney, it is my understanding that the Administration has concluded that the 2001 AUMF provides statutory authority for the current military operations against ISIL and that the 2002 AUMF also provides statutory authority for those operations at least to the extent that they are necessary to address the threat posed by ISIL’s operations in Iraq or to help establish a stable, democratic Iraq. Regardless of whether any additional congressional authorization might be necessary at any point, I agree with the President that we are strongest as a Nation when the Executive and the Congress work together on the use of military force abroad, and, should I be confirmed as Attorney General, I would support the President’s efforts to work with Congress to enact a resolution specifically authorizing the use of force against ISIL.

13. In the 2011 conflict with Libya, the President neither sought nor received congressional authorization for the use of military force, even though air strikes continued long past the 60-day requirement of the War Powers Resolution. The President’s tenuous legal theory was that the air strikes were not “hostilities” for purposes of the War Powers Resolution. This was in direct conflict with the legal opinion of the Department’s Office of Legal

Counsel. If you are confirmed as Attorney General and the President acts counter to your counsel in similar manner—possibly violating the law—what will you do?

**RESPONSE:** Should I be confirmed as Attorney General, I would provide the President with vigorous and independent legal advice in all situations.

14. The Department has secured billions of dollars through settlement agreements over the past few years, but not all of the money claimed in these settlements has gone to a governmental entity. For example, in the recent \$16.65 Bank of America settlement—a case in which your office participated—less than 60% of that money was paid to a governmental entity. \$7 billion of the settlement is to be spent independently by Bank of America on a nation-wide “consumer relief” program. The Department does not have the statutory authority to design a nationwide consumer relief program and direct appropriations and grants from public funds toward that program. That is a legislative power. Yet, it appears to have done so through a settlement agreement.

- a. Please explain where the Department has found the authority to appropriate public funds in such a manner and to design a public consumer relief program implemented by a private entity.

**RESPONSE:** The 2014 \$16.65 billion settlement with Bank of America constitutes the largest settlement with a single entity in the history of the Department of Justice. Among its other components, the settlement features a \$5 billion penalty under the FIRREA statute, payable to the U.S. Treasury, which represents the largest penalty ever assessed under that statute. In addition, the settlement requires the bank to make payments to the Department’s various federal and state law enforcement partners.

No public funds from the Bank of America settlement—whether from the FIRREA penalty or other payments to federal or state agencies—were directed toward consumer relief. Apart from these various payments, the bank agreed, as part of the referenced settlement agreement, to provide \$7 billion in consumer relief. The consumer relief portion of the settlement, however, will not be funded through public moneys. Instead, these are separate private funds—provided by the settling banks as part of the settlement agreement—that are dedicated to assisting consumers in the housing market, including struggling homeowners who have suffered as a result of the collapse of the housing market. That collapse was caused in large part by the conduct that was the basis for the Bank of America investigation—namely, the fraudulent packaging and selling of Residential Mortgage-Backed Securities (RMBS).

- b. Please describe what oversight and transparency measures have been put in place to monitor the expenditure of these funds, and what control, if any, the federal government will have over how this money is spent, other than through the broad terms of the settlement agreement. Additionally, please describe what controls are in place to ensure that this money will go to the victims of the alleged

wrongdoing—for instance, the purchasers of the residential mortgage-backed securities—rather than interest groups listed in the settlement agreement.

**RESPONSE:** The consumer relief provisions in the Bank of America agreement explicitly require the bank to provide specific amounts and types of consumer relief, targeted to help precisely those Americans in need of such relief—those who are still suffering the effects of the misconduct that was the basis for the government’s investigation. In addition, a series of provisions in the Bank of America settlement agreement require oversight of, and transparency into, Bank of America’s activities under the consumer relief provisions of the settlement agreement.

An annex to the settlement agreement provides very specific requirements for activities the bank must undertake to satisfy its consumer relief obligations. Among other provisions, for example, Bank of America is obligated to accrue at least \$2.15 billion in credits for first lien principal forgiveness for homeowners. And the consumer relief annex—which contains provisions that the bank agreed to at the time of the settlement—provides precise parameters for the bank’s satisfaction of its consumer relief obligations. The federal government does not dictate individual consumer relief decisions that the bank might make (such as, for example, which specific homeowners should be entitled to mortgage modifications).

Beyond these requirements, the settlement agreement establishes that an independent monitor—paid for by the bank—is charged with determining whether the bank has satisfied its consumer relief obligations. The settlement agreement further requires Bank of America to provide the monitor with all documentation necessary for the monitor to serve this function.

Moreover, the settlement agreement requires the monitor to issue regular public reports documenting the manner in which Bank of America is satisfying its consumer relief obligations. The Bank of America monitor has established a website, <http://bankofamerica.mortgagesettlementmonitor.com>, where the monitor’s reports, as well as other information about the settlements and the consumer relief provisions, are available to the public. These various provisions all help to assure that the bank lives up to its consumer relief obligations, and does so in a transparent manner.

15. State financial regulators in my state and others play an important role in protecting consumers and ensuring that we have robust and diverse financial services marketplaces in our states. Licensing is an important tool for these regulators by seeking to ensure businesses and individuals meet certain professional standards and conduct themselves with integrity. Many financial regulators are required to review criminal background information as part of the licensing process. It is my understanding the FBI denied Tennessee State officials access to any criminal history data starting January 1, 2015 and will deny Georgia access in July 2015. The FBI objected to these states’ statutes authorizing --but not mandating -- use of a nationwide state licensing system to process state-required criminal background record on licensees. I am concerned because Texas has similar language in its licensing laws. As Attorney General, would you promise to work with states to ensure state regulators have an efficient electronic system to access

FBI criminal background information for licensing purposes, as authorized under P.L. 92-544?

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I have not had the opportunity to study this issue, but if I am confirmed, I would expect to learn more about it.

16. Last November, President Obama and the Department of Homeland Security announced a series of unilateral and unconstitutional Executive Actions that will suspend enforcement of our immigration laws against a class of up to 4 million illegal immigrants. Under these executive actions, certain classes of illegal immigrants will be allowed to remain in the United States and obtain work authorization. Before President Obama formally announced these Executive actions, the Department of Justice Office of Legal Counsel issued a memorandum agreeing that the President had the authority to unilaterally grant amnesty to certain classes of illegal immigrants.

- a. Do you agree with the legal analysis contained in the OLC memorandum supporting President Obama's immigration Executive Actions?

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

- b. As a career prosecutor, have you ever been involved in a program through which certain classes of offenders were systematically granted deferred action or immunity from prosecution after admitting their crime in a written application?

**RESPONSE:** My understanding of the deferred action guidance issued by the Department of Homeland Security is that the guidance does not grant deferred action on a systematic basis. Instead, it establishes a series of factors, to be applied on a case-by-case basis, by those individuals responsible for enforcing our nation's immigration laws in order to prioritize the limited resources afforded to the agency. As a career prosecutor and a United States Attorney, I know full well the resource constraints that require those who enforce the law to prioritize the prosecution of those who pose the greatest threats to our country.

- c. In your experience as a prosecutor, does the non-enforcement of a particular law generally incentivize or encourage future violations of that law?

**RESPONSE:** In my experience, the decision to prioritize the enforcement of a law against a set of particular individuals, such as those who present the greatest risk to our country's safety and

security, results in increased prosecutions against those bad actors, by allowing limited prosecutorial resources to be dedicated to that law enforcement effort.

- d. Are you concerned that President Obama's new deferred action program will incentivize or encourage future violations of our immigration laws?

**RESPONSE:** I am hopeful that the Secretary's efforts to prioritize the enforcement of our immigration laws against criminals and national security threats will encourage individuals within the country to abide by the law. It is also my understanding that the new removal priorities established by the Secretary include recent border crossers and visa overstays who are ineligible for deferred action. As a result, it would appear to discourage attempts to cross the border illegally at this time, as such persons would be a priority for removal.

- e. Under the theory of prosecutorial discretion advanced by the Department of Justice in the OLC memorandum regarding President Obama's immigration executive actions, would it be possible for the President to unilaterally extend deferred action to all 11 million illegal immigrants in the United States? If not, what is the limiting principle on Department of Justice's theory of prosecutorial discretion?

**RESPONSE:** I do not understand that question to have been presented to the Office of Legal Counsel, as that is not a situation that is presented by the memoranda issued by the Secretary. As the OLC opinion indicated, "[g]iven that the resources Congress has allocated to DHS are sufficient to remove only a small fraction of the total population of undocumented aliens in the United States, setting forth written guidance about how resources should presumptively be allocated in particular cases is a reasonable means of ensuring that DHS's severely limited resources are systematically directed to its highest priorities across a large and diverse agency, as well as ensuring consistency in the administration of the removal system." OLC Op. at 10. I would also note that the OLC opinion examined an additional proposed deferred action program—for parents of recipients of deferred action under the Deferred Action for Childhood Arrivals program—and determined that it would not be permissible, reflecting a clear limit to discretion.

- f. Under President Obama's Executive Actions, many illegal immigrants who have been convicted of serious crimes in the United States will be eligible for deferred action and work authorization. For instance, a criminal alien would not be categorically excluded from receiving amnesty, even if they were convicted of the following types of offenses: child pornography possession, child abuse, assault, abduction, robbery, voter fraud, and many others. As a career prosecutor, you have routinely put criminals like these behind bars. Do you agree that granting deferred action to criminal aliens instead of removing them from the country will jeopardize public safety?

**RESPONSE:** It is my understanding that deferred action is not available to individuals convicted of criminal offenses and who pose a threat to national security or public safety. It is my expectation that the crimes to which you refer would ordinarily fall within these removal priorities.

- g. In 2013, the Department filed an amicus brief in a Ninth Circuit case arguing that the State of Arizona should be required to issue drivers' licenses to illegal immigrants who are beneficiaries of the DACA program. Do you agree with this analysis? If so, do you believe that states should have the right to deny drivers' licenses to individuals covered by President Obama's November 2014 immigration executive actions? If confirmed as Attorney General, would you support litigation requiring states to issue driver's licenses to such individuals?

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I was not involved in the brief to which the question refers. It is my understanding, however, that as a matter of preemption, neither the 2014 Deferred Action Guidance nor any federal statute compels States to provide driver's licenses to DACA and DAPA recipients, so long as the states base eligibility on existing federal alien classifications—such as deferred action recipients, or other categories of aliens—rather than creating new state-law classifications of aliens.

17. During a hearing last Congress, Gayle Trotter of the Independent Women's Forum testified before the Senate Judiciary Committee that guns are "a great equalizer" for women who are trying to protect themselves from aggressors. In my home State of Texas there have been countless examples of brave women standing their ground and defending themselves with firearms. For instance, last year in the South Texas city of Palmview, a pregnant woman stood her ground against two would-be home invaders and opened fire—forcing the criminals to retreat. They were later apprehended by SWAT officers after a long standoff. As Attorney General, will you work to encourage lawful firearm possession among women so that they are better equipped to defend themselves and their families against criminals?

**RESPONSE:** The Supreme Court has made clear that the Second Amendment protects the individual right of law-abiding citizens—both men and women—to keep and bear arms for self-defense in the home. If confirmed, I will ensure that the actions of the Department of Justice are consistent with the Constitution, including the Second Amendment.

18. In 1994, President Clinton and Congress enacted an "assault weapons ban" that prohibited the purchase of a large number of now-common self-defense and hunting firearms. In the decade since expiration of the ban, violent crime rates have dropped, while millions of law-abiding Americans have purchased self-defense weapons that were once prohibited under the assault weapons ban. Do you believe that the assault weapons ban was effective, and if confirmed as Attorney General, would you support the re-enactment of this type of gun ban?

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

19. From 2010-2011, the Department operated a controversial gun-walking program known as “Operation Fast and Furious.” As part of that program, Department officials knowingly transferred thousands of firearms to drug cartel associates and straw purchasers with no intent that these weapons would be tracked or interdicted. All told, the Department lost track of nearly 2,000 weapons that were put into the hands of drug cartel agents as part of this reckless operation—many of which have been recovered at violent crime scenes on both sides of our Southern border. Tragically, weapons from Operation Fast and Furious were used in the December 2010 murder of United States Border Patrol Agent Brian Terry. Throughout congressional investigations into the Operation Fast and Furious tragedy, Attorney General Holder repeatedly misled and stonewalled Congress, withholding tens of thousands of important documents through frivolous claims of executive privilege and making multiple inaccurate statements concerning his knowledge of the program.

- a. Do you believe that the gun-walking tactics used in Operation Fast and Furious were acceptable?

**RESPONSE:** In my position as a United States Attorney, I was not personally involved in either the underlying investigation of Operation Fast and Furious nor the Department’s responses to Congress regarding it. I share the perspective of many, including the Department’s Inspector General and Attorney General Holder, that this was a flawed operation.

- b. Can you think of any legitimate law enforcement rationale for transferring guns to drug cartel agents without interdicting or tracking them?

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

- c. During Operation Fast and Furious, was it appropriate for Department of Justice officials to demand that licensed and law-abiding firearms dealers participate in the illicit transfer of weapons to suspected straw purchasers?

**RESPONSE:** As noted above, in my position as a United States Attorney, I was not personally involved in either the underlying investigation of Operation Fast and Furious or the

Department's responses to Congress regarding it. Generally, I believe it would be inappropriate for Department officials to demand that citizens participate in the illicit transfer of weapons.

- d. If confirmed as Attorney General, would you ever allow Department of Justice officials to request that law-abiding Americans violate a federal statute?

**RESPONSE:** The Department of Justice has robust guidelines governing and limiting situations in which the government may authorize a citizen to engage in otherwise unlawful activity.

- e. Will you pledge to fire all Department of Justice employees who utilize gun-walking tactics similar to those in Operation Fast and Furious, or who were directly involved in the execution of that program?

**RESPONSE:** Just as I have in my tenure as a United States Attorney, if confirmed as Attorney General, I would take seriously all allegations regarding inappropriate actions by Department employees, and would follow well-established laws and procedures regarding disciplinary actions against employees found to have engaged in inappropriate conduct.

- 20. According to an unclassified threat assessment from the Texas Department of Public Safety: "Mexican cartels control most of the human smuggling and human trafficking routes and networks in Texas. The nature of the cartels' command and control of human smuggling and human trafficking networks along the border is varied, including cartel members having direct organizational involvement and responsibility over human smuggling and human trafficking operations, as well as cartel members sanctioning and facilitating the operation of human smuggling and human trafficking organizations." Do you agree that human smuggling networks and drug cartels are directly responsible for many cases of human trafficking in the United States? If confirmed as Attorney General, will you prioritize the investigation and prosecution of these networks and organizations?

**RESPONSE:** I understand that human trafficking is a serious threat in Texas, and am told that it is perpetrated by a wide range of individual smugglers, loosely affiliated smuggling networks, and organized smuggling rings, often only loosely and informally associated with the trafficking networks that lure the victims with false promises, arrange the smuggling, then coerce and exploit the victims once in the United States. Cartels, human smuggling organizations, and human trafficking networks all present serious criminal threats, and if I am confirmed as Attorney General, I will continue to use all available law enforcement tools to combat them all, and to continue investigating the complex relationships among them. I further commit that I will continue to build on the Department's record of vigorously prosecuting those who prey on those most in need of our protection. And I will continue to provide strong and effective assistance to survivors who we must both support and empower.

21. According to an October 2014 study by the Human Trafficking Pro Bono Legal Center, Department of Justice prosecutors secure restitution orders for victims in only 36% of human trafficking cases, and nearly half of U.S. Attorneys' Offices that have handled human trafficking cases have failed to win any compensation for victims. Do you agree that victim compensation and financial contribution from criminals should be a priority in human trafficking prosecutions? If confirmed as Attorney General, will you work with me to ensure that Department of Justice officials are adequately trained and instructed to seek victim restitution orders in all human trafficking cases?

**RESPONSE:** Securing restitution for trafficking victims is an essential part of the Department's victim-centered approach to trafficking investigations and prosecutions. If I am confirmed as Attorney General, I would welcome the opportunity to work with you and your staff on the issue of seeking restitution for victims of trafficking. I look forward to continuing the Department's record of secure significant restitution orders, as provided by law, and seeking justice for victims of human trafficking.

22. Do you believe that mandatory minimum sentences are an appropriate law enforcement tool in crimes involving the sexual exploitation and slavery of children?

**RESPONSE:** Those who exploit children commit heinous crimes against the most vulnerable members of society. Congress has responded to the seriousness of these offenses by enacting statutory schemes that include mandatory minimum sentences for many child sexual exploitation offenses. These sentences clearly signal that the sexual exploitation of children will not be tolerated, and I will ensure that those who do so will face appropriate punishment. The Department vigorously enforces these laws, and has placed the protection of children and other vulnerable populations from sexual exploitation and slavery at the top of the Department's list of priorities.

23. Do you support amending the federal hate crimes statute to cover the intentional targeting of a law enforcement officer?

**RESPONSE:** I attended the funerals of New York City Police Department Detectives Rafael Ramos and Wenjian Liu. The grief and the sense of loss from their tragic deaths could be felt across New York City. We cannot allow our law enforcement officers to be targets. We must provide law enforcement officers with the protections they need in order to serve and protect our communities.

The President recently established the Task Force on 21<sup>st</sup> Century Policing, and it will consider the proposal by the Fraternal Order of Police to expand the existing federal hate crimes statute to include law enforcement officers who have been targeted for violence because of their official position and duties. I look forward to hearing from the Task Force on this important subject.

If confirmed as Attorney General, one of my priorities will be to ensure that law enforcement officers have the tools that they need to do their jobs and to do them safely.

24. The rape kit backlog is a national scandal with tragic consequences for crime victims. Experts estimate that hundreds of thousands of rape kits currently sit on shelves and in evidence lockers across the country gathering dust—each one holding the potential to imprison a rapist and deliver justice for victims of this horrible crime. In 2013, I introduced the SAFER Act, which was enacted into law and amended the *Debbie Smith Act* to both increase the funding available to support the testing of kits and to support audits, by local law enforcement, of their un-submitted kits. Numerous states, including Texas, have enacted laws requiring statewide audits, and these SAFER grants will make an enormous difference in supporting law enforcement’s efforts to end the rape kit backlog forever. Though the SAFER Act has been law for nearly two years, Attorney General Holder and the National Institute of Justice have failed to fully implement this law.

- a. Is there any excuse for Attorney General Holder’s failure to fully implement the SAFER Act?

**RESPONSE:** I share your strong commitment to eliminate the backlogs of sexual assault kits that are being discovered in some law enforcement agencies. I understand that the Department of Justice has been actively engaged with law enforcement partners to develop strategies to eliminate backlogs and hold offenders accountable, while providing support to victims. I am committed to continuing this important effort to facilitate the core elements of accountability and transparency consistent with the purposes of the SAFER Act.

- b. Do you think the failure to implement this law sends a poor message to sexual assault survivors?

**RESPONSE:** Sexual assault is a public health and public safety problem with far reaching implications. I am committed to ensuring implementation of various efforts to support state, local, and tribal work to improve sexual assault investigations and victims’ services and assistance. I will continue the Department’s efforts to fund strategies and programs designed to provide resources to prevent and reduce the risk of sexual assault and effectively respond to the needs of sexual assault victims, as well as partnering with law enforcement agencies to improve victim notification and support services.

- c. If you are confirmed as Attorney General, will you pledge to immediately and fully implement the SAFER Act, as enacted in 2013?

**RESPONSE:** As stated previously, I am unwavering in my commitment to reduce the sexual assault kit backlog and promote accountability and transparency, the core elements of the SAFER Act.

- d. Will you commit to work with me to ensure that the National Institute of Justice is in full compliance with the SAFER Act requirement that not less than 75% of funds appropriated under the Debbie Smith Act are being deployed to state and local governments to analyze crime scene evidence, rather than being used for federal purposes that are not expressly permitted under the statute?

**RESPONSE:** I am firmly committed to ensuring that NIJ, along with all of the components of the Department, comply fully with all applicable laws in carrying out their missions.

- e. Under current law, the National Institute of Justice is required to submit an annual report discussing their DNA backlog reduction grant expenditures, but these reports are often submitted to Congress more than one year after the conclusion of the covered Fiscal Year. As Attorney General, will you ensure that Congress receives annual DNA backlog reduction reports within 90 days of the end of each Fiscal Year?

**RESPONSE:** I am fully committed to ensuring that NIJ meets all requirements of providing reports to Congress in timely fashion.

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

**QUESTIONS FROM SENATOR CRUZ**

**Questions on Executive Amnesty**

**I. Deferred Action**

- On two occasions, the Obama Administration has granted amnesty (otherwise known as “deferred action” because it suspends removal proceedings otherwise required by law) to entire classes of illegal immigrants:
  - Deferred Action for Childhood Arrivals (“DACA”): In a June 2012 memorandum, then Secretary of Homeland Security Janet Napolitano announced that certain illegal immigrants under the age of 31 who came to the United States as children could apply for deferred action.<sup>1</sup>
  - Deferred Action for Parental Accountability (“DAPA”): In a November 2014 memorandum, the current Secretary of Homeland Security Jeh Johnson expanded the DACA program to include childhood arrivals who are now over the age of 30 and announced a new program that would allow certain parents of children who are either citizens or lawful residents of the United States to apply for deferred action. This most recent program would grant amnesty to an estimated 5 million illegal immigrants.<sup>2</sup>

In a subsequent legal memorandum issued by the Department of Justice’s Office of Legal Counsel (OLC), the Administration justified the legality of its decision to grant deferred action to a class of 5 million illegal immigrants as a legitimate exercise of its prosecutorial discretion.<sup>3</sup>

**1. Based on the material and information contained in the OLC opinion, please answer each of the following questions separately:**

**a. Do you agree or disagree with the legal conclusions in the OLC opinion?**

**RESPONSE:** As I indicated at my hearing, the opinion by the Office of Legal Counsel is based upon a thorough review of precedent, prior actions by Congress, as well as the discretionary

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<sup>1</sup> Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (Jun. 15, 2012).

<sup>2</sup> Jeh Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014).

<sup>3</sup> U.S. Department of Justice, Office of Legal Counsel, *The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* (Nov. 19, 2014).

authority of the Department of Homeland Security to prioritize the removal of the most dangerous aliens within the United States and recent border crossers. Accordingly, the legal analysis by the Office of Legal Counsel appears reasonable.

**b. Cite the specific provisions of the United States Code that authorize the President to grant deferred action to illegal alien childhood arrivals and the illegal alien parents of U.S. citizens.**

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

**c. Define prosecutorial discretion.**

**RESPONSE:** As I described during my testimony before the Committee, as a career prosecutor and United States Attorney, I know well that prosecutors, acting in good faith, must look at the facts of a matter and the law, and consider both the benefits of a prosecution as well as the resources necessary and available.

**d. Are the President’s actions a proper exercise of prosecutorial discretion as you have defined it and why?**

**RESPONSE:** As I have stated, the memoranda issued by the Secretary of Homeland Security appears to be an exercise of discretion, consistent with stated congressional priorities, to focus limited agency resources on the prosecution and removal of high priority aliens, such as criminals, threats to national security, and recent border crossers.

**e. Does the fact that Congress has expressly authorized deferred action for certain classes of removable aliens<sup>4</sup> but not for the classes covered by DACA and DAPA establish that there is no authority for the President to grant deferred action under DACA and DAPA?**

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

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<sup>4</sup> See e.g., 8 U.S.C. 1154(a)(1)(D)(i)(II), (IV) (providing that certain individuals are “eligible for deferred action”); 8 U.S.C. 1227(d)(1) (authorizing an “administrative stay of a final order of removal” for T and U visa applicants who can demonstrate a prima facie case for approval); 115 Stat. 272, 361 (authorizing “deferred action” for certain family members of lawful residents killed on 9/11); 117 Stat. 272, 361 (authorizing “deferred action” for certain family members of certain U.S. citizens killed in combat).

- Article II, Section 3 of the United States Constitution states that the President “shall take Care that the Laws be faithfully executed.” Although it may not be feasible for the President to enforce every law in every case, there is a difference between declining to enforce a law for an entire class of people (which is nothing more than rewriting the law) and declining to enforce a law based on the facts and equities of a particular case (which is a legitimate exercise of prosecutorial discretion).
- 2. Is it a violation of the Take Care Clause for the President to refuse to enforce the immigration laws for a distinct class of individuals who are not otherwise exempted by Congress?**

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

- 3. Do you believe the President has the authority to exercise executive discretion to:**
- a. categorically exempt a class of people from enforcement of the Affordable Care Act?**
  - b. categorically exempt a class of people from enforcement of federal environmental laws?**
  - c. categorically exempt a class of people from enforcement of the Internal Revenue Code?**

**RESPONSE:** To the extent that this question attempts to characterize the effect of the deferred actions on immigration by analogy to other enforcement prioritizations, my understanding of the deferred action guidance issued by the Department of Homeland Security is that the guidance does not grant deferred action on a systematic basis. Instead, it establishes a series of factors, to be applied on a case-by-case basis, by those individuals responsible for enforcing our nation’s immigration laws in order to prioritize the limited resources afforded to the agency. As a career prosecutor and a United States Attorney, I know full well the resource constraints that require those who enforce the law to prioritize the prosecution of those who pose the greatest threats to our country.

- In the lawsuit that Texas and more than 20 other states have brought against the United States challenging the President’s actions,<sup>5</sup> the United States Government has taken the position that its deferred action decisions are judicially unreviewable non-enforcement decisions.<sup>6</sup>

- 3. Do you agree that the President’s decision to defer removal actions for certain categories of illegal aliens is unreviewable by Article III courts? If your answer is yes, please provide a detailed explanation as to why.**

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<sup>5</sup> See, e.g., <https://www.texasattorneygeneral.gov/files/epress/files/20141203ImmigrationExecutiveOrderLawsuit.pdf> (last viewed Feb. 5, 2015).

<sup>6</sup> Pl.’s Reply in Support of Mot. for Preliminary Inj., United States v. Texas, No. 1:14-cv-254 (S.D. Tex.) (“Plaintiffs’ redress . . . is through the political process, not the courts.” (quoting Def. Opp. at 29)).

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

## **Questions on Executive Amnesty**

### **II. Work Authorization**

- Under both DACA and DAPA, illegal immigrants granted deferred action would be eligible to apply for work authorization in the United States.
- 1. **Do you agree or disagree that the President lacks the authority to grant work authority to illegal aliens who are eligible for deferred action under DACA or DAPA? If you disagree with this statement, please provide a detailed explanation as to why, including citations to the relevant statutory authority.**

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

- 2. **Do you agree or disagree that affirmatively granting illegal aliens the right to work is not an exercise of prosecutorial discretion? If you disagree with this statement, please provide a detailed explanation as to why.**

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

- In his November 20, 2014 memorandum on DAPA, Secretary Johnson cites Section 274A(h)(3) of the Immigration and Nationality Act (8 U.S.C. 1324a(h)(3)) as the basis for his authority to grant work authorizations to illegal aliens.<sup>7</sup> For purposes of determining work authorization, that provision defines the term “unauthorized alien” as an alien who is not “(A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or *by the Attorney General*” (emphasis added). (Note: The language referencing the Attorney General represents unchanged “legacy” language that has not been changed since the Department of Homeland Security was first authorized in 2002.)
- 3. **Do you agree or disagree that the statutory language cited above means that the Secretary of Homeland Security has complete discretion to grant work**

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<sup>7</sup> Jeh Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014).

**authorizations to any alien? If you agree with this statement, please provide a detailed explanation as to why.**

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

**4. Do you agree or disagree that the statutory language cited above gives the Secretary of Homeland Security complete discretion to grant work authorizations to all aliens? If you agree with this statement, please provide a detailed explanation as to why.**

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

### **Questions on Executive Amnesty**

#### **III. Advance Parole as Pathway to Citizenship/Benefits**

- INA Section 212(d)(5) (8 U.S.C. 1182(d)(5)) authorizes the Secretary of Homeland Security to parole otherwise inadmissible immigrants “on a case-by-case basis for urgent humanitarian reasons or significant public benefit.” INA Section 245(a) (8 U.S.C. 1255(a)), in turn, allows an alien to have his status adjusted to legal permanent resident if that alien was “admitted or paroled” into the United States.

**1. Do you agree or disagree that the Secretary of Homeland Security lacks the legal authority to grant “advance parole” to illegal aliens covered by DAPA (i.e., the parents of U.S.-born children who, but for their unlawful presence, would be eligible for green cards)? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** As a United States Attorney who is not an expert in immigration law, I am not familiar with the authority that the Secretary of Homeland Security exercises over parole decisions. However, if confirmed as Attorney General, I will support the strong enforcement of our nation’s immigration laws.

**2. If you think that the Secretary of Homeland Security does have the legal authority to grant “advance parole” to illegal aliens covered by DAPA, do you agree or disagree that granting advance parole could allow the Secretary of Homeland Security to then grant lawful permanent resident status to those aliens, thereby placing them on a “path to citizenship”? If you agree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** As a United States Attorney who is not an expert in immigration law, I am not familiar with the authority that the Secretary of Homeland Security exercises over parole decisions. However, if confirmed as Attorney General, I will support the strong enforcement of our nation's immigration laws.

### **Questions on Executive Amnesty**

#### **IV. Driver's Licenses to DACA and DAPA Recipients**

- 1. Do you think that federal law compels states to issue driver's licenses to DACA and DAPA recipients who are in the United States illegally? Whether you answer yes or no, please provide a detailed explanation as to why.**

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I was not involved in the preparation of the Department's amicus brief in the Ninth Circuit regarding this issue. It is my understanding, however, that as a matter of preemption, neither the 2014 Deferred Action Guidance nor any federal statute compels states to provide driver's licenses to DACA and DAPA recipients, so long as the states base eligibility on existing federal alien classifications—such as deferred action recipients, or other categories of aliens—rather than creating new state-law classifications of aliens.

### **Questions on DOJ Legal Positions and Practices**

#### **I. Attorney General's Advisory Committee**

- It is our understanding that you have served on the Attorney General's Advisory Committee of U.S. Attorneys (Advisory Committee) almost since the start of your second tenure as United States Attorney for the Eastern District of New York. Specifically, since assuming your duties as United States Attorney on May 3, 2010, you were appointed by Attorney General Eric Holder, also in May 2010, to serve on the Advisory Committee.<sup>8</sup> In September 2011, you were appointed by Attorney General Holder to serve as vice chair of the Advisory Committee.<sup>9</sup> In January 2013, you were appointed by Attorney General Holder to serve as chair of the Advisory Committee,<sup>10</sup> and you continue to hold that chair.

The Advisory Committee, according to regulation, appears to provide very broad latitude in terms of the type and scope of input the Advisory Committee and its members may

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<sup>8</sup> U.S. Department of Justice Press Release, *U.S. Attorneys Paul J. Fishman and Loretta E. Lynch to Lead Attorney General's Advisory Committee* (Sept. 1, 2011) (noting your initial appointment to the Advisory Committee in May 2010).

<sup>9</sup> *Id.*

<sup>10</sup> CNN Library, *Loretta Lynch Fast Facts*, CNN (Dec. 5, 2014) (noting your appointment as chair of the Advisory Committee in January 2013).

provide to the Attorney General, the Deputy Attorney General, and the Associate Attorney General.<sup>11</sup> The regulation provides (with emphasis added):

(b) The Committee shall make recommendations to the Attorney General, to the Deputy Attorney General and to the Associate Attorney General concerning *any matters which the Committee believes to be in the best interests of justice*, including, but not limited to, the following:

(1) *Establishing and modifying policies and procedures* of the Department;

(2) Improving management, particularly with respect to the relationships between the Department and the U.S. Attorneys;

(3) Cooperating with State Attorneys General and other State and local officials for the purpose of *improving the quality of justice in the United States*;

(4) Promoting *greater consistency in the application of legal standards throughout the Nation* and at the various levels of government; and

(5) Aiding the Attorney General, the Deputy Attorney General and the Associate Attorney General in *formulating new programs for improvement of the criminal justice system at all levels, including proposals relating to legislation* and court rules.<sup>12</sup>

- 1. Do you agree or disagree that the subject matter scope of the Advisory Committee, as provided for in the above regulatory language, is essentially limitless? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** While the language of the regulation is broad, the purpose of the Committee is to provide the Attorney General with recommendations in the best interests of justice. The United States Attorneys conduct an extremely wide range of litigation in the United States District Courts throughout the country, and we work closely with state, tribal, and local officials and community organizations. As such, we provide the Attorney General with a perspective that is shaped by our diverse experiences as the Department's representatives around the country so that the Attorney General can make the most informed decisions regarding the Department's policies and procedures on any matter affecting the administration of justice.

- 2. Have you, in any of your capacities on the Advisory Committee (i.e., as an entering member, vice chair, or chair) provided any written or verbal advice, feedback, or information, or communicated in any direct or indirect way, via**

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<sup>11</sup> 28 CFR 0.10(b).

<sup>12</sup> 28 C.F.R. 0.10(b).

**official or non-official channels, with either the Attorney General, the Deputy Attorney General, or the Associate Attorney General, on any of the following subjects:**

- a. Any aspect of the Administration’s immigration policy, including executive amnesty for illegal aliens or work authorization for illegal aliens?**
- b. Any aspect of the Administration’s approach to the Defense of Marriage Act (DOMA), including the Administration’s decision to no longer defend DOMA in federal court?**
- c. Any aspect of the Administration’s enforcement of the Voting Rights Act or other federal laws pertaining to voting rights, including its resistance to states’ efforts to enhance or enact voter identification laws or its selective enforcement of voting rights protections?**
- d. Any aspect of the Administration’s enforcement of federal drug laws, including its executive decisions to not pursue enforcement in states that have legalized marijuana for recreational use?**
- e. Any aspect of the Internal Revenue Service’s (IRS) political targeting of private organizations seeking tax-exempt status, including the decision to not appoint a special prosecutor to investigate that targeting?**
- f. Any aspect of Operation Fast and Furious, including Attorney General Holder’s contempt finding or the litigation related to that contempt finding?**
- g. Any aspect of the Department of Justice’s surveillance of reporters?**
- h. Any aspect of the Department of Justice’s application of the Foreign Corrupt Practices Act (FCPA), including discussion of potential FCPA targets?**
- i. Any aspect of the Administration’s response to the terrorist murder of U.S. citizens in Benghazi, Libya, on September 11, 2012, including decisions regarding the post-incident investigation by the Federal Bureau of Investigation?**
- j. Any aspect of the Administration’s decision to close the Guantanamo Bay Detention Facility (GTMO), including the decision to transfer detainees out of GTMO?**
- k. Any aspect of the Administration’s decision to close its Office of Political Affairs (OPA) in January 2011, including discussion with the U.S. Office of Special Counsel regarding the investigation into OPA?**

**RESPONSE:** I believe that the most comprehensive and accurate record of the work of the AGAC would be the summaries of our monthly meetings, which I understand the Department made available in unredacted form to Committee staff for the purpose of its consideration of my record despite their pre-decisional, deliberative nature. I would note that some of the topics you have highlighted above arose in AGAC meetings, such as the lessons that United States Attorney’s Offices can learn from the flawed Operation Fast and Furious.

## **Questions on DOJ Legal Positions and Practices**

### **II. DOJ Refusal to Defend DOMA**

- According to Attorney General Eric Holder, it is the longstanding practice of the Department of Justice to defend “the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense.” Yet, in February 2011, the Attorney General announced that the Department would no longer defend the constitutionality of Section 3 of the Defense of Marriage Act, which defined marriage under federal law as the union of one man and one woman. The Attorney General offered two reasons for this decision: (1) the Department does not consider the arguments in defense of DOMA to be “reasonable,” and (2) the President concluded that DOMA was unconstitutional.<sup>13</sup>

**1. Do you agree or disagree with Attorney General Holder that no “reasonable” arguments could be made in defense of a law that defines marriage as limited to the union of one man and one woman? If you agree with his position, please provide a detailed explanation as to why.**

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

**2. Do you agree or disagree with the Attorney General’s decision to not defend DOMA?<sup>14</sup> If you agree with his decision, please provide a detailed explanation as to why.**

**RESPONSE:** When Congress passes a law, the Department of Justice should vigorously defend the constitutionality of that law. That is a vitally important principle and a longstanding tradition of the Department of Justice, which affords appropriate respect to Congress as a co-equal branch of government, and I fully subscribe to it. As I have stated elsewhere, however, there are limited exceptions to this rule. With respect to DOMA, the Supreme Court has now invalidated Section

**3. Do you agree or disagree with Attorney General Holder that the President can refuse to defend a law in court that the President believes is unconstitutional? If you agree with his position, please provide a detailed explanation as to why.**

**RESPONSE:** When Congress passes a law, the Department of Justice should vigorously defend the constitutionality of that law. That is a vitally important principle and a longstanding tradition of the Department of Justice, which affords appropriate respect to Congress as a co-equal branch

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<sup>13</sup> Press Release, *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act*, Dept. of Justice (Feb. 23, 2011).

<sup>14</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013) (Slip op. at 12, 6 n.2.).

of government, and I fully subscribe to it. There are only two exceptions. The first is where a statute violates the separation of powers by infringing on the President's constitutional authority. The second is where there are no reasonable arguments that can be offered in defense of a statute. These exceptions are narrow, and they should be invoked only after the most careful deliberation.

### **Questions on DOJ Legal Positions and Practices**

#### **III. DOJ Refusal to Enforce Federal Marijuana Laws**

- The Obama Administration arguably refuses to fully enforce federal drug laws with respect to marijuana, which is still listed as a Schedule I controlled substance in accordance with the Controlled Substance Act. Marijuana continues to be listed under Schedule I because it has long been considered by federal law enforcement and medical authorities to be both dangerous and without medicinal value.

- 1. Do you agree or disagree with the federal position that marijuana is a dangerous controlled substance? If you disagree with the federal position, please provide a detailed explanation as to why.**

**RESPONSE:** As I stated in my testimony before the Committee, I do not support the legalization of marijuana. It is the Administration's position to oppose the legalization of marijuana and other drugs because legalization would increase the availability and use of illicit drugs, and pose significant health and safety risks to all Americans, particularly young people.

- 2. Do you agree or disagree with the federal position that marijuana has no medicinal value? If you disagree with the federal position, please provide a detailed explanation as to why.**

**RESPONSE:** Marijuana is a Schedule I controlled substance with no currently accepted medical use in the United States. The potential for medicinal uses of marijuana and its components is the subject of ongoing research, and such research is appropriately assessed and evaluated by the Department of Health and Human Services within the statutory framework of the Controlled Substances Act as I understand has occurred in the past, as recently as 2011, in the consideration of petitions to reschedule marijuana.

- 3. Do you agree or disagree with the statement that states that have legalized marijuana for recreational use have done so in violation of federal law? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** The manufacture and distribution of marijuana is prohibited by federal law, specifically, the Controlled Substances Act (CSA), except as authorized pursuant to limited exceptions within the CSA concerning research and related activities.

4. Do you agree or disagree with the statement that states that have legalized marijuana for medicinal use have done so in violation of existing federal law? If you disagree with this statement, please provide a detailed explanation as to why.

**RESPONSE:** Please see response to Part III, Question 3, above.

5. Do you agree or disagree with the statement that federal prosecutors possess the prosecutorial discretion to refuse to prosecute all federal marijuana cases as a class or group? If you agree with this statement, please provide a detailed explanation as to why.

**RESPONSE:** In all areas of civil and criminal enforcement, the Department uses its discretionary enforcement authority in a manner that seeks to focus limited investigative and prosecutorial resources to address the most significant public health and public safety threats. In every instance, prosecutors must make decisions about how limited resources are brought to bear to best confront those threats. The Department's policies, including in the area of marijuana enforcement, as stated in the Department's August 29, 2013 memorandum, are crafted to provide guidance on doing so in an effective, consistent and rational way, while giving prosecutors discretion within the constraints of that guidance to take into account the circumstances of each case.

6. Do you agree or disagree with the statement that federal prosecutors possess the prosecutorial discretion to refuse to prosecute federal marijuana cases where the amount of marijuana at issue falls below a certain threshold? If you agree with this statement, please provide a detailed explanation as to why.

**RESPONSE:** Please see my response to Question 5, above. Rather than focus solely on quantity, the Department's 2013 memorandum provides guidance for Department employees regarding the use of the Department's limited investigative and prosecutorial resources to address the most significant public health and public safety threats in an effective, consistent and rational way. In doing so, the guidance identifies eight enforcement priorities that historically have been and continue to be of primary importance in guiding the exercise of prosecutorial discretion in the area of marijuana enforcement. The guidance further acknowledges the importance of examining the particular circumstances of each case and the authority of the Department to pursue investigations and prosecutions that otherwise serve an important federal interest.

- In April 2013, the Drug Enforcement Administration (DEA) released a report<sup>15</sup> that reaffirmed the following: (1) that marijuana remains a dangerous controlled substance,

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<sup>15</sup> U.S. Drug Enforcement Administration, *The DEA Position on Marijuana* (Apr. 2013).

and that its continued listing in Schedule I was entirely appropriate,<sup>16</sup> and (2) that many (if not all) major American medical association, including the American Medical Association, the American Society of Addiction Medicine, the American Cancer Society, and the American Academy of Pediatrics, reaffirm the view that marijuana does not have medicinal value.<sup>17</sup> The DEA's position on marijuana continues to be echoed by Dr. Nora Volkow, Director of the National Institutes of Health's National Institute on Drug Abuse, who is on record stating that marijuana is a harmful, non-medicinal substance.<sup>18</sup>

- 7. Please read the cited DEA report and, based on the material and information contained in that report, answer each of the following questions separately:**
- a. Do you agree or disagree with any statement within, or portion of, the DEA April 2013 report? If you disagree with any statement within, or portion of, the DEA report, please provide a detailed explanation as to why.**

**RESPONSE:** While I have not read the report to which you refer, as I stated in my testimony and in response to Question 1 above, I do not support the legalization of marijuana. Marijuana is a Schedule I controlled substance with no currently accepted medical use in the United States. The potential for medicinal uses of marijuana and its components is the subject of ongoing research, and such research is appropriately assessed and evaluated by the Department of Health and Human Services within the statutory framework of the Controlled Substances Act as I understand has occurred in the past, as recently as 2011, in the consideration of petitions to reschedule marijuana.

- b. Do you agree or disagree with any of the American medical associations that marijuana has no medicinal value? If you disagree with any of these American medical associations, please provide a detailed explanation as to why.**

**RESPONSE:** While I have not reviewed the particular views stated by the American medical associations you reference, please see response to Part III, Question 2, above.

- c. Are you aware of any domestic medical associations that maintain that marijuana is either medicinal, not harmful, or otherwise beneficial to users?**

**RESPONSE:** While I am not aware of the particular views of every American medical association, please see my response to Part III, Question 2, above.

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<sup>16</sup> *Id.* at 1 (noting that “[m]arijuana is properly categorized under Schedule I of the Controlled Substances Act,” that [t]he clear weight of the currently available evidence supports this classification,” and that “there is a general lack of accepted safety for its use even under medical supervision”).

<sup>17</sup> *Id.* at 2-4 (citing these and other medical associations and organizations that reject the notion that smoked marijuana has any medicinal value).

<sup>18</sup> *e.g.*, New England Journal of Medicine, *Adverse Health Effects of Marijuana Use* (Jun. 5, 2014) (co-authored by Dr. Volkow, and discussing the short- and long-term harmful effects of smoking marijuana, which can include neurological impairment); American Psychological Association, *Marijuana addiction a growing risk as society grows more tolerant* (May 2011) (noting Volkow's comments about how smoking marijuana has the potential to interfere with cognitive development and function, particularly in developing brains).

- 8. Please read Dr. Volkow's cited *New England Journal of Medicine* article and, based on the material and information contained in that article, answer each of the following questions separately:**
- a. Do you agree or disagree with the premise that smoked marijuana is harmful to a person's health? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** While I have not read the article to which you refer, I do not disagree with the premise that smoked marijuana is harmful to a person's health.

- b. Do you agree or disagree with Dr. Volkow's professional assessment about the potential short- and long-term effects of marijuana usage? If you disagree with Dr. Volkow's professional assessment, please provide a detailed explanation as to why.**

**RESPONSE:** I have not read the article to which you refer, and have not personally studied the subject sufficiently to address particular short- and long-term effects of marijuana usage.

- Four states – Colorado, Washington, Oregon, and Alaska – have now legalized the cultivation, distribution, and sale of marijuana for purely recreational use, thereby creating a legalized and regulated market for the illegal controlled substance within their respective states. These states have taken these internal actions to promote marijuana, despite the fact that the cultivation, distribution, and sale of marijuana remain illegal under federal law.<sup>19</sup> Some of these states' efforts may have at least been encouraged by the Obama Administration's recent executive declarations about new federal marijuana-related enforcement priorities.<sup>20</sup> Colorado's legalization of the cultivation, distribution, and sale of marijuana has triggered at least one lawsuit by adjacent states, which now trace current marijuana enforcement difficulties to Colorado's legalization of marijuana.<sup>21</sup>

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<sup>19</sup> Governing, *State Marijuana Laws Map* (Jan. 20, 2015) (identifying Colorado, Washington, Oregon, and Alaska as recreational use states).

<sup>20</sup> James M. Cole, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), identifying the eight following federal priorities regarding the enforcement of federal law against marijuana: (1) preventing the distribution of marijuana to minors; (2) preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; (3) preventing the diversion of marijuana from states where it is legal under state law in some form to other states; (4) preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; (5) preventing violence and the use of firearms in the cultivation and distribution of marijuana; (6) preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; (7) preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and (8) preventing marijuana possession or use on federal property.

<sup>21</sup> Denver Post, *Nebraska and Oklahoma sue Colorado over marijuana legalization* (Dec. 18, 2014) (citing the multi-state lawsuit and the interstate ramifications of intrastate legalization).

- 9. Before you are confirmed to serve as the next Attorney General, what steps will you take to require these states to cease and desist their support of the cultivation, distribution, and sale of marijuana, or to otherwise bring these states into compliance with existing federal controlled substance law?**

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I am not in a position to take the types of action to which you refer.

- 10. Do you agree or disagree with the statement that state laws that affirmatively authorize the cultivation, distribution, or sale of marijuana and that attempt to regulate it are preempted by the Controlled Substances Act or other federal statutory law? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Preemption analysis is statute-specific and presents a question of whether a specific state law conflicts with a federal statutory regime. I have not personally studied the issue of preemption in the context of the particular state laws in existence sufficiently at this time to take a position with regard to any individual statutory scheme.

- 11. Do you agree or disagree with the statement that federal statutory law, by virtue of the fact that it unequivocally declares marijuana to be a Schedule I controlled substance, preempts state law on the subject of marijuana, and therefore necessarily precludes states from creating a marketplace for the cultivation, distribution, and sale of marijuana under state law? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Please see my response to Part III, Question 10, above.

- 12. Do you agree or disagree with the Obama Administration's decision to effectively suspend enforcement of the federal ban on marijuana (except with respect to certain enforcement priorities) in states that have legalized the cultivation, distribution, and sale of marijuana? If you agree with this decision, please provide a detailed explanation as to why.**

**RESPONSE:** Neither the Administration nor the Department of Justice has suspended enforcement of the Controlled Substances Act in states that have legalized the cultivation, distribution, or sale of marijuana. The Department's 2013 memorandum provides guidance, applicable to prosecutors in every state, regarding the use of the Department's limited investigative and prosecutorial resources to address the most significant public health and public safety threats in an effective, consistent and rational way. In doing so, the guidance identifies eight enforcement priorities that historically have been and continue to be of primary importance in guiding the exercise of prosecutorial discretion in the area of marijuana enforcement. The guidance further acknowledges the importance of examining the particular circumstances of each

case and the authority of the Department to pursue investigations and prosecutions that otherwise serve an important federal interest.

**13. Do you agree or disagree with the statement that it violates the Take Care Clause for the Administration to enforce marijuana laws only in states that have not legalized the use of marijuana in some way? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Please see my response to Part III, Question 12, above.

- Reports indicate that there are arguably significant banking irregularities among Colorado's legalized marijuana-related businesses, which raise the significant possibility that these businesses may be improperly avoiding the reporting of marijuana-related revenue in order to avoid paying federal income taxes.<sup>22</sup>

**14. Before you are confirmed to serve as the next Attorney General, can you commit or not commit to dedicating the resources of the Department of Justice to investigating the degree to which these Colorado-based marijuana-related businesses may be avoiding the payment of federal income taxes? If you will not commit to investigating the tax compliance of these businesses, please provide a detailed explanation as to why.**

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I am not currently privy to information about the tax compliance of businesses in Colorado, but I understand that 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.

In all civil and criminal enforcement matters, including those involving violations of the federal tax laws, the Department of Justice uses its discretionary enforcement authority in a manner that seeks to focus limited investigative and prosecutorial resources to address the most significant violations and to maximize the effect of its enforcement actions.

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<sup>22</sup> Denver Post, *IRS fines unbanked pot shops for paying federal payroll tax in cash* (Jul. 2, 2014) (noting how marijuana-based businesses are frequently unable to use legitimate banks because of the illicit nature of their business).

## Questions on DOJ Legal Positions and Practices

### IV. DOJ Refusal to Appoint Special Prosecutors for IRS Matters

- In May 2013, the Treasury Inspector General for Tax Administration (“TIGTA”) confirmed that the IRS had used inappropriate criteria to identify potential political organizations applying for tax-exempt status under Section 501(c)(4).<sup>23</sup> In the months since, the President Obama has publicly discussed the severity of the situation,<sup>24</sup> and Attorney General Holder has asserted an intention to launch a criminal investigation into the above IRS abuses. To date, however, there are no outward signs of an active criminal investigation; the individual appointed to lead the internal Department of Justice investigation into the IRS had contributed heavily to President Obama and the Democratic Party;<sup>25</sup> and Attorney General Holder has refused requests to appoint a special prosecutor for an investigation into IRS.<sup>26</sup>

**1. Do you agree or disagree with Attorney General Holder’s decision to not appoint a special prosecutor? If you agree with his decision, please provide a detailed explanation as to why.**

**2. Before you are confirmed to serve as the next Attorney General, will you or will you not commit to appoint a special prosecutor for the purpose of conducting an investigation into the potential criminal wrongdoing in connection with the IRS’s above documented conduct? If you will not commit to appointing a special prosecutor, please provide a detailed explanation as to why.**

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

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

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<sup>23</sup> Treasury Inspector General For Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 2013).

<sup>24</sup> Press Release, *Statement by the President*, White House (May 14, 2013).

<sup>25</sup> Katie Pavelich, *BREAKING: New Emails Show Lois Lerner Was in Contact With DOJ About Prosecuting Tax Exempt Groups*, TownHall (Apr. 16, 2014).

<sup>26</sup> *Letter from Principal Deputy Assistant Attorney General Peter J. Kadzik to Senator Ted Cruz* (March 10, 2014).

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

- There have also been allegations that the IRS has shared thousands of pages' worth of confidential taxpayer information with the White House.<sup>27</sup> Such sharing may have violated federal laws designed to protect the confidentiality of taxpayer information.
- 3. Before you are confirmed to serve as the next Attorney General, will you or will you not commit to appoint a special prosecutor for the purpose of conducting an investigation into any alleged sharing of confidential taxpayer information with the White House? If you will not commit to appointing a special prosecutor, please provide a detailed explanation as to why.**

**RESPONSE:** Please see response to Part IV, Questions 1 and 2, above.

### **Questions on DOJ Legal Positions and Practices**

#### **V. Operation Fast and Furious**

- On August 19, 2009, the Obama Administration created a new strategy (dubbed "Operation Fast and Furious") to ostensibly stem the flow of illegal weapons from the United States to Mexican drug cartels by putting an emphasis on identifying the trafficking networks rather than arresting straw purchasers of illegal weapons.<sup>28</sup> This, of course, required federal law enforcement to allow weapons to be illegally purchased and then trafficked. Unfortunately, the weapons were not tracked (or were not tracked successfully), which allowed many of these weapons to enter the stream of commerce

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<sup>27</sup> Robert W. Wood, *In 'Lost' Trove Of IRS Emails, 2,500 May Link White House To Confidential Taxpayer Data*, *Forbes* (Nov. 27, 2014).

<sup>28</sup> Office of National Drug Control Policy, *National Southwest Border Counternarcotics Strategy Implementation Update*, White House (Jan. 7, 2010).

and trafficking and be used in the commission of crimes, including violent crimes. The full extent of the damage done by Operation Fast and Furious may never be known.

**1. Do you agree or disagree that Operation Fast and Furious was effective in tracking and monitoring how Mexican drug cartels obtain firearms? If you agree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** In my position as a United States Attorney, I was not personally involved in either the underlying investigation of Operation Fast and Furious, or the Department's responses to Congress regarding it. I share the perspective of many, including the Department of Justice's Inspector General and Attorney General Holder, that this was a flawed operation.

**2. Do you agree or disagree that operations of this kind pose inherent risks to the safety and security of not only the American public, but also to American federal, state, and local law enforcement?**

**RESPONSE:** As noted previously, I share the perspective of many, including the Department of Justice's Inspector General and Attorney General Holder, that this was a flawed operation.

- The House of Representatives has tried for years to acquire information from the Department of Justice about Operation Fast and Furious. The Department's refusal to provide that information<sup>29</sup> on grounds of executive privilege led to the U.S. House of Representatives holding Attorney General Holder in contempt of Congress in 2012. This represented the first time in U.S. history that an Attorney General was held in contempt of Congress.<sup>30</sup> Because the Department refused to enforce the contempt citation, the Committee on Oversight and Government Reform (OGR) filed suit in federal district court. The court ordered the Department to begin producing documents by November 3, 2014.<sup>31</sup> Approximately 64,000 pages of documents were finally produced, although the Department continues to assert privilege over others.<sup>32</sup>

**3. Please provide your legal understanding of the origins, nature, and purpose of the doctrine of executive privilege.**

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I have not had occasion to study the doctrine of Executive Privilege, but my understanding is that the doctrine is constitutionally-based. To preserve and protect the Executive Branch's proper functioning under the Constitution, some materials need to remain confidential. In some

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<sup>29</sup> Deputy Attorney General James Cole, *Letter to Chairman Issa*, Department of Justice (Jun. 20, 2012).

<sup>30</sup> Alan Silverleib, *House Holds Holder in Contempt*, CNN (Jun. 29, 2012).

<sup>31</sup> Josh Gerstein, *Judge won't allow Holder appeal now in contempt case*, Politico, Nov. 18, 2013; Jennifer Koons, *In Loss for Department of Justice, Judge Rules Fast and Furious Lawsuit Can Proceed*, MainJustice.com (Sept. 30, 2013).

<sup>32</sup> Susan Ferrechio, *Department of Justice Dumps 64,000 Pages Related to Fast and Furious*, Washington Times (Nov. 4, 2014).

instances, it becomes necessary for the President to assert Executive Privilege in order to preserve the separation of powers.

4. **Do you agree or disagree that the doctrine was designed only to protect the confidentiality of a president's inner circle of advisors, rather than to provide a general right of the President's cabinet officers to withhold information from the public? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** As stated above, I have not had occasion as the United States Attorney for the Eastern District of New York to study the doctrine of Executive Privilege, but my understanding is that the doctrine is constitutionally-based. I also understand that the scope of the privilege is the subject of ongoing litigation, and that the Department of Justice has taken the position that Executive Privilege is necessary to protect the President's broad Article II functions, a position accepted by the district court.

5. **Before you are confirmed to serve as the next Attorney General, will you or will you not commit to turning over to both chambers of Congress any and all remaining documents that Attorney General Holder has refused to provide during the prior congressional investigations into Operation Fast and Furious? If you will not commit to turning over any and all remaining Operation Fast and Furious documents, please provide a detailed explanation as to why.**

**RESPONSE:** If confirmed as Attorney General, I will commit to being open to a negotiated resolution of the dispute that balances the legislative need for the documents at issue with the important Executive and constitutional interests at stake.

6. **Before you are confirmed to serve as the next Attorney General, will you or will you not commit to preserving the entire amount of Operation Fast and Furious documents in the possession of the Department of Justice, in order to permit a subsequent Administration or federal court the opportunity to review those documents? If you will not commit to preserving unreleased Operation Fast and Furious documents for future review, please provide a detailed explanation as to why.**

**RESPONSE:** If confirmed as Attorney General, I will commit to ensuring that the Department complies with its preservation obligations.

### **Questions on DOJ Legal Positions and Practices**

#### **VI. DOJ Interference with Freedom of the Press**

- Under Attorney General Holder, the Department of Justice obtained warrants to search the phone records of the Associated Press<sup>33</sup> and the personal e-mail account of Fox News Chief Washington Correspondent James Rosen<sup>34</sup> in connection with stories that they published containing classified information, all without informing the target of the search. In testimony before the House Judiciary Committee, Federal Bureau of Investigation Director Robert Mueller testified that investigations of “criminal co-conspirators,” as Rosen was labeled in the search warrant under which the surveillance was conducted, were used “quite often” without anticipating prosecution.<sup>35</sup>

**1. Do you agree or disagree that it is inappropriate for the Department of Justice to label a journalist as a “criminal co-conspirator” and then routinely conduct surveillance of that person without seeking to prosecute him or her, when there is no evidence that the journalist is doing anything other than engaging in well-accepted journalistic practices? If you disagree with this statement, please provide a detailed explanation as to why.**

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

## **Questions on DOJ Legal Positions and Practices**

### **VII. DOJ Foreign Corrupt Practices Act Abuses**

- In much the same way as civil forfeiture, critics of the FCPA note that the Department of Justice collects and retains for use (without further congressional approval or disbursal from the Treasury) fines paid in settlement of federal FCPA investigations. This ability to retain FCPA fines incentivizes not only a vigorous application of the FCPA, but also “creative” legal theories (which can lead to investigations of companies for potentially innocuous behavior). Critics of the FCPA, and the Department’s pursuit of FCPA investigations, point out that the combination of investigation and potential litigation expenses frequently drive what may be innocent companies to settle, which both cements the revenue source for the Department and prevents federal judges from having opportunities to interpret provisions of the FCPA.

<sup>33</sup> Mark Sherman, *Gov’t Obtains Wide AP Phone Records In Probe*, Associated Press (May 13, 2013).

<sup>34</sup> Ann E. Marimow, *A rare peek into a Department of Justice leak probe*, Washington Post (May 19, 2013).

<sup>35</sup> FBI Oversight Hearing Before the H. Comm. on the Judiciary, 113 Cong. (2013) (Statement of Dir. Mueller, Chairman).

**1. Do you agree or disagree with the claim that the ability of the Department of Justice to keep and use FCPA settlement fines incentivizes application of the FCPA? If you disagree with this claim, please provide a detailed explanation as to why.**

**RESPONSE:** I disagree with this claim, which I believe is built on a faulty premise regarding the process by which criminal fines and other financial penalties are paid and subsequently put to use. Fines for FCPA violations are not “kept” or “used” by the Department, and no such use incentivizes application of the FCPA. Rather, as with all cases, the Department considers the strength of the evidence and other long-standing policy considerations (*see, e.g.*, United States Attorney’s Manual (USAM) 9-28.300) in determining whether to bring an FCPA prosecution.

A company convicted of an FCPA violation pays any accompanying fine not to the Department but to the relevant U.S. district court clerk’s office. Those funds are then directed to the Crime Victim Fund, which is a U.S. Treasury fund created pursuant to Title 42, United States Code, Section 10601. Funds paid into the U.S. Treasury are not available for use by the Department except through the appropriations process or by statute.

A company that settles an FCPA investigation through a non-prosecution or deferred prosecution agreement pays any accompanying financial penalty not to the Department but to the U.S. Treasury. Pursuant to Congressional authorization and strict Departmental oversight, a small percentage of these funds may be made available to the Department. More specifically, in 1993 Congress authorized the creation of a 3% working capital fund (“3% Fund”) for the Department. *See* Public Law 113-234, 28 C.F.R. Section 527. Three percent of penalties associated with certain financial recoveries, including through non-prosecution and deferred prosecution agreements, are paid into the 3% working capital fund. After rigorous review by the Collection Resources Allocation Board, overseen by the Justice Management Division, the Department may award funds from the 3% Fund to support certain litigation, data administration, and personnel costs.

**2. Has your office actually tried any FCPA cases to a verdict in federal court? If the answer is yes, please provide details about these cases.**

**RESPONSE:** The Eastern District of New York has participated in a number of significant FCPA investigations with the Fraud Section of the Criminal Division of the Department, and it continues to do so. To date, these investigations have resulted in two corporate resolutions: (1) In re Ralph Lauren, NPA, \$882,000 penalty, press release at: <http://www.justice.gov/opa/pr/ralph-lauren-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay>; and (2) In re Comverse Technology, Inc., NPA, \$1.2 million penalty, press release: <http://www.justice.gov/opa/pr/comverse-technology-inc-agrees-pay-12-million-penalty-resolve-violations-foreign-corrupt>); and one guilty plea by Garth Peterson of Morgan Stanley (and a declination against Morgan Stanley) (press release: <http://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required>). While the Department has conducted FCPA trials in many

districts, the United States Attorney's Office for the Eastern District of New York has not had an FCPA trial to date.

- As you know, the Criminal Division's Fraud Section is charged with investigating and enforcing the criminal provisions of the FCPA. Recently, Andrew Weissmann was selected to be the Chief of the Fraud Section. Mr. Weissmann is a former prosecutor and FBI general counsel. In private practice, however, Mr. Weissmann has been an outspoken critic of DOJ's FCPA program. Specifically, in a report<sup>36</sup> Mr. Weissmann drafted for the U.S. Chamber of Commerce's Institute for Legal Reform, he has recommended that: (1) a compliance defense to the FCPA should be added; (2) a company's liability should be limited for the prior actions of a company it has acquired; (3) a "willfulness" element should be added for corporate criminal liability; (4) a company's liability should be limited for the actions of a subsidiary; and (5) the definition of "foreign official" under the FCPA should be changed.

**3. Do you agree with any, some, or all of Weissmann's proposals for reforming the FCPA?**

**RESPONSE:** It is my understanding that Mr. Weissmann made these comments while in private practice and in connection with his representation of the U.S. Chamber Institute for Legal Reform ("Chamber"). It is also my understanding that, in the intervening time period, the Department has met with the Chamber, as well as other stakeholders, to engage in a healthy and productive dialogue regarding the Department's interpretation and application of the FCPA. If confirmed as Attorney General, I would continue to foster dialogue with the Chamber and other stakeholders regarding our FCPA program.

**4. Which of these changes (if any) do you think could be done administratively, as opposed to legislatively?**

**RESPONSE:** I do not support the proposed changes. Several of them would be a significant departure from general principles of corporate criminal law, effectively creating unique exceptions for FCPA cases that are unwarranted, are contrary to Congress's intent in enacting the FCPA, and would impose often insurmountable obstacles to effective enforcement of the FCPA.

- In 2004, then-Deputy Attorney General (and current director of the Federal Bureau of Investigation) James Comey stated that "[the Department of Justice wants] real time enforcement, so that the public and potential white collar criminals see that misdeeds are swiftly punished." Despite this statement, the 2014 OECD Foreign Bribery Report noted that "the average time taken (in years) to conclude foreign bribery cases has steadily increased over time, [from an average of 1.3 years in 2004] peaking at an average of 7.3

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<sup>36</sup> U.S. Chamber Institute for Legal Reform, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act* (Oct. 26, 2010).

years taken to conclude the 42 cases in 2013.”<sup>37</sup> Lengthy federal investigations not only place a tremendous financial burden on the targeted corporations and their shareholders, but also on taxpayers who shoulder the agency’s expenses for conducting the investigation.

- 5. Do you agree or disagree with Director Comey’s statement regarding the value of real-time law enforcement? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** I agree that law enforcement must move swiftly and responsibly in investigating both white collar and other criminal activity. I also agree that, for deterrence purposes, it is important to move quickly and bring charges against those individuals and companies that have engaged in criminal behavior.

While the Department has been working diligently to find meaningful and reasonable ways to reduce the time white collar FCPA investigations take, the question’s reliance on the OECD Foreign Bribery Report is misplaced. As I understand it, the referenced statistic is based on an aggregate of all the OECD Working Group members’ cases, rather than isolating the time taken by the United States in its cases. Also, this statistic does not measure the length of the criminal investigation. Rather, it measures the time between the last criminal act and the sanction, increasing substantially the time measured, since the Department (or foreign law enforcement) might not learn about a potential violation until years after the last criminal act has occurred.

- 6. Given that the FCPA Unit within the Department’s Fraud Section has expanded its personnel from 2004 to today, and given that the Department receives even more international cooperation today than it did in 2004, do you agree or disagree that the Department should be witnessing reduced investigative timelines for FCPA investigations rather than increased timelines? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Additional resources and cooperation are greatly appreciated and can often be key factors in expediting criminal investigations. However, they are only two of many factors that can influence the time it takes to conduct a successful investigation of any kind. Compared to other white collar investigations, the challenges associated with FCPA investigations can be much greater. Because of the nature of the offense, most of the evidence in these cases is typically located overseas. While international cooperation efforts have expanded significantly over the past ten years, the process for obtaining evidence from overseas is still time-consuming.

- 7. Before you are confirmed to serve as the next Attorney General, will you or will you not commit to dramatically reducing the timeline of FCPA-related Fraud Unit investigations, in order to reduce the financial burden on potentially innocent corporations and reduce investigation-related taxpayer expenses? If**

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<sup>37</sup> Organization for Economic Cooperation and Development, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (Dec. 2, 2014).

**you will not commit to reducing these investigative timelines, please provide a detailed explanation as to why.**

**RESPONSE:** Under my leadership, the Eastern District of New York has been committed to increasing the speed of its white collar investigations, including its FCPA investigations. As a result of the particular challenges of corporate and overseas investigations, however, the investigations can take a significant amount of time. While improvements in this area can be made, irresponsibly or artificially expediting an investigation solely for the sake of speed can harm the investigation and the pursuit of justice, as well as create greater harms to the targets, subjects, and witnesses in our investigations. If I am confirmed as Attorney General, you can be assured that the Department will continue to review each case on its merits and will move as expeditiously and responsibly as possible.

- Often, many of the countries with corrupt officials are the same countries that harbor terrorists, that seek to undermine U.S. foreign policy, and that have rampant bid rigging and illegal cartel conduct. On the opposite side of the equation, there are an increasing number of countries that have passed new anti-bribery statutes in the hope of curbing their own internal corruption problems and spurring legitimate economic growth.

**8. How will you marshal the criminal justice resources of the Department of Justice to enforce the FCPA in a way that helps in the fight against terrorism, cartel conduct, and international money laundering? Please provide a detailed explanation, based on your current experience as United States Attorney for the Eastern District of New York, of how you intend to tackle the problem.**

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I am well aware of the link between corruption, corrupt regimes, and transnational crime, including economic crime, human trafficking, narcotics trafficking, money laundering, and even terrorism. In addition to prosecuting foreign corruption, narcotics trafficking, money laundering, and terrorism cases, the Department works closely with its counterparts throughout the U.S. government to devise and implement robust anticorruption strategies. For example, my Office has worked closely with the intelligence community on terrorism and corruption-related matters. The Department further participates, along with colleagues in other agencies in the U.S. government, in developing anticorruption policies through various international organizations and anticorruption conventions, including the Organization for Economic Cooperation and Development's Working Group on Bribery, the G-7, the G-20, and the U.N. Convention Against Corruption. The Department also consults with civil society organizations involved in the battle against corruption.

If confirmed as the Attorney General, I would continue to ensure that fighting corruption overseas, as well as domestically, remains a top priority for the Department. I would ensure that resources are appropriately directed to enforcing U.S. laws targeting foreign corruption, recovery of assets stolen by kleptocrats, and corrupt regimes.

**9. Given that more and more countries are enacting and enforcing anti-bribery statutes, would you agree or disagree that the FCPA ought to be amended to restrict FCPA jurisdiction to countries that do not have a prima facie anti-corruption infrastructure? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Such an exception would be unique under federal law. I disagree with this approach, as I believe it would do harm to the Department’s anticorruption efforts. The Department works closely with countries that are developing their own anticorruption infrastructures, and we are well aware that it can take years of persistent effort to create an effective and holistic response to corruption of domestic and foreign officials.

As a recent OECD Report on Foreign Bribery noted, enforcement of existing anticorruption statutes, particularly those targeting foreign bribery, is improving but has a long way to go to see consistent and effective enforcement even among top economies in the world.

- The Department of Justice generally emphasizes the benefit of voluntary self-disclosure to, and voluntary cooperation with, FCPA investigations. Corporations are increasingly questioning the benefit, however, of rushing toward self-disclosure without demonstration of some sort of legal or cost benefit for doing so. To address this, some practitioners have suggested that the FCPA should contain a “safe harbor” from criminal prosecution for corporations that (1) have robust compliance programs, (2) self-disclose potential FCPA violations, and (3) cooperate fully with the Department’s investigation, akin to what the Antitrust Division has for cartel enforcement.<sup>38</sup> (The Department would, of course, be able to continue to obtain non-criminal penalties for violations.)

**10. Do you agree or disagree with the statement that there should be an FCPA “safe harbor provision” to help corporations that are trying to do the right thing? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** I do not believe a “safe harbor provision” is necessary or desirable. Both the U.S. Sentencing Guidelines and the Department of Justice already provide significant benefits for companies that have robust compliance programs, self-disclose potential FCPA violations, and cooperate fully with the Department’s investigation. Indeed, in a recent FCPA matter, the Criminal Division and the Eastern District of New York declined to prosecute Morgan Stanley based on many of those factors, among others, despite the fact that one of its Managing Directors bribed a foreign official to obtain business for and on behalf of Morgan Stanley.

**11. If you agree with the concept of an FCPA safe harbor provision, please describe what the structure or contours of such a safe harbor provision should be, and how you would implement that provision. Please provide a detailed explanation,**

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<sup>38</sup> Christopher M. Matthews, *Terwilliger to Propose New Rules for FCPA Disclosure*, Just Anti-Corruption (Jun. 22, 2010).

**based on your current experience as United States Attorney for the Eastern District of New York, of how you would write and implement such a provision.**

**RESPONSE:** The factors outlined in your question are important considerations in all FCPA cases, but I do not believe that a “safe harbor provision” is necessary or desirable.

- Members of the business community, practitioners, commentators, and even members of Congress have expressed frustration with the Department of Justice’s failure to publicize declined FCPA prosecutions, even where there is public knowledge that a particular corporation is under investigation. This practice may have several negative effects, including preventing corporations from having clarity about what type of conduct is considered acceptable. Given the Department’s financial incentive to ensure robust application of the FCPA, there is concern that this refusal to publish decline-to-prosecute information is intended to protect the FCPA fine-based revenue source for the Department.

**12. Would you agree or disagree with the statement that FCPA decline-to-prosecute decisions should be made available to the public? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** I agree that the Department should continue to explore ways by which it can responsibly share information while protecting the many sensitive interests that federal, criminal investigations implicate. The Department has a longstanding general practice of refraining from discussing non-public information on matters it has declined to prosecute. This practice is designed to protect ongoing investigations, privacy rights and other interests of uncharged parties, and sensitive, internal law enforcement deliberations. This practice and these considerations apply across the enforcement of all federal criminal laws.

Nevertheless, I must emphasize that the Department does pursue means by which declinations and other information about the decision to prosecute can be responsibly shared with entities or individuals under investigation, the business community, practitioners, commentators, and members of Congress. The United States Attorney’s Manual (USAM) describes situations in which a United States Attorney can exercise discretion to provide notice that an investigation is being closed. *See* USAM § 9-11.155.

Further, in the last two years, the Department has made great efforts to provide more information and transparency in the area of the FCPA, including the publication of A Resource Guide to the U.S. Foreign Corrupt Practices Act (the “Resource Guide”). The Resource Guide, which was written by the Department and the U.S. Securities and Exchange Commission (SEC), provides the public with extensive information about the Department’s FCPA enforcement approach and priorities. It contains a section on declinations and sets out criteria prosecutors consider in declining to bring a prosecution under the FCPA. In addition, the Department responds to opinion requests concerning its enforcement intent about actions that may be perceived as violating the anti-bribery provisions of the FCPA. *See* Title 15, United States Code, Sections 78dd-1(e) and 78dd-2(f). These opinion letters provide significant additional insight into the

Department's enforcement views, as well as transparency for companies, individuals, and practitioners as to what is acceptable or not.

**13. Before you are confirmed to serve as the next Attorney General, will you or will you not commit to publishing information about the FCPA cases that the Department has decided not to pursue or prosecute? If you will not commit to publishing this information, please provide a detailed explanation as to why.**

**RESPONSE:** I will commit to continuing the Department's practice of actively pursuing and implementing means by which declinations and other information about the decision to prosecute, or not, can be responsibly and appropriately shared. As detailed in my answer to the preceding question, the United States Attorney's Manual already provides a mechanism to provide notice that an investigation is being closed. I also commit to continuing the Department's recent efforts to provide more information and transparency, as it did by publishing the Resource Guide.

**Questions on DOJ Legal Positions and Practices**

**VIII. DOJ Civil Asset Forfeiture Abuses**

- There has been recent congressional concern about the Department of Justice's use of civil asset forfeiture, which has historically allowed federal prosecutors to seize cash and property from an individual before that individual is charged with a crime (and, in many circumstances, in the absence of any criminal charges or due process hearings).<sup>39</sup> It is also our understanding that you have been an aggressive user of civil asset forfeiture as United States Attorney for the Eastern District of New York, with your office receiving more than \$113 million in civil forfeiture proceeds from 123 cases between 2011 and 2013.<sup>40</sup>

**1. Please confirm the above number of civil asset forfeiture actions and the sum of civil asset forfeiture revenue taken in by your office during your recent tenure as United States Attorney (and, if these figures are incorrect, please provide the correct or updated figures).**

**RESPONSE:** During the period between May 1, 2010 and January 21, 2015, my Office filed approximately 196 civil asset forfeiture cases. While some of those cases remain pending, the completed cases resulted in the forfeiture of approximately \$95 million in civil forfeiture proceeds.

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<sup>39</sup> *Loretta Lynch's Money Pot*, Wall Street Journal (Nov. 21, 2014).

<sup>40</sup> *Id.*

- 2. Of the total number of civil asset forfeiture actions that have occurred in the Eastern District of New York during your recent tenure as United States Attorney, how many of those actions resulted in formal criminal charges:**
- a. against the person from whom the assets were originally seized?**
  - b. against another person (such as an accomplice in criminal activity)?**

**RESPONSE:** The Department of Justice does not maintain statistical information that would enable my Office to respond to this request. The Department's system for tracking and monitoring forfeiture matters is an asset tracking system, not a case tracking system. As such, the system contains only limited information on criminal cases that include forfeiture allegations for specific assets. Data is not recorded for every criminal case that may have been brought against a person involved in a civil asset forfeiture matter. Accordingly, it is not possible to provide accurate statistics regarding the number of criminal cases that were brought against a person involved in a civil asset forfeiture matter.

Nevertheless, I am aware of recent cases in which my Office has achieved great success through civil forfeiture actions against assets either in the absence of criminal charges or where assets cannot be forfeited in connection with a criminal case. In these cases, civil asset forfeiture functioned as an important tool—and in some instances, the only tool—for taking the profit out of crime and preserving the availability of assets for return to crime victims.

For example, in *United States v. All Funds on Deposit at Citigroup Smith Barney, et al.*, Kobi Alexander, a criminal defendant and former CEO of Comverse Technology, Inc. (“Comverse”), forfeited over \$46 million to the United States. The civil forfeiture action that led to this recovery was filed after Alexander fought extradition to the United States from Namibia in connection with pending charges of conspiracy, mail, wire and securities fraud and other offenses stemming from his scheme to backdate employee option grants. After defeating a number of challenges to the forfeiture by Alexander and his wife, the government entered into an agreement in which Alexander agreed to forfeit the seized funds in order to return the forfeited funds to Comverse, the victim of the charged crimes. In turn, Comverse agreed to use the monies to settle shareholder litigation arising from the backdating scandal. Because Alexander was out of the country and would not return to the United States, the remission of this money to victims could not have been achieved through criminal forfeiture, which requires a criminal conviction.

Similarly, in *United States v. Tai*, my Office used civil forfeiture to recover proceeds of crime where, again, a conviction could not be obtained. In that case, Tai passed away before his trial. By commencing a civil forfeiture action, the government was able to preserve approximately \$7 million in assets that represented proceeds of health care fraud, and which are now available for return to Medicare, Medicaid and private insurance company victims. Due to the Tai's untimely death, there could be no criminal conviction, and this result could not have been achieved through criminal forfeiture.

My Office also achieved the preservation of tens of millions of dollars in tainted assets through the use of civil forfeiture in connection with the prosecution of defendants Brian Callahan and Adam Manson. In the related criminal case, both defendants pled guilty to securities and wire fraud in connection with a large Ponzi scheme, misappropriating approximately \$96 million from their victims. Callahan diverted millions of the fraudulently-obtained funds to defendant

Manson's real estate project, a 117-unit beachfront luxury resort and resident development in Montauk known as the Panoramic View. Before the criminal investigation began, in April 2012, my Office initiated a civil forfeiture action against Callahan's residence and the unsold units of the Panoramic View, which is worth at least approximately \$60 million. Fifteen months later, in July 2013, the grand jury returned a criminal indictment. The filing of the civil forfeiture action served to restrain and prevent the dissipation of valuable assets while the criminal investigation was pending, thereby preserving property for potential return to victims of the defendants' scheme. If the property instead was sought to be forfeited through criminal forfeiture, it would have been at risk of being sold or otherwise dissipated prior to the grand jury's indictment.

- On Friday, January 16, 2015, Attorney General Holder issued an order restricting the practice whereby the federal government "adopts" state and local law enforcement seizures of property that might otherwise violate state civil asset forfeiture laws. Under the stated policy, this practice would be limited to state and local seizures of only "firearms, ammunition, explosives, and property associated with child pornography."<sup>41</sup> While the order appears to be a step in the right direction, it also appears to be very limited in scope. For one, the order does not restrict in any way the federal government's ability to engage in unlimited civil asset forfeiture. Nor does it restrict any joint federal-state civil asset forfeiture.

**3. Do you agree or disagree that the federal government's ability to engage in civil asset forfeiture presents due process concerns? If you disagree, please provide a detailed explanation as to why.**

**RESPONSE:** Asset forfeiture is a critical law enforcement tool intended to deprive criminals of the proceeds and instrumentalities of their crime and to compensate victims of crime. The civil asset forfeiture regime includes extensive safeguards to protect due process and property rights. Because civil asset forfeiture is a proceeding against property and not against an individual, it does not require an accompanying criminal conviction. Rather, the government must prove by a preponderance of the evidence that the property at issue is linked to criminal activity. Civil forfeiture law further provides protection for any innocent owner of property who is unaware of its link to criminal activity. As a result of civil forfeiture, the Department has been able to return billions of dollars to the victims of crime.

**4. Before you are confirmed to serve as the next Attorney General, will you or will you not commit to reducing the Department of Justice's use of civil asset forfeiture in the absence of formal criminal charges? If you will not commit to reducing civil asset forfeiture in the absence of formal criminal charges, please provide a detailed explanation as to why.**

**RESPONSE:** Please see response to VIII, Question 3, above.

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<sup>41</sup> Eric Holder, *Prohibition on Certain Federal Adoptions of Seizures by State and Local Law Enforcement Agencies*, Department of Justice (Jan. 16, 2015).

- Critics of civil asset forfeiture have highlighted the Department of Justice’s ability under current law to collect in an offsetting account and use (without further congressional approval or disbursal from the Treasury) revenue derived from civil asset forfeiture proceeds for Department activities. Because the Department has the freedom to keep and use this revenue without additional steps, critics maintain that the Department has every incentive to continue, and even expand, its use of civil asset forfeiture (and, for all intents and purposes, can self-fund certain agency functions, outside of the normal appropriations framework). One proposed solution for eliminating the incentive to engage in civil asset forfeiture is to change federal law to require that any proceeds collected as a result of civil asset forfeiture be deposited directly into the general fund of the Treasury.

**5. Do you agree or disagree that the Department’s ability to keep and use proceeds from civil asset forfeitures incentivizes the Department’s use of civil asset forfeiture? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Federally forfeited assets are deposited into the Assets Forfeiture Fund. These funds are in turn used to compensate victims of crime, pay administrative costs, and provide critical resources to state and local law enforcement. The Department has extensive procedures in place to ensure that forfeited assets are used appropriately, including a prohibition that they be used to fund employee salaries. As a result of forfeiture, the Department has been able to return billions of dollars to the victims of crime. If forfeited assets were deposited into the General Treasury instead of the Assets Forfeiture Fund, they would no longer be available for victims of crime.

**6. Do you agree or disagree that it would be more appropriate for the Department’s proceeds from civil asset forfeiture to be deposited directly into the general fund of the Treasury? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Please see response to VIII (5) above.

- Frequent deposits beneath the \$10,000 threshold can trigger federal scrutiny on suspicion the depositors are seeking to evade federal oversight for crimes like money laundering or drug trafficking. On occasion, such deposits are seized using the Department of Justice’s civil asset forfeiture capacity. Frequent, small deposits, however, are a common habit of legitimate small businesses, which rely on small injections of revenue and adequate account levels to ensure smooth bill payment and operations.

**7. Do you agree or disagree that the Department should exercise greater care when it attempts to seize bank accounts of individuals and entities that could be sole proprietors or legitimate small businesses? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** The structuring laws enacted by Congress are intended to prevent individuals from structuring financial transactions to avoid reporting requirements under the Bank Secrecy Act. Frequently, structured cash deposits are designed to conceal crimes such as narcotics offenses, money laundering and tax evasion. The currency reporting requirements have been an effective tool in assisting law enforcement in its detection of such criminal conduct. Structuring deprives law enforcement of this critical information, which is why Congress made it a criminal offense.

- 8. Do you agree or disagree that there should be a “loser pays” policy in which the federal government would pay for the legal expenses of individuals whose property is ultimately determined by a federal court to have been seized inappropriately (or if there is some other demonstrable failure of due process)? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** With respect to a “loser pays” policy, I understand that the law currently provides that a prevailing claimant in a civil forfeiture proceeding is entitled to have their attorneys’ fees paid by the government.

## **Questions on National Security Issues**

### **I. Obama Administration’s Criminal Justice Approach to Terrorism**

- The Department of Justice recently announced the prosecution of two separate cases in the Eastern District of New York involving attacks by terrorists on U.S. troops in overseas theaters of operation.

The first case, announced on January 20, 2015, charged two Yemeni nationals who are members of al Qaeda, Sadiq Al-Abbadi and Ali Alvi, with conspiring to murder U.S. nationals abroad and providing material support to al Qaeda. The complaint alleges that the two men engaged in attacks against U.S. forces in Afghanistan, in which an Army Ranger was killed and several others were seriously wounded. One of the defendants also engaged in attacks against U.S. forces in Iraq. The complaint states that the alleged conduct occurred between 2003 and 2008. The defendants were arrested in Saudi Arabia and then extradited to the United States.<sup>42</sup>

The second case, announced on January 23, 2015, charged the defendant Faruq Khalil Muhammed ‘Isa, who is identified as a member of a multinational terrorist network, with conspiring to kill U.S. nationals abroad and providing material support to a terrorist conspiracy to kill U.S. nationals abroad. The complaint alleges that the defendant

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<sup>42</sup> Press Release, *Two Yemeni Nationals Charged with Conspiring to Murder United States Nationals Abroad and Providing Material Support to al Qaeda*, U.S. Department of Justice (Jan. 20, 2015).

assisted in orchestrating a suicide attack that killed five U.S. soldiers. The defendant was extradited from Canada.<sup>43</sup>

- 1. Do you agree or disagree with the Obama Administration's decision to bring to the United States terrorist fighters who engaged in combat against our troops overseas and to try them as civilian criminals entitled to all the procedural protections of our criminal justice system? If you agree with this decision, please provide a detailed explanation as to why.**

**RESPONSE:** I believe strongly that the United States government must use every available tool, including detention of unlawful enemy combatants and military commission trials, as well as Article III prosecutions, to protect the American people. In any particular case, representatives of the agencies who are tasked with protecting the American people, including the Department of Defense, the Department of Homeland Security, the Department of Justice and agencies in the Intelligence Community, work together to determine the most effective tools to apply in that case, based on the particular facts and applicable law. As the United States Attorney for the Eastern District of New York, my role to date has been limited to determining whether or not there was a prosecutable federal case, not which was the appropriate tool to employ.

Because the cases to which you refer are ongoing prosecutions, I cannot comment on the specific facts or decision-making processes in those matters, other than to indicate that the process described above was observed.

- 2. Do you agree or disagree that these fighters should be treated as unlawful enemy combatants subject to indefinite detention and trial by military commission for violations of the laws of war? If you disagree with this decision, please provide a detailed explanation as to why.**

**RESPONSE:** Please see response to Question 1, above.

- 3. Are you concerned that by bringing terrorists to the United States for trial, Administration policy might draw terrorists here and expose the public to danger?**

**RESPONSE:** Although I cannot comment on these particular ongoing cases, I can say that appropriate steps have always been taken to ensure the security of terrorism-related proceedings in my district, as well as to ensure that terrorists detained in our prisons are held securely and do not pose a threat to our citizens. From my firsthand experience as a United States Attorney, I can attest that the criminal justice system has proven in hundreds of terrorism cases since before 9/11 to be a swift, secure, and effective option, among others, to incapacitate terrorists, gain valuable intelligence, and ensure that justice is served. While we must remain vigilant to the persistent

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<sup>43</sup> Press Release, *Alleged Terrorist, Charged With Murder of Five American Soldiers, Extradited to United States*, U.S. Department of Justice (Jan. 23, 2015).

risk of terrorist attacks and use all lawful tools of national power, I am confident that we can continue to prosecute terrorists in our courts and detain them in our prisons safely and securely.

## **Questions on National Security Issues**

### **II. Obama Administration's Guantanamo Bay Detention Facility Policy**

- It has been reported that, of the 620 detainees released from U.S. military's Guantanamo Bay Detention Facility (GTMO), at least 180 of these detainees have returned (or are suspected of having returned) to the battlefield to fight against U.S. forces and allies. According to U.S. officials, of those 180 confirmed or suspected recidivists, 20 to 30 have either joined ISIS or other militant groups in Syria.<sup>44</sup> There are now only 122 detainees at GTMO.<sup>45</sup>

**1. Do you agree or disagree with the President's decision to close GTMO? If you agree, please provide a detailed explanation as to why.**

**RESPONSE:** I support the President's policy. Although it is generally lawful to detain enemy combatants consistent with the laws of war for the duration of a conflict, I am concerned about the adverse effect of Guantanamo on our national security interests and cooperation with our allies, as identified by the President and the Department of Defense. As a United States Attorney, I am aware of concerns Guantanamo raises in the context of trying to secure the cooperation of foreign governments in terrorism cases.

**2. If you agree, please provide your view on what to do with the remaining 122 detainees.**

**RESPONSE:** The President has made clear that we will not transfer anyone from Guantanamo unless the threat the detainee may pose has been sufficiently mitigated and the transfer would be consistent with national security and our humane treatment policy. It is my understanding that each Guantanamo detainee has been evaluated based on a thorough interagency process, that 54 detainees have been approved for transfer unanimously by relevant Departments and Agencies, and that reviews for certain categories of detainees not currently approved for transfer are continuing by Periodic Review Boards according to criteria set forth in an executive order and statute. I support efforts to ensure that detainees are thoroughly evaluated to assess any threat they may pose and to transfer them to other countries only after satisfying the criteria for transfers established by law. Other detainees at Guantanamo are being prosecuted in military commissions, and I fully support that process.

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<sup>44</sup> Justin Fishel & Jenner Griffin, *Sources: Former Guantanamo detainees suspected of joining ISIS, other groups in Syria*, Fox News (Oct. 30, 2014).

<sup>45</sup> Fact Sheet, *Guantanamo by the Numbers*, Human Rights First (Jan. 15, 2015). Of the 242 detainees at the start of the Obama presidency, 116 have been transferred, repatriated, or resettled. *Id.*

**3. Is it illegal for the United States government to detain terrorists indefinitely at GTMO?**

**RESPONSE:** It is lawful for the United States to detain enemy combatants at Guantanamo for the duration of the conflict, consistent with the 2001 AUMF as informed by the law of war, and subject to review of their detention by the courts.

**4. Is it illegal for the United States government to detain terrorists indefinitely at any other facility?**

**RESPONSE:** The location of a particular detention facility would not alter the government's detention authority, although the laws of war would inform in what circumstances such individuals could be detained.

**5. Do you or do you not have concerns about what seems to be the Obama Administration's policy of transferring GTMO detainees to other governments' custody, regardless of whether these governments are willing or able to demonstrate their intent or capacity to continue to detain the transferred individuals?**

**RESPONSE:** The President has made clear that we will not transfer anyone from Guantanamo unless the threat the detainee may pose has been sufficiently mitigated and the transfer would be consistent with national security and our humane treatment policy. It is my understanding that the security measures provided by the receiving country are thoroughly evaluated before any transfer decision is made. If I am confirmed as Attorney General, I would support the Administration's efforts to ensure that detainees are thoroughly evaluated to assess threat they may pose and to transfer them only where we can do so consistent with our national security and with the criteria for transfers established by law.

**6. If it is illegal for the United States government to detain terrorists indefinitely at GTMO or any other facility, why is it legal or permissible for the United States government to transfer detainees to another government for indefinite detention?**

**RESPONSE:** I am unaware of any practice or policy to this effect.

**7. Will you or will you not commit to reviewing the Administration's policy of transferring detainees to foreign governments in light of the evidence of recidivism of transferees? If you will not commit to reviewing this policy, please provide a detailed explanation as to why.**

**RESPONSE:** The President has made clear that we will not transfer anyone from Guantanamo unless the threat the detainee may pose has been sufficiently mitigated and the transfer is

consistent with national security and our humane treatment policy, and that security measures provided by the receiving country are thoroughly evaluated before any transfer decision is made. If I am confirmed as Attorney General, I would support the Administration's efforts to ensure that detainees are thoroughly evaluated to assess any threat they may pose and to transfer them only where we can do so consistent with our national security and with the criteria for transfers established by law. It is my understanding that the most recent public report released by the Office of the Director of National Intelligence found that over 90% of the detainees transferred by the current Administration are neither confirmed nor suspected of having reengaged in terrorist or insurgent activity. Past instances of recidivism are and should be an important consideration.

### **Questions on National Security Issues**

#### **III. Obama Administration's U.S. Citizen Domestic Drone Strike Policy**

- In February 2013, a "White Paper" from the Department of Justice was released explaining that the government has the authority to kill U.S. citizens in a foreign country, outside the area of hostilities, if they are senior operational leaders of al Qaeda, provided that certain conditions are met, including that they present an "imminent" threat.<sup>46</sup>
  1. **Do you agree or disagree that it would violate the Due Process Clause of the United States Constitution if the President ordered the killing of a U.S. citizen on U.S. soil without judicial process if that U.S. citizen does not present an imminent (meaning immediate) threat of death or serious bodily injury to others? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** In a letter to Senator Rand Paul addressing this issue, Attorney General Eric Holder stated that the President does not have "the authority to use a weaponized drone to kill an American not engaged in combat on American soil." Although I have not had occasion in my role as a United States Attorney to consider the question in depth, I agree with Attorney General Holder's response.

- The Administration's 2013 White Paper, which applied only to targeted killings of Americans overseas, explained that an "imminent" threat "does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future."<sup>47</sup>
  2. **Do you agree or disagree with this White Paper's definition of "imminent"? If you agree, please provide a detailed explanation as to why.**

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<sup>46</sup> Office of Legal Counsel, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Organizational Leader of Al Qaeda or an Associated Force*, Department of Justice.

<sup>47</sup> *Id.*

**RESPONSE:** The Administration has stated that, in the counterterrorism context, the imminence determination incorporates consideration of at least the following factors: the relevant window of opportunity to act against the individual posing the threat; the possible harm that missing that window would cause to civilians; and the likelihood of heading off future disastrous attacks against the United States. I have not had occasion in my role as a United States Attorney to consider such questions in depth, but the Administration’s statement accords with my understanding that the meaning of “imminence” depends on the context and that the determination whether a threat is imminent should take into account all relevant facts and circumstances, and may be difficult to evaluate in the abstract.

## **Questions on Voting Rights**

### **I. The Voting Rights Act’s Preclearance Requirement**

- In *Shelby County v. Holder*, 133 S. Ct. 2612 (June 25, 2013), the Supreme Court invalidated Section 4 of the Voting Rights Act, which had established the formula for determining which states and localities must obtain preclearance from the Department of Justice before implementing any changes to their respective election laws.

- 1. Do you agree or disagree with the Supreme Court’s holding in *Shelby County* that the Voting Rights Act formula based on social conditions in 1965 no longer accurately reflected today’s social conditions? If you disagree with the Court’s holding, please provide a detailed explanation as to why.**

**RESPONSE:** The decisions of the Supreme Court represent the law of the land. I note that the *Shelby County* case itself remains as pending litigation in which the Department is a defendant, and for that reason, I cannot comment further.

- 2. Do you agree or disagree with the view that the imposition of a federal preclearance requirement for changes to a state’s election laws violates the Tenth Amendment of the United States Constitution? If you disagree with this view, please provide a detailed explanation as to why.**

**RESPONSE:** This question relates to whether to impose a new preclearance requirement in some circumstances, and that question is at issue in various pending litigation in which the Department is participating. As a result, I cannot comment.

- 3. Do you agree or disagree with the view that the preclearance requirement of the Voting Rights Act is obsolete in modern America? If you disagree with this view, please provide a detailed explanation as to why.**

**RESPONSE:** Because this necessarily relates to the question of whether to impose a new preclearance requirement in some circumstances, which is at issue in various pending litigation in which the Department is participating, I cannot comment.

## Questions on Voting Rights

### II. Voter Identification Laws and Legislation

- In November 2014 – after President Obama nominated you to serve as Attorney General – you were recorded in a video<sup>48</sup> speaking to an audience in Long Beach, California. You were highly critical of states’ voter identification laws. In the course of giving this speech, you made the following comments:
  - “Fifty years after the march on Washington, 50 years after the Civil Rights Movement, we stand in this country at a time when we see people trying to take back so much of what Dr. King fought for. ... People try and take over the State House and reverse the goals that have been made in voting in this country.”
  - “But I’m proud to tell you that the Department of Justice has looked at these laws, and looked at what’s happening in the Deep South, and in my home state of North Carolina [that] has brought lawsuits against those voting rights changes that seek to limit our ability to stand up and exercise our rights as citizens. And those lawsuits will continue.”
  - “There’s still more work to do. People tell us the ‘dream’ is not realized because dreams never are. [Nelson] Mandela and [Martin Luther] King knew we had to continue working, and I’d be remiss if I didn’t tell you, that under this president and under this attorney general, that the Department of Justice is committed to following through with those dreams.”
  - Your comments during this video mirror the comments of Attorney General Holder, who has used the Department of Justice’s resources to block state voter identification laws or state efforts to pass new voter identification laws. Attorney General Holder has openly used his authority to pursue an “aggressive” assault of states’ laws or efforts to pass laws, claiming that these laws or efforts are attempts “disenfranchise American citizens of their most precious rights.”<sup>49</sup>
- 1. **Do you agree or disagree that states voter identification laws have legitimate, franchise-protecting purposes and are not aimed at disenfranchising U.S. citizens? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** I do not have any categorical views on these issues in the abstract. My general understanding is that the Department considers questions of the validity of voting practices, such as voter identification laws, based on the particular requirements of the federal law being enforced, based on the particular facts of the practice being investigated, and based on the particular facts in the jurisdiction.

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<sup>48</sup> Drew MacKenzie, *Loretta Lynch Attacks Voter ID Laws in Video*, Newsmax (Nov. 10, 2014).

<sup>49</sup> Sari Horwitz, *Eric Holder vows to aggressively challenge voter ID laws*, Washington Post (Jul. 10, 2012).

As the Supreme Court held in *Crawford v. Marion County Election Board*, voter identification laws are not per se unconstitutional. Nor do they necessarily violate the Voting Rights Act. I understand that before the *Shelby County* decision, the Department did preclear some voter identification laws, such as in Virginia and New Hampshire.

The analysis of a voter ID law is very specific to the particular law, the particular jurisdiction, and a wide range of factors that Congress has identified as relevant to determining whether a particular voting practice comports with the Voting Rights Act. As such, it is difficult for me to comment on the merits of any law (or in the abstract) without a full understanding of how the law actually operates in a particular jurisdiction.

I would also note that the Department of Justice has a number of important law enforcement responsibilities in this area. These responsibilities include investigating and prosecuting violations of the federal criminal laws (such as election frauds that violate the federal criminal statutes). These responsibilities also include investigating and bringing suit to prevent violations of the federal voting rights laws. If I am confirmed as Attorney General, I am committed to enforcing all of the federal laws within the Department's jurisdiction, including the federal criminal laws that criminalize various types of election fraud, and the federal voting rights laws such as the Voting Rights Act, according to their terms, in a fair and even-handed manner.

2. **Do you agree or disagree that states have a legitimate right to prevent non-citizens from voting in their respective elections? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Please see my response to Question 1, Part II, above.

3. **Do you agree or disagree that states have a legitimate, constitutionally sound interest in preventing fraudulent votes from being cast in their respective elections? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Please see my response to Question 1, Part II, above.

4. **Do you agree or disagree that the millions of people who support voter identification laws have no racial animus whatsoever? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Please see my response to Question 1, Part II, above.

5. **Do you agree or disagree that state efforts to pass voter identification laws are an assault on the goals and achievements of the Civil Rights Movement? If you agree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Please see my response to Question 1, Part II, above.

### **Questions on Voting Rights**

#### **III. Selective Voting Rights Enforcement**

- There is concern that the Department of Justice under Attorney General Holder has embraced the view that federal voting rights laws should not be enforced in a race-neutral manner but should only be enforced to protect the rights of minority voters. Reports produced by the U.S. Commission on Civil Rights, in addition to feedback from the Commission's membership, indicate that the Department has incorporated this view into its policy and strategy.<sup>50</sup>

- 1. Do you agree or disagree that federal voting rights laws are intended to protect—and that the Department of Justice should protect—the rights of all voters regardless of race? If you disagree with this view, please provide a detailed explanation as to why.**

**RESPONSE:** I am not personally familiar with the specifics of each one of the civil and criminal provisions of the federal laws regarding voting rights, nor am I familiar with the specifics of their interpretation by the Department or the federal courts. My general understanding is that in some provisions of the federal civil and criminal laws regarding voting, Congress has sought to protect all voters in all elections, while other provisions are more specific; for example, in some provisions Congress has sought to protect voters in particular types of elections (e.g., voters in elections for federal office), while in other provisions Congress has sought to protect voters it has identified as having particular challenges with regard to voting (e.g., voters away from their place of residence due to service in the uniformed services and American citizens living overseas, or voters who suffer from blindness, disabilities or an inability to read or write). If I am confirmed as Attorney General, I am committed to enforcing all the federal laws within the Department's jurisdiction, including the federal voting rights laws, according to their specific terms, in a fair and even-handed manner. As a general matter, I agree that the right of every eligible American citizen to vote and have that vote counted in our elections is fundamental to our democracy and should be protected.

- 2. Will you commit or not commit to reaffirming that it is the policy of the Department of Justice to pursue voting rights cases on behalf of all voters, regardless of their color, ethnicity, religion, or any other factor? If you will not commit to this specific step, please provide a detailed explanation as to why.**

**RESPONSE:** Please see response to Question 1, in Part III, above.

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<sup>50</sup> See U.S. Commission on Civil Rights, Letter from Commissioner Peter Kirsanow to Chairman Charles Grassley, 1-4 (Feb. 3, 2015) (detailing Department conduct, including that of former Deputy Attorney General Julie Fernandes, with respect to the Civil Rights Division's removal of cases involving white voters from Civil Rights Division consideration and citing specific Commission reports that explore this subject in depth).

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

**QUESTIONS FROM SENATOR DURBIN**

**1. John R. Justice Student Loan Program**

The Justice Department's Bureau of Justice Assistance operates an important program called the John R. Justice (JRJ) program, which provides student loan repayment assistance to state and local prosecutors and public defenders across the nation.

Congress enacted the JRJ program in 2008, modeling it after the Attorney Student Loan Repayment Program that the Department of Justice operates for its own attorneys. The JRJ program helps state and local prosecutors and public defenders pay down their student loans in exchange for a three-year obligation to continue serving in their positions. This has proven to be an effective recruitment and retention tool for prosecutor and defender offices. And since the Department of Justice is awarding hundreds of millions of dollars in grants each year to state and local law enforcement, which generates higher numbers of arrests and criminal cases, it is critical that we help prosecutor and defender offices keep experienced attorneys on staff to handle these cases.

The JRJ program has helped thousands of prosecutors and defenders across the country. But for the program to remain successful, the Department of Justice must remain committed to this program and to carefully administering and overseeing it. **Will you commit to work with me to keep this program operating effectively during your tenure if you are confirmed?**

**RESPONSE:** If confirmed as Attorney General, I will work with you and other Members of Congress to ensure that all DOJ programs, including the John R. Justice (JRJ) Program, operate efficiently and effectively. The Department's Bureau of Justice Assistance, which administers JRJ, also will continue to work with Congress, as well as relevant outside groups, to act on recommendations for improving JRJ.

**2. Hate Crimes Reporting**

Last October marked the five-year anniversary of the passage of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, which gives the FBI authority to investigate violent hate crimes when state law enforcement agencies are unable or unwilling to do so. As I said at the time of its enactment, this law is one of the most important civil rights laws of our time.

Despite this success, we have much more work to do. The FBI recently released its annual Hate Crimes Statistics report, which indicated that state and local law enforcement jurisdictions

reported 5,928 hate crimes in 2013. As significant as that number is, the Bureau of Justice Statistics has estimated that there are actually more than 250,000 hate crimes annually.

**If confirmed, will you take steps to ensure that the FBI and the Department of Justice work together with state and local law enforcement and affected communities to improve hate crime reporting?**

**RESPONSE:** No person should be a victim of violence because of intolerance and bigotry due to his or her race, color, religion, national origin, gender, sexual orientation, gender identity or disability. Perpetrators of hate crimes must be prosecuted, and the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 strengthened the Department's ability to prosecute hate crimes. I understand that the Department has increased its outreach and training to law enforcement regarding identifying, investigating, and prosecuting hate crimes, and if confirmed as Attorney General, I look forward to strengthening these efforts.

**Nomination of Loretta E. Lynch to be Attorney General of the United States  
Questions for the Record  
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**QUESTIONS FROM SENATOR FEINSTEIN**

**1. Dangers Posed by Drones**

Unmanned aircraft – or, drones – are becoming an increasing problem for air travel. Some reported “near-misses” have involved major airliners near LaGuardia and JFK airports in the district where you serve as U.S. Attorney. For example, as reported by the Washington Post on November 26, 2014, here is one example of what FAA found: “Jet Blue Flight 1572, an Airbus 319 inbound to LaGuardia Airport, reports that a suspected small drone flew ‘under the nose of the aircraft’ while between 1,500 and 2,000 feet.” Here is another example: “Air traffic controllers report that a red, black, and yellow drone ‘almost hit’ Republic Airlines Flight 6230 while inbound to LaGuardia Airport . . . about two miles north of the Verrazano-Narrows Bridge.” Just in the last week, a drone breached White House airspace, landing on the White House grounds. Press reports also state that, over the weekend, another possible drone flew approximately 100 feet above a United Airlines flight that was at an altitude of 7,000 feet. The flight was on its way to Boston’s Logan Airport.

- Will you commit that the Department of Justice will review federal criminal laws to determine which may apply to uses of drones that create hazards for air travel?

**RESPONSE:** I understand there is a Department of Justice Working Group, which includes privacy, policy, legal, law enforcement, and grant-making components, to identify and address policy and legal issues pertaining to the use of Unmanned Aerial Systems (UAS). The Department is also participating in an interagency process that is considering UAS-related policy issues that are shared across departments and agencies. If I am confirmed, I expect to learn more about these efforts.

- If that review shows that additional legislation is necessary, will you commit to work with me on such legislation?

**RESPONSE:** If I am confirmed as Attorney General, I would welcome the opportunity to work with you and other Members of Congress if there is a need for additional legislation.

**2. Re-programming Funds Away from SCAAP**

The Department of Justice administers the State Criminal Alien Assistance Program, or “SCAAP,” which reimburses states and localities for the extraordinary costs that they incur for incarcerating undocumented criminal immigrants. Although such costs continue to escalate, funding for SCAAP continues to fall far short, getting slashed by 70% since 2000. Eligible

jurisdictions receive only pennies on the dollar. California counties' combined SCAAP reimbursement deficit stretches into the hundreds of millions of dollars annually. Its counties are reimbursed for 10% or less of their SCAAP-related expenses. Furthermore, in each of the past two years, DOJ has used its general authority to reprogram up to 10% of an appropriation to reprogram the maximum 10% away from SCAAP, thus further reducing the already-slashed SCAAP funding by another almost \$50 million.

- Will you commit to ending this undermining of the SCAAP program by stopping the reprogramming of the maximum 10%?

**RESPONSE:** I understand your concerns over the reduced SCAAP funding available for direct awards to state, local, and tribal grantees. As I understand it, SCAAP can only reimburse participating jurisdictions for a small portion of their costs, which limits the program's ability to relieve the financial burden that criminal aliens impose on state and local governments. If I am confirmed as Attorney General, I will work with OJP to continue to make every effort to look for ways to improve the effectiveness of OJP research, training, and technical assistance programs, and seek ways to make OJP operations more efficient.

### 3. **Lawyers for Unaccompanied Alien Children**

In December 2008, the Unaccompanied Alien Child Protection Act was signed into law as part of the Wilberforce Trafficking Victims Protection Reauthorization Act. I worked on the 2008 and 2013 reauthorization bills to ensure that, among other things, children who arrive in the United States without a parent or guardian, are, to the greatest extent practicable, provided with counsel to represent them in legal proceedings.

As you likely know, almost 70,000 unaccompanied children entered the U.S. this summer from Central America, and current funding is only a drop in the bucket compared to the need. Yet studies show that the rate of unaccompanied alien children who show up for immigration court increases from 60.9% to 92.5% when represented by a lawyer.

- Will you commit, if confirmed, to work with the Secretaries of Health and Human Services and Homeland Security to provide as many of these children as possible with legal representation?

**RESPONSE:** If confirmed as Attorney General, I would work with our federal partners to explore ways to improve the effective and efficient adjudication of immigration court cases, including those involving unaccompanied children.

### 4. **Immigration Judge Shortage**

I met with a group of immigration judges this past summer who work for the Department of Justice's Executive Office for Immigration Review, known as EOIR, and was appalled at the case backlog and extreme workload they face.

With a backlog of a staggering 375,000 cases in the immigration courts, the average wait time for cases is over a year. California has the largest pending immigration court backlog, with 77,246 cases, and the second-longest wait in the country, with an average wait time of 686 days. The longer that these cases go unresolved, the longer it takes to remove criminals from this country and to end the legal limbo that thousands of people eligible for immigration relief face. Congress recently appropriated funds to EOIR for the Justice Department's request of 35 new immigration judge teams. But considering the backlog, it is not enough.

- If confirmed, will you work to increase the number of immigration judges to help alleviate this backlog?

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

## 5. **Federal Marijuana Enforcement**

As you know, under Attorney General Holder, the Department of Justice has scaled back enforcement of federal marijuana laws – especially in states that have legalized recreational and/or medical marijuana under their own laws. In California, for example, we learned that there are as many as 200 to 300 large marijuana grow sites in Fresno. Yet, the U.S. Attorney in that district prosecuted only 37 marijuana cases between August 2013 and December of 2014. He told my staff that he did not have sufficient resources to bring more cases. Despite these changes to Department policy, your office in New York has reportedly prosecuted “the world's largest marijuana suppliers.”

- As Attorney General, do you plan to continue Attorney General Holder's policy, or do you plan to take a fresh look at the Department's approach to the enforcement of federal drug laws?

**RESPONSE:** The Department is currently committed to enforcing the Controlled Substances Act (CSA) in a manner that efficiently applies limited resources to address the most significant threats to public health and safety, and if confirmed as Attorney General, I will ensure that we continue to enforce the CSA.

## 6. Protecting Our Youth From Dangerous Synthetic Drugs

Synthetic drugs, like K-2, Spice, and Bath Salts, have been of major concern in recent years, prompting a number of efforts to combat these substances. However, when Congress outlawed several of these synthetic drugs, traffickers did not stop producing them. Instead, they slightly altered the chemical structure of illegal drugs to produce what are called “controlled substance analogues,” which mimic the effects of drugs like ecstasy, cocaine, PCP and LSD. I have introduced a bipartisan bill with Senator Portman and many others, the *Protecting Our Youth from Dangerous Synthetic Drugs Act of 2015*, which gives law enforcement tools they need to address this issue.

- Would legislation that enables the federal government to establish and maintain a list of controlled substance analogues, thereby clearly defining whether a new synthetic drug is illegal, be helpful to the Department of Justice’s efforts to prosecute synthetic drug cases?

**RESPONSE:** I share your concerns regarding synthetic drugs, which are highly dangerous, do not have known legitimate medical uses, and are not approved by the FDA. They pose a great danger to the public, especially children and teenagers. I understand that the DEA has been carefully monitoring the emergence of new synthetic drugs, and employs a broad range of measures to combat their use, including investigation and prosecution, administrative scheduling, and education and training for law enforcement, health professionals, and communities. If confirmed as Attorney General, I would welcome the opportunity to work with you and other Members of Congress if there is a need for additional legislation in this area.

## 7. Increase in Methamphetamine Seizures at the California-Mexico Border

In 2006, the *Combat Meth Epidemic Act*, which I authored, became law. This legislation requires precursor chemicals used to make methamphetamine, such as pseudoephedrine, to be sold behind the counter. This law has helped to effectively reduce the production of methamphetamine in the United States.

As a consequence of the increased difficulty of manufacturing in the U.S., production has shifted to Mexico, where transnational criminal organizations are producing increasing amounts of methamphetamine and smuggling it into the United States. These organizations are finding new and innovative ways to bring methamphetamine across the U.S. – Mexican border, including by liquefying it and by using drones.

It is my understanding that between 2009 and 2014, there was a 300 percent increase in seizures at the California ports of entry, and that methamphetamine seized in San Diego accounted for 63 percent of all methamphetamine seized at all ports of entry nationwide. I also understand that methamphetamine-related emergency room visits, deaths and arrests are on the rise in San Diego, as are prosecutions.

- Under your leadership, what steps will the Department of Justice take to counteract the

increase in methamphetamine smuggling from Mexico into California?

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I have not had the opportunity to study methamphetamine smuggling from Mexico into California, but I share your concerns and I agree that we must prevent illicit drugs from entering the United States. I know that DEA has a number of programs and partnerships with federal, state, and local law enforcement to address drug trafficking, including detecting, seizing, and cleaning up clandestine methamphetamine laboratories. If I am confirmed as Attorney General, I will support these partnerships and efforts to combat the proliferation of methamphetamine in the United States.

- Are there additional tools or resources that Congress can provide the Department with to ensure these dangerous substances don't continue to cross our borders?

**RESPONSE:** If I am confirmed as Attorney General, I would welcome the opportunity to work with you and other Members of Congress if there is a need for additional legislation.

#### 8. **Preventing Terrorists from Obtaining Guns and Explosives**

I am very concerned that individuals with links to terrorism regularly purchase guns in the United States.

According to the Government Accountability Office, between February 2004 and December 2010, there were 1,453 cases in which a known or suspected terrorist — individuals who at the time were on federal terrorist watch lists — tried to buy a firearm or obtain a firearm or explosives license or permit. And in 91% of these cases — a total of 1,321 separate occasions — those known or suspected terrorists successfully passed a background check.

Now, here are three recent examples of terrorists who obtained and used firearms:

- The Kouachi brothers—the terrorists who killed 12 people at Charlie Hebdo in Paris—have been reported in the press to be on the U.S. no fly list.
- One of the alleged Boston Marathon bombers, Tamerlan Tsarnaev, was reportedly placed on two terrorist watch lists in 2011.
- And in 2009, Abdulhakim Mujahid Muhammad opened fire at a military recruiting station in Little Rock, Arkansas. He killed one and critically injured another.

In 2007, the Bush Administration's Justice Department drafted legislation to close this gap and prevent a known or suspected terrorist from buying a gun or explosive. In 2009, Attorney General Holder expressed the Obama Administration's support for this legislation.

- Do you believe it is important to give the Executive Branch the power to prevent a known or suspected terrorist from buying a gun or explosive?

**RESPONSE:** The executive branch has a number of effective mechanisms to contain any potential terror threat, including those from terrorists who seek to obtain firearms. Indeed, in my office, the Eastern District of New York—the United States Attorney's Office that has handled the most terrorism trials since 9/11—we have frequently employed firearm and explosives charges against terrorist suspects. I look forward to working with Congress if we determine that additional tools are needed to enhance our capacities, consistent with our commitment to civil liberties and national security.

## 9. Human Trafficking

As U.S. Attorney, you have prosecuted sex traffickers, and I applaud you for that work. However, I am concerned that the Department of Justice is not consistently prosecuting the buyers of sex acts involving children and other trafficking victims. For example, during Operation Cross Country, the FBI recovered over 100 child sex trafficking victims and arrested 281 traffickers. However, no buyers were reported arrested. As the State Department official who oversees anti-trafficking efforts noted, “[n]o girl or woman would be a victim of sex trafficking if there were no profits to be made from their exploitation.”

- Will you commit to me that, if confirmed, you will direct federal prosecutors to prosecute the buyers of sex acts involving children and other trafficking victims?

**RESPONSE:** Addressing the commercial sexual exploitation of children has been a top priority for me as the United States Attorney for the Eastern District of New York, as it has for the Department of Justice as a whole. I can assure you that it will be continue to be one of the Department’s highest priorities if I am confirmed as Attorney General. The Department takes a comprehensive approach in its investigations and prosecutions that aims to apprehend the traffickers who supply the children and the customers who fuel the demand for the children, and, most importantly, to expeditiously remove child victims from an exploitative situation. Because deterring the demand for commercial sex with minors is an important tool in the fight to eradicate this industry, my District and others have successfully prosecuted numerous offenders who purchased or attempted to purchase sex with minors, and we will continue to do so if I am confirmed.

The website Backpage.com advertises “massages” and “escorts,” but is widely known to sell sexual services, including services involving adolescents who are under the age of 18. For example, in an undercover operation, the Cook County (Illinois) Sheriff’s Office found that “100% of the women claiming to be massage therapists or platonic escorts on Backpage have accepted the offer of money for sex from our undercover male officers.” The Sheriff’s Office concluded that Backpage is a “haven for pimps and sex solicitors who are victimizing women and girls for their own gain.”

The Department of Justice has prosecuted—and obtained guilty pleas from—a website similar to Backpage called myRedBook.com, using the Travel Act, money laundering statute, and “aiding and abetting” statute.

- Will you commit that, if confirmed as Attorney General, you will fully investigate

and, if the facts warrant prosecution, prosecute Backpage.com and any other website that sells the sexual services of children?

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I share your grave concerns about the use of internet sites to facilitate human trafficking. If confirmed as Attorney General, I would ensure that the Department of Justice remains committed to pursuing those who use these websites to exploit minors and, more broadly, to preventing and responding to child sex trafficking, whether it takes place online or off.

## 10. Wildlife Trafficking

Wildlife trafficking is a global crime that is valued at \$8 to \$10 billion annually, making it one of the most lucrative types of organized crime in the world. There is also increasing evidence that wildlife trafficking is funding armed insurgencies like Al Shabaab, the Lord's Resistance Army, and the Janjaweed.

As importantly, wildlife trafficking is a morally repugnant practice that threatens some of our world's most iconic species with extinction. Poachers are slaughtering very young and juvenile elephants for their tusks due to the record high demand for ivory. Senator Graham and I have introduced a bill to increase penalties on wildlife traffickers. The bill thus supports the Administration's *National Strategy to Combat Wildlife Trafficking*, which called for "placing wildlife trafficking on an equal footing with other serious crimes."

- Could you describe why the Justice Department needs greater criminal penalties to successfully combat wildlife trafficking?

**RESPONSE:** Wildlife trafficking is a serious crime that threatens the survival of endangered species and undermines security across nations. We are increasingly seeing sophisticated criminal networks engaged in wildlife trafficking to generate illicit proceeds, which in turn bankroll further criminal activity. It is critically important that we have the necessary legal authorities to successfully investigate and prosecute wildlife trafficking and related crimes. We must deprive these networks their funding sources, which they use to fund other serious crime.

## 11. Gang Legislation

You have significant experience prosecuting drug, gang, and gun crimes. As you know, gangs continue to devastate many communities in California and across our country. The 2011 National Gang Threat Assessment found that gang membership increased by 40 percent between 2009 and 2011 and that "[g]angs are responsible for an average of 48 percent of violent crime in most jurisdictions and up to 90 percent in several others . . . ."

For nearly two decades, I have worked with Senator Hatch and others on legislation that would increase the tools that prosecutors have to prosecute gang members.

- If confirmed, will the Department of Justice vigorously enforce federal law against gang members and others who commit major drug or gun trafficking crimes?

**RESPONSE:** As a career prosecutor and United States Attorney, I know well the devastating effect gang violence can have on communities. I agree that the Department should continue to vigorously enforce all the federal laws at our disposal to address gangs and others who commit major drug, gun, and violent crimes. As a United States Attorney, this has been a priority for my Office, and if I am confirmed as Attorney General, it will continue to be one of my priorities.

- Does the Department need stronger tools to combat gangs?

**RESPONSE:** If I am confirmed as Attorney General, I would welcome the opportunity to work with you and other Members of Congress if there is a need for additional legislation.

## 12. **Internet Gambling**

I have long been concerned about Internet gambling. As you know, the FBI has concluded that online casinos are “vulnerable to a wide range of criminal schemes,” including money laundering and ventures by transnational organized crime groups. Furthermore, online gambling gives minors and addicts access to gambling with only a few clicks on a smartphone or computer.

In 2011, the Department reversed its long-standing interpretation of the Wire Act, concluding for the first time that the Act prohibited the use of the wires for gambling related to sporting events only. I believe a persuasive argument can be made that the Wire Act prohibits all Internet gambling.

- Will you commit to me that you will direct Department lawyers to re-examine the Office of Legal Counsel’s 2011 re-interpretation of the Wire Act?

**RESPONSE:** If confirmed as Attorney General, I will review the Office of Legal Counsel opinion, which considered whether interstate transmissions of wire communications that do not relate to a sporting event or contest fall within the scope of the Wire Act. It is my understanding, however, that OLC opinions are rarely reconsidered. If confirmed, I will read the opinion and if it articulates a reasonable interpretation of the law, I would welcome the opportunity to work with you and other Members of Congress to address concerns about online gambling through legislation.

## 13. **Community Policing**

Over the past several months, we have seen protests over the deaths of Michael Brown and Eric Garner turn violent. The pictures from Ferguson often show a line of heavily armed officers on one side, and protesters on the other.

To avoid these pictures in the future, I strongly believe that, as a country, we must reinvigorate community policing. I commend President Obama for creating a task force to examine how law enforcement can reduce crime while building public trust.

- If confirmed, will you use the influence you will have as Attorney General — including the grant funding the Department gives out — to encourage police chiefs, sheriffs, and other local law enforcement officers to engage in community policing?

**RESPONSE:** I believe that community policing is fundamental to strong, safe, and vibrant neighborhoods. The Attorney General has many tools at his or her disposal to advance community policing, including through the Department's Office of Community Oriented Policing (COPS). COPS advances community policing by funding the hiring of community policing professionals, and offering training, technical assistance and information resources to law enforcement, community members, and local government leaders. I understand that funding for COPS has been a priority for the Department under Attorney General Holder, and I would continue that commitment if I am confirmed.

- Will you make sure the voices of rank-and-file officers are included in the Department's work on this issue?

**RESPONSE:** Voices from every rank within a police department are important to the Department's work and I would ensure that all voices are heard and have a seat at the table during discussions about advancing community policing. I understand that the President's Task Force on 21st Century Policing has begun its work and is hearing testimony from a diverse group of stakeholders, including rank-and-file officers and police leadership. If confirmed as Attorney General, I look forward to reviewing the testimony and the Task Force's recommendations.

- In Los Angeles, I understand that the Simon Wiesenthal Center and the Museum of Tolerance have facilitated hundreds of sessions of training aimed at improving community policing and creating partnerships between police officers and the citizens that they protect. If confirmed, will you explore opportunities to work with organizations such as this one to strengthen the relationship between law enforcement and communities?

**RESPONSE:** It is important for the Department of Justice to explore opportunities to work with a variety of partners to develop and deliver effective training that strengthens relationships between law enforcement and the community. If confirmed as Attorney General, I would continue to explore all opportunities for partnership to advance community policing.

#### 14. Crime Victims' Rights

For many years, former Senator Kyl and I pushed to provide victims of crime with a set of basic protections in the federal criminal justice system. The effort started in 1996, when we introduced a federal victims' rights amendment to the Constitution. We re-introduced the amendment in 1997, 1998, 1999, 2002, and 2003. Hearings were held in the Senate and House, and the Senate Judiciary Committee passed the measure three times.

However, it became clear that we did not have the 2/3 support needed to pass a constitutional amendment. So, in 2004, we turned our attention to passing a statute that protects victims' rights in the federal system. On October 30, 2004, we succeeded in enacting the Crime Victims' Rights Act.

The law gives victims of federal crimes eight specific rights. They are the right to:

- Be reasonably protected from the accused;
- Be given timely notice of any public court proceeding involving the accused;
- Not be excluded from any such public court proceeding;
- Be reasonably heard at any such public proceeding;
- Confer with the attorney for the Government in the case;
- Full and timely restitution;
- Proceedings free from unreasonable delay;
- Be treated with fairness and with respect for the victim's dignity and privacy.

Unfortunately, crime victims continue to have difficulty exercising their rights under the Crime Victims' Rights Act. A 2008 report by the Government Accountability Office (GAO) found that "[p]erceptions are mixed regarding the effect and efficacy of the implementation of the CVRA . . . ." For instance, the report suggests that victims are not always notified of a plea hearing because the prosecution team does not believe it is in their interest to have victims attend certain hearings.

Two cases demonstrate how victims' rights are not always respected:

First, in the *Antrobus* case out of Utah, Vanessa Quinn, who was murdered by Sulejman Talovic using a gun that was illegally sold to him by Mackenzie Hunter, was not recognized by the district court as a victim of Hunter's crime. As a result, Quinn's parents, the Antrobuses, were not allowed to deliver a victim impact statement at Hunter's sentencing, to receive restitution for unreimbursed Funeral expenses, or to express their objections to the dismissal of one of the counts against Hunter. When the Antrobuses appealed, the Tenth Circuit applied a "clear and indisputable error" standard of review to the district court's ruling — not the ordinary appellate standard of review, which reviews questions of law *de novo* — and concluded that "[t]his is a difficult case, but we cannot say that the district court was clearly wrong in its conclusion."

Second, in a case named *In re Dean* concerning the BP oil spill, the 15 victims who were killed and more than 170 who were injured were denied the opportunity to consult with the

government regarding the likelihood that criminal charges would be filed and the details of a potential plea bargain. Notably, the Fifth Circuit concluded that the district court had “misapplied” the Crime Victims’ Rights Act and “should have fashioned a reasonable way to . . . ascertain the victims’ views on the possible details of a plea bargain.” However, the appellate court declined to uphold the victims’ rights because of the very deferential standard it applied to its review of the lower court’s ruling.

Now, I want to ask you a series of questions about specific steps you can take to better ensure that the Justice Department upholds victims’ rights:

- First, I have pushed legislation that would clarify that crime victims’ rights must be respected when a plea agreement or deferred prosecution agreement is reached before charges are filed. The Attorney General’s guidelines state that prosecutors should make “reasonable efforts” to consider victims’ views about prospective plea agreements, but consulting with victims is not required. Do you believe victims should have the right to be informed in a timely manner of a prospective plea agreement or deferred prosecution agreement, including before charges are filed?

**RESPONSE:** The Department is committed to ensuring victims a voice in all critical case decisions. Since 2011, the Attorney General Guidelines for Victim and Witness Assistance have made clear that the Department expects prosecutors to consult with victims regarding pleas, including those pre-charging, whenever it is appropriate to do so. The appropriateness of such consultation must take into consideration the defendant’s rights, the need for confidentiality, security concerns, and the practical considerations inherent in plea agreements that may be reached quickly or in cases with a large number of victims.

I believe in the full participation of victims in the criminal justice process and am committed to ensuring victims’ voices are heard. If I am confirmed as Attorney General, I will emphasize that the Department should continue to provide victims with their rights and to advocate on their behalf throughout the criminal process, from the first detection of the crime through any period of incarceration.

- Second, when victims are denied their rights in the trial court and appeal that denial, do you believe the appellate court should apply the ordinary standard of appellate review — legal error or abuse of discretion — or the more deferential “clear and indisputable error” standard?

**RESPONSE:** I recognize that courts have disagreed about the legal standards that apply under the law as currently written, but I also respect and understand that Congress is free to amend the statute to clarify its intentions. If I am confirmed as Attorney General, I would welcome the opportunity to work with you and other Members of Congress if there is a need for additional legislation.

- Finally, the 2008 GAO report made several recommendations for steps the Justice Department should take to support victims in exercising their rights. Will you review

the Department's response to these recommendations and report back to me on how these recommendations have been implemented?

**RESPONSE:** It is my understanding that since the 2008 GAO report, the Department has made efforts to implement its recommendations. If confirmed as Attorney General, I would look forward to learning more about these efforts and whether more should be done.

Senator Portman and I wrote to Attorney General Holder in December to point out a troubling new study by The Human Trafficking Pro Bono Legal Center. That study found that federal prosecutors did not request restitution in 37% of qualifying human trafficking cases studied that were brought between 2009 and 2012. When the prosecutor did not request restitution, it was granted in only 10% of cases. Overall, restitution was awarded in only 36% of cases.

- The law is clear that restitution shall be ordered for any trafficking offense. Why aren't prosecutors seeking restitution in every trafficking case?

**RESPONSE:** Securing restitution for trafficking victims is an essential part of the Department's victim-centered approach to trafficking investigations and prosecutions. Over the past two years, as the numbers of human trafficking prosecutions have risen to unprecedented levels, including record numbers of human trafficking cases filed in each of the past two years, and a cumulative forty-eight percent increase in the past four years, the Department has been actively strengthening the enforcement of the Trafficking Victims Protection Act's restitution provisions among federal prosecutors nationwide, including providing training for U.S. Attorneys' offices around the country.

- Will you commit to directing prosecutors to seek restitution for trafficking victims in every prosecution?

**RESPONSE:** If I am confirmed as Attorney General, I will pursue, to the greatest extent possible, restitution for victims of trafficking.

- Will you update the U.S. Attorneys' Manual to direct prosecutors to seek restitution and to seek restoration of forfeited assets when necessary to satisfy restitution orders?

**RESPONSE:** Please be assured that the Department is committed to seeking restitution in federal prosecutions, especially for the most vulnerable of victims. We look forward to continuing to secure significant restitution orders, as provided by law, and seeking justice for victims of human trafficking.

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

**QUESTIONS FROM SENATOR FLAKE**

1. As I mentioned in the hearing, I have concerns regarding the U.S. Attorney's Office for Arizona's recent order that pulls back on Operation Streamline's successful "zero tolerance" policy. I have a few follow up questions.

**RESPONSE:** I appreciate that this is an important matter of great concern to you, as you articulated in my courtesy visit with you and in a subsequent letter to me. I commit to you that if I am confirmed, I will learn more about Operation Streamline and will carefully consider the concerns you have shared with me.

- a. Do you believe that pulling back on a "zero tolerance" policy with regard to Operation Streamline will result in an increase or decrease in the number of illegal border crossers in the future?

**RESPONSE:** Public safety must be the paramount consideration in making prosecutorial decisions as they relate to the prosecution of undocumented aliens. As the United States Attorney for the Eastern District of New York, I have not stood in the shoes of the Southwestern Border United States Attorneys as they have set their priorities. While I have great confidence in those United States Attorneys, if confirmed as Attorney General, I will personally take a close look at the policies governing prosecution of illegal border crossers to ensure that those policies are best protecting the security of the United States and its citizens. If confirmed as Attorney General, I will work to ensure effective deportation and removal consequences for immigration violations.

- b. What do you believe will be the consequences of it becoming widely known that certain categories of offenders, such as first time border crossers without criminal histories, are not being prosecuted?

**RESPONSE:** If confirmed as Attorney General, I will prioritize public safety in the enforcement of federal immigration laws, including criminal immigration laws. The security of the United States and its citizens will always be my top priority. It is my understanding that the new removal priorities established by the Department of Homeland Security include recent border crossers and visa overstays who are ineligible for deferred action. As a result, it would not appear to be in anyone's interests to attempt to cross the border illegally at this time, as they would be a priority for removal. If confirmed as Attorney General, I will work to ensure effective deportation and removal consequences for immigration violations.

- c. Given your experience as a U.S. Attorney, do you believe that rolling back Operation Streamline and reducing prosecutions in the Yuma Sector, an area that

has shown a significant decrease in border crossings since the implementation of Operation Streamline, is prudent?

**RESPONSE:** I support effective deportation and removal consequences for immigration violations. I can assure you that if confirmed as Attorney General, I will take a close look at Operation Streamline, to ensure that the Department of Justice is pursuing effective policies that promote public safety in the enforcement of federal immigration laws, including criminal immigration laws. Public safety must be the paramount consideration in making prosecutorial decisions as it relates to the prosecution of undocumented aliens.

- d. In your testimony, you mentioned budget constraints as one reason for possibly pulling back on Operation Streamline's "zero tolerance" policy. Do you commit to notify me of budgetary issues related to Operation Streamline, if that appears to be an impediment to continuing the "zero tolerance" policy?

**RESPONSE:** The security of the United States and its citizens will always be my top priority if I am confirmed as Attorney General. I share your concern that public safety not be jeopardized by budget challenges. If confirmed, I am committed to working closely with the Committee on budgetary issues related to the enforcement of immigration laws and other federal laws within the jurisdiction of the Department of Justice.

- e. If you are confirmed, do you commit to provide specifics of the new Operation Streamline policy as well as any historical analysis done of the appropriateness of these changes given Operation Streamline's impact on recidivism?

**RESPONSE:** With regard to the prosecution of Improper Entry by Alien offenses, like other federal criminal cases, the USAOs formulate and implement district guidelines in the exercise of investigative and prosecutorial discretion, consistent with the Principles of Federal Prosecution. *See United States Attorneys' Manual 9-27.000.*, [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrm.htm#9-27.001](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.001). I look forward to working with you, this Committee, and the United States Congress to provide the information you need regarding this policy to perform your critical oversight responsibilities, subject to the Department's long-standing law enforcement responsibilities.

- f. In addition, if confirmed as Attorney General, will you support restoring Operation Streamline under a "zero tolerance" approach and removing the prohibition on prosecuting first time border crossers absent specific circumstances?

**RESPONSE:** As noted above, I support effective deportation and removal consequences for immigration violations. I can assure you that if confirmed as Attorney General, I will be committed to public safety in the enforcement of federal immigration laws, including criminal immigration laws. The security of the United States and its citizens will always be my top

priority. If confirmed, I will take a close look at the policies governing prosecution of illegal border crossers to ensure that they are best protecting the security of the United States and its citizens. I look forward to working with you and this Committee to ensure that we are effectively pursuing our shared goal of protecting the American people.

2. In your testimony, you stated that you are “not aware of how the [Department of Homeland Security] will actually go forward and implement by regulation [President Obama’s executive action].” Can you explain whether you believe, regardless of its constitutionality, that President Obama’s executive action must be implemented through the regulatory process? And, if so, what are the legal implications of not following that process?

**RESPONSE:** It is my understanding that the Department of Homeland Security has followed, or will follow, any applicable regulatory procedures with respect to the memoranda issued by the Secretary in November 2014.

3. I appreciate your commitment to ensure that Crime Victims Funds only be used to assist victims of crimes. In the January 13, 2015 memorandum that your office sent following up on your committee testimony, it is noted in the last paragraph the Department is “working on guidance that will minimize [the new law’s] impact.” It has been reported that the Department of Justice and the Office of Victims of Crime is considering a “pro-rata” solution that will partially shift the payment for victim advocates to non-Crime Victims Fund revenues. This would necessarily result in diminishing the services that are being provided to crime victims.
  - a. Will you commit to directing that victim advocates and supervisors be confined to serving the needs of crime victims?

**RESPONSE:** Although I am not in a position to comment upon any proposed guidance, I am committed to the implementation of the requirement in the Victims of Crime Act of 1984, as amended by the Victims of Child Abuse Act Reauthorization Act of 2013, as to the permissible use of the Crime Victims Fund.

4. Two weeks ago, the Department of Justice announced the criminal prosecution of three foreign terrorists who were charged for conspiring to kill U.S. soldiers who were fighting in Afghanistan and Iraq and providing material support to al-Qaeda. There are number of concerns with prosecuting these terrorists in Article 3 courts, including the safety of the proceedings, introduction and sharing of classified intelligence with these terrorists’ lawyers, and, if convicted, sending terrorists into U.S. prisons where they can recruit disaffected prisoners to their cause. Given your involvement in these cases as U.S. Attorney for the Eastern District of New York, where these cases are being prosecuted, I assume you have dealt with these issues.

- a. As the current U.S. Attorney for the Eastern District what did you do to mitigate these risks, and if confirmed as Attorney General, how do you plan on mitigating these risks in the future?

**RESPONSE:** While I cannot comment on the ongoing prosecution, I can say that appropriate steps are taken to ensure the security of the proceedings in my district, as well as to ensure that terrorists detained in our prisons are held securely and will not pose a threat to our citizens. From my firsthand experience as a United States Attorney, I can attest to the ability of our criminal justice system to serve as one effective tool, among many, to address the threat posed by terrorists and to gather valuable intelligence that aids in the disruption of terrorist organizations. The criminal justice system has proven in hundreds of terrorism cases since before 9/11 to be a swift, secure, and effective option to incapacitate terrorists, gain valuable intelligence, and ensure justice is served. The Classified Information Procedures Act (CIPA) has proven to be a valuable and effective tool to protect classified intelligence in Article III proceedings. While we must remain vigilant to the persistent risk of terrorist attack, I am confident that we can continue to prosecute terrorists in our courts and detain them in our prisons safely and securely.

5. Last Congress, a Constitutional amendment was proposed to enable government to limit funds contributed to candidates and funds spent by or in support of candidate's ability to influence elections. The text of the amendment reads as follows:

*'Section 1. To advance democratic self-government and political equality, and to protect the integrity of government and the electoral process, Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections.'*

*'Section 2. Congress and the States shall have power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.'*

*'Section 3. Nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.'*

- a. Do you have any concerns with this amendment as drafted?

**RESPONSE:** Amendment of the United States Constitution is a very serious matter and requires very careful consideration of all of the potential effects that such an amendment could have, both now and in the future. An amendment that relates to political activity and speech, in particular, should be undertaken only after careful consideration of the potential effect on fundamental First Amendment freedoms of our citizens and the press.

I understand that the specific amendment proposed here is intended to advance important policy concerns regarding transparency in our campaign finance system and the prevention of corruption and the appearance of corruption. These concerns regarding the integrity of our

elections have long been validated by the Supreme Court, and any amendment of the Constitution requires careful and thorough consideration and balancing of these important interests.

- b. Would you agree with the ACLU, who has stated that “this and similar constitutional amendments would fundamentally break the Constitution and endanger civil rights and civil liberties for generations.”

**RESPONSE:** As described above, a Constitutional amendment that relates to political activity and speech, in particular, should be undertaken only after careful consideration of the potential effect on fundamental First Amendment freedoms of our citizens and the press.

6. The President made the unilateral decision to delay the Affordable Care Act’s employer mandate for one year despite clear statutory language instructing that the penalties associated with the mandate “shall apply 2 months beginning after December 31, 2013.” This is just one example of the President unilaterally making changes to the law. One report says that the President has made 28 unilateral changes to the Affordable Care Act.
  - a. Do you believe that President Obama had the authority to delay the Affordable Care Act’s employer mandate?

**RESPONSE:** I have not had an opportunity to review this issue in my position as a United States Attorney. It is my understanding that the Department of the Treasury has explained the legal basis for its determinations on this issue to Congress.

7. Exactly one year ago today, on February 5<sup>th</sup>, 2014, I submitted written question to Attorney General Holder following up on the Department of Justice oversight hearing that was held on January 29<sup>th</sup>, 2014. In order for Congress to effectively perform its oversight role, I believe there needs to be more timely responses to follow-up questions.
  - a. If you are confirmed as Attorney General, do you commit to respond to Congressional questions in a timelier manner?

**RESPONSE:** Yes. As I described in my testimony, I am committed to fostering a new and improved relationship with this Committee and Congress. If confirmed, I will ask my staff to review the Department’s processes for responding to congressional inquiries and questions for the record and to improve the Department’s response time.

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

**QUESTIONS FROM SENATOR FRANKEN**

**Question 1.** The Computer Fraud and Abuse Act (CFAA) has received attention for its potentially harsh penalties. In 2013, I wrote a letter to the Department of Justice expressing my concern about the way in which Aaron Swartz was aggressively prosecuted under the CFAA, and associating myself with a similar letter by Senator Cornyn. The Department's response was, in short, that the prosecution of Swartz was consistent with the Act. Since then we have heard many people – from all over the political spectrum – call for reform of the CFAA. Recently, the White House announced a proposal to amend the Act. Some have characterized the proposal as a step in the wrong direction, noting – for example – that it would increase certain sentences. What is your assessment of these criticisms, and what is your opinion of the proposal?

**RESPONSE:** I believe that the Department of Justice has a responsibility to protect Americans from invasions of their privacy and security by prosecuting and deterring computer crimes. Accordingly, we must ensure that the CFAA, like all of our tools, remains up-to-date and reflects the changes in the way that cybercrimes are committed, changes that have occurred in the decades since it was first enacted. For example, I understand that the Administration's proposals include provisions designed to facilitate the prosecution of those who traffic in stolen American credit cards overseas, to enable the Department to dismantle botnets that victimize hundreds of thousands of computers at a time, and to deter the sale of criminal "spyware."

With respect to the sentencing provisions contained in those proposals, I believe it is appropriate to ensure that, in the event a defendant is convicted of a hacking offense, the sentencing court has the authority to impose a sentence that fits the crime. For example, the enormous harm caused by the massive thefts of Americans' personal financial data from retailers illustrates the need to ensure that the maximum sentences available are adequate to deter the worst offenders. As the level of harm caused by the worst cybercrimes increases, I support increasing the maximum penalties available to punish those crimes to a level commensurate with similar crimes, such as mail fraud or wire fraud.

It is also important to understand that these statutory *maximum* sentences do not control what sentence is appropriate for less significant offenses under the CFAA. In many criminal prosecutions, including prosecutions under the CFAA of all but the most serious offenses, the statutory maximum penalty has little or no impact on the sentencing of convicted defendants. Instead, in each case, prosecutors make individualized sentencing recommendations, and judges make individualized decisions, based on such factors as the facts of the case, the offender's history, and the U.S. Sentencing Guidelines.

Finally, I note that the Administration's 2015 proposal does not include any new mandatory *minimum* sentences, and I support the decision not to seek any such new sentences in the CFAA at this time.

**Question 2.** Last year, President Obama announced several reforms to the NSA's surveillance programs. This included a new policy that permits companies to release certain, limited information about the number of National Security Letters they receive annually. The Attorney General was authorized to set guidelines on this new transparency provision. I was pleased to see transparency measures included in the reforms. As I have often noted, I believe increased transparency is needed so that the public has the information it needs to make informed judgments about these programs.

Unfortunately, the guidelines that were issued only allow companies to disclose broad ranges of the number of National Security Letters they have received, and do not allow companies to say if they have received no letters whatsoever.

Last Congress, we failed by a close vote to reach cloture on the motion to proceed to the USA FREEDOM Act, a major NSA surveillance reform bill. The bill included strong government transparency provisions, which I was proud to write with Senator Heller. Those provisions promised to give the American people important information about the numbers of Americans who had their information collected by the government under the different surveillance laws, and they would have allowed companies to make more significant public disclosures. Will you commit to reviewing DOJ's transparency policies governing surveillance programs and consider issuing more robust guidelines?

**RESPONSE:** Although I have not had occasion as a United States Attorney to consider these questions, it is my understanding that the Administration supported the USA Freedom Act, and that the Department of Justice has played a significant role in enhancing the ability of companies to provide additional transparency. Should I be confirmed as Attorney General, I look forward to continuing the Department's efforts to enhance transparency to the greatest extent possible consistent with protecting our national security and to work with the Intelligence Community and Congress.

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

**QUESTIONS FROM SENATOR GRAHAM**

*On National Security*

1. At your confirmation hearing, I asked you if you thought the U.S. is at war. You responded: “We are at war, Senator.” I have two follow up questions:
  - a. Do you believe the U.S. is at war with radical Islam?
  - b. What makes up the battlefield in this war?

**RESPONSE:** It is my understanding that the United States is in an armed conflict with al-Qaida, the Taliban and associated forces. Although I have not had occasion as a United States Attorney to address the question, it is my understanding that pursuant to the 2001 AUMF, as informed by the laws of war, the United States has used military force against such organizations in areas of active hostilities, such as Afghanistan, and outside such areas in certain circumstances, consistent with other applicable domestic and international law.

2. Do you believe that, based on certain actions, a U.S. citizen can become an enemy combatant under the law of war?

**RESPONSE:** Although I have not had occasion to address the question in my role as a United States Attorney, my understanding is that whether an individual is an enemy combatant under the law of war depends on the particular circumstances. It is also my understanding that there are circumstances in which a U.S. citizen can become an enemy combatant under the law of war.

3. If a U.S. citizen joins an enemy force, does the U.S. have the legal authority to detain that citizen as an enemy combatant under the law of war?

**RESPONSE:** Although I have not had occasion to address that question in my role as a United States Attorney, my understanding is that whether an individual may be detained as an enemy combatant under the law of war depends on the particular circumstances. Based on my review of applicable Supreme Court precedent, the United States would have legal authority, in certain circumstances, to detain a U.S. citizen who has joined an enemy force as an enemy combatant under the law of war.

4. If a U.S. citizen joins an enemy force, does the U.S. have the legal authority to use lethal force against that citizen?

**RESPONSE:** Although I have not had occasion to address that question in my role as a United States Attorney, my understanding is that whether the United States has legal authority to use lethal force against a U.S. citizen who has joined an enemy force depends on the particular circumstances. I have seen the public version of the July 2010 memorandum in which the Office of Legal Counsel advised that, where certain conditions are met, the United States would have legal authority to use lethal force against a U.S. citizen who is a leader of Al Qaeda or associated forces—terrorist groups actively plotting against the United States and with which we are at war—and who poses an imminent threat of violent attack against the United States. Thus, in certain circumstances, the United States would have legal authority to use lethal force against a U.S. citizen who joins an enemy force.

5. Do you think that the Military Commissions system is a viable forum to prosecute non-U.S. citizen unlawful enemy belligerents captured on the battlefield?

**RESPONSE:** Yes, in certain circumstances a military commission could be a viable forum to prosecute such individuals. Should I be confirmed as Attorney General, I look forward to working with the military and the others in the executive branch to make the best determination about where each case should be brought. As I stated at the hearing, if terrorists threaten Americans here or abroad, they will face American justice. Should I be confirmed as Attorney General, I would continue to support the Executive Branch's strong practice of utilizing all of the tools in our arsenal. And that includes the military commission process.

6. Prior to this current conflict, can you give me a case in U.S. history where an unlawful enemy belligerent, caught on a foreign battlefield, was tried in U.S. civilian court?

**RESPONSE:** I am unaware of such cases, but have not had occasion to examine whether such a case has been brought.

7. Do you think that non-U.S. citizen unlawful enemy belligerents captured on foreign battlefields should be afforded the same constitutional protections as common criminals apprehended in the U.S.?

**RESPONSE:** It is my understanding that, in many circumstances, a non-U.S. citizen unlawful enemy belligerent captured on a foreign battlefield would not be entitled to constitutional protections. But as stated above and as I stated at the hearing, I would continue the strong practice of utilizing all of the tools in our arsenal to ensure that we effectively respond to terrorist threats and vindicate justice. Based on a careful analysis of options, the appropriate tool in a particular case could be a criminal prosecution by a United States Attorney's Office like the one I now proudly lead, which would be subject to certain constitutional protections. Or the

appropriate option could be a military commission trial, which I understand Congress crafted to satisfy the constitutional protections that might apply in that context.

### ***On Online Gambling***

1. On December 23, 2011, the Department's Office of Legal Counsel released an opinion holding that the Wire Act only prohibits online gambling as it relates to sporting events or contests, reversing the DOJ's long-held position that the Wire Act extends to all forms of gambling. Do you agree with this OLC opinion?

**RESPONSE:** If confirmed as Attorney General, I will review the Office of Legal Counsel opinion, which considered whether interstate transmissions of wire communications that do not relate to a sporting event or contest fall within the scope of the Wire Act. It is my understanding, however, that OLC opinions are rarely reconsidered. If confirmed, I will read the opinion and if it articulates a reasonable interpretation of the law, I would welcome the opportunity to work with you and other Members of Congress to address concerns about online gambling through legislation.

2. Do you believe the law is clear that the Wire Act extends only to sports bets or wagers?

**RESPONSE:** OLC concluded that the Wire Act does not extend to interstate transmissions of wire communications that do not relate to a sporting event or contest. As noted in my response to question 1, above, if confirmed I will review the opinion and determine whether I find OLC's interpretation of the statute to be reasonable.

3. In 2013, your office filed a civil forfeiture action which included as a predicate offense, the operation of gambling websites offering "casino games and sports betting" – websites your office claimed violate "multiple federal criminal statutes, including ... [the Wire Act] (making it unlawful to use a wire in connection with placing a bet or wager)"? *U.S. v. Two Million Eighty Thousand Dollars, et.al.*, CV 13-2077 (E.D.N.Y. April 9, 2013).
  - a. If the law is clear that the Wire Act extends only to sports betting, why did your office not limit it to sports betting in its complaint, as quoted above?
  - b. On the other hand, if the law is not clear, was it appropriate for DOJ to overturn the law without consulting Congress, or seeking guidance from the courts?

**RESPONSE:** As alleged in the amended complaint, the civil forfeiture action, *United States v. Two Million Eighty Thousand Dollars, et.al.*, CV 13-2077 (E.D.N.Y. April 9, 2013), arose from a joint state and federal investigation into an illegal sports bookmaking and money laundering enterprise with operations in Queens County, New York, and elsewhere. The criminal enterprise used bookmakers located in the United States to solicit and accept sports wagers for the placement of bets on off-shore Internet gambling websites. The proceeds seized in connection with the civil forfeiture action were exclusively the proceeds of sports gambling. The reference in the civil forfeiture complaint to "real money" casino games and sports betting" was taken

from one of the website's own description of the activities that it facilitated and was not a description of the predicate offense that the government asserted as the basis for the forfeiture.

The amended complaint alleged multiple bases for the forfeiture of the sports betting proceeds. In addition to the Wire Act offenses, the government alleged violations of 18 U.S.C. § 1955(a) (illegal gambling business) and 18 U.S.C § 1956 (money laundering). Notably, all of the funds forfeited thus far in this matter have been forfeited exclusively under 18 U.S.C. § 1955(d), which authorizes the forfeiture of property used in violation of the provisions of 18 U.S.C. § 1955(a).

4. The OLC lawyer who authored the opinion subsequently stated that "it is just that – an opinion." Does the opinion carry the force of law?

**RESPONSE:** It is my understanding that OLC opinions customarily are treated as authoritative by executive agencies. I am not aware of any statute or regulation that gives OLC opinions the force of law.

5. Do you think it was appropriate for OLC to effectively open the door for states to offer Internet gaming without the involvement of Congress, the public, law enforcement, and state and local officials?

**RESPONSE:** Pursuant to delegation, OLC exercises the Attorney General's authority to provide the President and executive agencies with advice on questions of law. Because OLC helps the President fulfill his constitutional obligation to take care that the law be faithfully executed, it is my understanding that the Office strives to provide an objective assessment of the law using traditional tools of statutory interpretation. These tools would not include seeking the views of Congress, the public, law enforcement, or state and local officials on a question of statutory interpretation.

6. At your confirmation hearing, you agreed that online gambling could be used as a way to finance terrorist organizations. If confirmed, would you suspend or revoke the OLC opinion to give you a chance to review it, and give you and Congress time to work together to clarify the law?

**RESPONSE:** As noted in my response to question 1, above, I will review the OLC opinion if confirmed as Attorney General. Unless in the course of my review I conclude that OLC's interpretation of the Wire Act is unreasonable, I do not intend to take any action to suspend or revoke the opinion. I would, of course, welcome the opportunity to work with you and other Members of Congress to address concerns about online gambling through legislation.

### *On Office of Justice Programs*

DOJ's Office of Justice Programs (OJP) has consistently offered a competitive program for national organizations mentoring youth across America. This program defines national organization as those serving youth in at least 45 states.

- a. Does DOJ intend to change the criteria it currently uses under the Mentoring Program?
- b. If so, what impact would this change have on national organizations the Mentoring Program has helped fund to date?

**RESPONSE:** I am not aware whether OJP plans to make changes to the Mentoring Program. However, if confirmed as Attorney General, I look forward to working with OJP on any plans they may have to improve their programs, including changes to the eligibility criteria for the Mentoring Program. I understand that this program provides critical support to mentoring organizations and the youth they serve.

### *On Obscenity Laws*

1. Do you believe the distribution and production of obscene material damages our communities?

**RESPONSE:** Obscenity is not protected by the First Amendment. I know that the Department focuses its limited investigative and prosecutorial resources on egregious cases that inflict the most damage on our communities, particularly those that facilitate child exploitation and cases involving the sexual abuse of children, including obscene depictions of child rape. For that reason, the significant majority of the federal obscenity cases the Department prosecutes involve the exploitation of children.

2. The federal obscenity laws, 18 U.S.C. §§ 1460-1470, have been largely unenforced under the Holder DOJ. These laws prohibit the distribution and production of obscene material, and provide heightened penalties for the distribution and production of obscene material related to minors. If confirmed, do you intend to enforce these laws?

**RESPONSE:** I understand that the Department has brought significant obscenity prosecutions in recent years, and remains committed to bringing obscenity cases where appropriate. As indicated above, the Department focuses its limited investigative and prosecutorial resources on egregious cases that inflict the most damage on our communities, particularly those that facilitate child exploitation and cases involving the sexual abuse of children, including obscene depictions of child rape.

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

**QUESTIONS FROM SENATOR HATCH**

1. On April 25, 2013, Professor Paul Cassell of the University of Utah College of Law testified before the House Judiciary Subcommittee on the Constitution regarding implementation of crime victims' rights statutes. These include the Mandatory Victim Restitution Act, 18 U.S.C. §3663A, and the Crime Victims Rights Act, 18 U.S.C. §3771, both of which I helped to enact. He suggested that your office had failed to follow these statutes in a sealed case involving a racketeering defendant who had cooperated with the government. Specifically, he cited documents appearing to show that your office failed to notify victims of the sentencing in that case and had arranged for the racketeer to keep the money he had stolen from victims, even though the law makes restitution mandatory. Please explain in detail how your office protected the rights of crime victims in this case and, in particular, how it complied with the mandatory restitution provisions of these two statutes.

**RESPONSE:** The defendant in question, Felix Sater, provided valuable and sensitive information to the government during the course of his cooperation, which began in or about December 1998. For more than 10 years, he worked with prosecutors from my Office, the United States Attorney's Office for the Southern District of New York and law enforcement agents from the Federal Bureau of Investigation and other law enforcement agencies, providing information crucial to national security and the conviction of over 20 individuals, including those responsible for committing massive financial fraud and members of La Cosa Nostra. For that reason, his case was initially sealed.

During my most recent tenure as the United States Attorney for the Eastern District of New York, the Office's only activity related to this matter was to address whether certain materials should remain sealed. My Office's position has consistently been upheld by the courts.

The initial sealing of the records related to Sater—which pre-dated my tenure as United States Attorney—occurred by virtue of a cooperation agreement under which Sater pled guilty and agreed to serve as a government witness. In 2013, following proceedings before United States District Judge I. Leo Glasser of the Eastern District of New York, roughly three-fourths of the materials in this case were unsealed. At this point, the majority of the materials that remain sealed go to the heart of the nature of Sater's cooperation in several highly sensitive matters. Judge Glasser has ruled that these remaining materials should remain sealed on the basis of, among other things, the "safety of persons or property" and the "integrity of government investigation and law enforcement interests."

In addition to Judge Glasser's 2013 ruling, a three-judge panel of the Second Circuit Court of Appeals twice rejected efforts to reconsider the decision to keep certain materials sealed in this case. The judges reviewing Judge Glasser's order concluded that "given the extent and gravity of Sater's cooperation," continued sealing of select materials was appropriate. In a separate

instance, the court went out of its way to warn the plaintiffs behind the lawsuit to cease any further “frivolous” motions or else risk court-imposed sanctions. Finally, just last month, the Supreme Court declined to hear any further arguments from the parties behind this lawsuit.

In terms of restitution, there has been speculation that my Office pursues restitution from cooperating defendants differently than it does from other defendants. It does not. With respect to Sater’s case, the information in the record that concerns the issue of restitution remains under seal. As a matter of practice, however, the prosecutors in my Office work diligently to secure all available restitution for victims, whether the defendants convicted in their cases cooperate with the government or not. In fact, since June 2010, in EDNY cases, judges have imposed nearly two billion dollars in restitution to individual and government victims.

2. For several years, then-Senator Joe Biden and I worked to insure that the Justice Department supported youth mentoring organizations. We helped groups like the Boys and Girls Clubs of America greatly expand the number of those they serve by partnering with the Office of Justice Programs, which you will oversee if appointed to be Attorney General. In recent years, the President’s budgets have proposed to reduce funding for youth mentoring grants and Congress has restored and even increased that funding. Can you assure me that, as Attorney General, you will work with OJP and others to make sure that funds are directed where they can do the most good and maximize the delivery of needed services?

**RESPONSE:** I know that mentoring organizations in this country, like the Boys and Girls Clubs of America, are doing amazing work with young people. The Department’s Office of Justice Programs (OJP) is invested in supporting the continued expansion of high quality mentoring for at-risk youth through the appropriated mentoring funds. OJP, through the Office of Juvenile Justice and Delinquency Prevention (OJJDP), has worked with and continues to work with many of these mentoring organizations through the use of funding solicitations directed at National and Multi-state mentoring organizations.

If I am confirmed as Attorney General, I will support the work of OJJDP and the many mentoring organizations implementing high quality mentoring programs. I will also support the OJJDP National Mentoring Resource Center, which is a source of training and technical assistance for all mentoring programs across the country.

3. In your hearing on January 28, I urged you to enforce laws prohibiting child pornography and to help victims receive restitution. Adult obscenity also lacks First Amendment protection and harms individuals, families, and communities. It is connected to sexual exploitation and violence against women as well as to human trafficking and is a destructive force in marriages. Even though the Obscenity Prosecution Task Force has been disbanded and prosecution of adult obscenity brought back under the Child Exploitation and Obscenity Section, will you commit to aggressively enforcing the adult obscenity laws and provide current data about the cases initiated and prosecuted by the Department that involve only adult obscenity?

**RESPONSE:** As you note, obscenity is not protected by the First Amendment. I understand that the Department has brought significant obscenity prosecutions in recent years, and I look forward to ensuring that the Department remains committed to bringing obscenity cases where appropriate. The Department can provide current data concerning obscenity prosecutions, if helpful.

4. I understand that the Justice Department is in the process of reviewing the ASCAP and BMI consent decrees. I want you to know how interested I am in this process and how important it is to the future of songwriters. Will you commit to making meaningful revisions to the decrees as soon as possible?

**RESPONSE:** I understand that the Antitrust Division is currently reviewing the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) decrees in order to determine whether the decrees' terms continue to be appropriate given advances in markets and technology in music distribution and promotion. The Antitrust Division solicited public comments on a number of questions concerning these decrees. *See* <http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html>. I believe the Department is working as expeditiously as possible to complete the review in a timely fashion and understand that it will pursue any appropriate modifications so that music publishers and licensees benefit from competitive markets, taking into account new media technologies.

5. It has been reported that the Justice Department systematically targets lawful businesses by pressuring financial and banking services providers to stop doing business with firearm and ammunition companies and others dubbed "high risk." Do you believe that this type of targeting is appropriate and will you continue his practice if appointed to be Attorney General?

**RESPONSE:** The role of the Department of Justice is to enforce the law and as a career prosecutor and the United States Attorney for the Eastern District of New York, I can assure you that I, and my fellow prosecutors and law enforcement partners, take this role seriously. Our job is to investigate specific evidence of unlawful conduct and enforce the law. Our cases should target businesses that are violating the law, not those acting lawfully.

The Department works every day to uphold the law and protect the American people. To ensure that our efforts are effective, the Department also must make sure to prevent any potential misunderstanding of its efforts that could be detrimental to lawful businesses. Thus, if I am confirmed as Attorney General, I will make clear that it is imperative that we inform financial institutions that any investigations are based on specific evidence that a financial institution is breaking the law, and not on the institution's relationships with lawful industries or companies.

6. Several years ago, the ATF was removed from the Treasury Department and became a stand-alone agency and the Department of Homeland Security was created. The ATF and

DHS often work together and share many of the same tasks. Do you believe the ATF should remain a separate agency or should it be merged with DHS?

**RESPONSE:** Although as the United States Attorney for the Eastern District of New York I have not studied various proposals for re-organizing components of the Department of Justice, I support ATF and believe its law enforcement capabilities must be preserved. ATF is a unique law enforcement agency in the Department of Justice that protects our communities from violent criminals, criminal organizations, the illegal use and trafficking of firearms, the illegal use and storage of explosives, acts of arson and bombings, acts of terrorism, and the illegal diversion of alcohol and tobacco products. ATF partners with communities, industries, law enforcement, and public safety agencies to safeguard the public through information sharing, training, research and use of technology.

7. I disagree with the Justice Department's decision not to enforce federal marijuana laws in states that have legalized marijuana. It sends the wrong message to our youth and demonstrates disregard for the rule of law. We should all agree, however, about the need to continue fighting drug trafficking organizations and the dangers they cause. In my state of Utah and other western states, drug trafficking organizations divert rivers and streams, clear cut timber, pollute the environment, and even place booby traps in the course of illegally growing marijuana on public lands. I recently introduced legislation with Sen. Feinstein to address these problems, S.348, the Protecting Lands Against Narcotics Trafficking Act. It enhances penalties for growers who degrade the environment and create public safety hazards and creates a fund to remediate environmental harms cause by illegal marijuana cultivation. Will you commit to making the prevention of marijuana growth on federal land a priority and to ensuring that prosecutors use the tools that my bill provides?

**RESPONSE:** As indicated in the Deputy Attorney General's Memorandum, dated August 29, 2013, combating large-scale marijuana grows, including those on public lands, is a priority for the Department. The geographic isolation of the marijuana grows and the size of federal public lands requires a coordinated and multi-agency effort. I understand that some of my fellow United States Attorneys, particularly those in the western part of the United States, are working closely with DEA, the National Forest Service, the Bureau of Land Management (BLM), and other federal, state, and local partners to enforce the controlled substance laws against drug traffickers who threaten public safety and the environment by using federal public lands for large-scale marijuana cultivations.

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

**QUESTIONS FROM SENATOR LEE**

1. As the Nation’s chief legal officer, the Attorney General is responsible for giving the President and other government agencies candid advice about the legality of proposed Executive action. With that in mind, please answer the following:
  - a. If confirmed, you (or the Office of the Legal Counsel under your supervision) would be asked to definitively opine on the legality of a variety of proposed Executive actions. As an experienced lawyer, you know that often both sides of a legal dispute can muster reasonable arguments in their defense. And yet one side’s arguments, however reasonable, are nevertheless wrong—or at least weaker than those opposed to them. In your view, is it the duty of the Department of Justice to give a favorable opinion of the legality of proposed action so long as reasonable arguments can be made in its defense? Or must the Department decide, *de novo*, whether those arguments are in fact correct?
  - b. At your hearing, you testified repeatedly that you had reviewed the OLC memo concerning the legality of the President’s executive action on immigration, and found its arguments “reasonable.” Do you agree that, if confirmed, you must independently determine whether those arguments are not just “reasonable” but in fact correct?

**RESPONSE:** If I am confirmed as Attorney General, as I testified at my confirmation hearing, the Constitution and the laws of the United States will be my guide as I exercise my powers and responsibilities as Attorney General, and I will fulfill those responsibilities with integrity and independence. As United States Attorney, I have not yet had occasion to have extensive interaction with the Office of Legal Counsel (OLC). As your question suggests, OLC is charged with advising whether proposed executive actions are lawful. OLC is not an advocate charged with defending executive actions in litigation, and it is not OLC’s mission to devise any possible argument to defend such action, or to advance all arguments that would be available to support such action in court. Rather, if I am confirmed as Attorney General, I would expect OLC to provide candid, independent, and principled advice, especially where that advice is inconsistent with the aims of policymakers. 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. Because, in providing its advice, OLC is exercising the delegated authority of the Attorney General, I will appropriately supervise the Office in its work.

2. How would you describe your approach to statutory interpretation?
  - a. To what sources would you look in deciding a legal question that turned on interpretation of a federal statute?

**RESPONSE:** Consistent with Supreme Court precedent, I would approach statutory interpretation using all of the tools available to me, including the statute's text, structure, context, history, and purpose, as well as relevant case law.

- b. Does a statute have a purpose beyond the purpose expressed in the enacted text of the legislation and if so, how would a lawyer be capable of adducing a statute's purpose?

**RESPONSE:** Supreme Court precedent demonstrates that the purpose of a statute can be discerned from a range of available tools, including the statute's text, structure, context, and history.

3. In the case of the Commerce Clause, apart from circumstances present in *Lopez* and *Morrison*, what are the limits on Congress's Commerce Clause power?

**RESPONSE:** I have not undertaken a systematic review of Commerce Clause jurisprudence. However, it is my understanding that the Commerce Clause grants Congress broad authority to regulate commerce among the states and activities that have a substantial effect on interstate commerce, but would not extend to legislation not necessary and proper to such regulation. The precise contours of Congress's Commerce Clause power have been (and are being) developed in the courts.

4. Do you believe that Congress has at any time overstepped its authority under the Commerce Clause since *Wickard*, other than in *Lopez* and *Morrison*?

**RESPONSE:** As noted above, I have not undertaken a systematic review of Commerce Clause jurisprudence in connection with this question, but I am not aware of other instances since *Wickard* where the Supreme Court struck down a statute based on a conclusion that Congress had exceeded its authority under the Commerce Clause.

5. Under the Supreme Court's decision in *Bolling v. Sharpe*, the Federal Government may not constitutionally discriminate on the basis of race. With that in mind, do you believe it is consistent with the constitutional equal-protection principle for Congress to require local governments or private employers to take explicit account of the racial impact of employment policies?

**RESPONSE:** I believe that employers have a right to select the best candidates for a job. For forty years, the Supreme Court has recognized that employment practices that disproportionately screen out people of a particular race, national origin, or gender can deny an individual a job as effectively as directly excluding persons of a group. Congress included this established principle in the Civil Rights Act of 1991, and the Department of Justice has enforced it for decades,

through both Republican and Democratic administrations. My understanding is that the Department brings job discrimination cases based on the law, never solely on the number of persons hired from any racial group.

6. Do you believe that *Citizens United v. FEC* was correctly decided?

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I have not had occasion to reach a considered view on whether *Citizens United v. FEC* was correctly decided. I support and follow the Supreme Court's binding decisions now as the law of the land, and if confirmed, I would continue to do so as Attorney General.

7. During a State of the Union address, President Obama said the *Citizens United* decision would allow "foreign corporations to spend without limits in our elections." Do you believe that is an accurate description of the holding of that case?

**RESPONSE:** I am not familiar with the President's comment that you have quoted above or the context in which it was made, and I would not want to speculate on what he may have intended by it.

8. I would like to give you another opportunity to answer a question you were asked several times at your hearing about the limits of Executive power. Imagine the President decided that, because Congress had failed to act to reform the tax laws, the federal government would simply no longer collect any taxes above a 25% marginal rate. Could such an act be a constitutionally permissible exercise of prosecutorial discretion? Please include, in your answer, a yes or no.

**RESPONSE:** It is not clear to me that the collection of taxes is an activity subject to principles of prosecutorial discretion, and I am not familiar with whether or, if so, how the Internal Revenue Service relies on the concept of prosecutorial discretion in connection with its tax collection efforts.

9. INA § 212(d)(5)(A) limits the government's authority to parole aliens into the United States to certain limited circumstances. It provides in relevant part that parole may be granted "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." Nevertheless, USCIS's Form I-131 permits recipients of deferred action to obtain advance parole—*i.e.*, permission to leave the country and then be paroled back into the United States upon their return—for "educational purposes, employment purposes, or humanitarian purposes."<sup>1</sup> According to USCIS, "[e]ducational purposes include, but are not limited to, semester abroad programs or academic research" and "[e]mployment purposes include, but are not limited to, overseas assignments, interviews,

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<sup>1</sup> See Instructions to USCIS Form I-131, OMB Doc. No. 1615-0013, at p. 4.

conferences, training, or meetings with clients.”<sup>2</sup> Do you believe that an undocumented alien’s need to attend meetings with clients abroad presents an “urgent humanitarian reason[]” or a significant benefit to the American public within the meaning of INA § 212(d)(5)(A)?

**RESPONSE:** As United States Attorney who is not an expert in immigration law, I am not familiar with the authority that the Secretary of Homeland Security exercises over parole decisions. However, if confirmed as Attorney General, I will support the strong enforcement of our nation’s immigration laws.

10. If an inadmissible alien approached our border, without a visa, and asked to be paroled into the United States in order to take a business meeting in New York, or attend a conference in Washington, D.C., do you agree it would be unlawful to parole the alien into the country for that purpose?

**RESPONSE:** As United States Attorney who is not an expert in immigration law, I am not familiar with the authority that the Secretary of Homeland Security exercises over parole decisions. However, if confirmed as Attorney General, I will support the strong enforcement of our nation’s immigration laws.

11. Will you commit to independently determining whether USCIS’s advance parole program complies with INA § 212(d)(5)(A) and release your conclusions to the Congress?

**RESPONSE:** If the Office of Legal Counsel is presented with this question in the course of its duties, or if the Department is tasked with defending actions by USCIS relating to advance parole, I would expect these actions to take into account the applicable statutory criteria.

12. In April 2014, DHS Secretary Jeh Johnson told the U.S. Council of Mayors that immigrants who entered this country illegally have “earned the right to be citizens.” Do you agree with that assertion?

**RESPONSE:** I am not familiar with the context of the Secretary’s remark. I believe that eligibility for citizenship is established by statute and implementing regulations. I would defer to Congress and those officials entrusted with citizenship determinations as to how these laws should be amended or enforced.

13. You recently announced that your office was prosecuting, for conspiracy to commit murder, foreign terrorist fighters accused of engaging in combat with U.S. troops on battlefields abroad. What criteria were used to decide whether these combatants should

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<sup>2</sup> *Id.* at p. 5.

be criminally prosecuted rather than detained under the law of war and prosecuted by military commissions under the Military Commissions Act?

**RESPONSE:** I believe strongly that the United States government must use every available tool, including detention of unlawful enemy combatants and military commission trials, as well as Article III prosecutions, to protect the American people. In any particular case, representatives of the agencies who are tasked with protecting the American people, including the Department of Defense, the Department of Homeland Security, the Department of Justice and agencies in the Intelligence Community, work together to determine the most effective tools to apply in that case, based on the particular facts and applicable law. As the United States Attorney for the Eastern District of New York, my role to date has been limited to determining whether or not there was a prosecutable federal case, not which was the appropriate tool to employ.

Because the cases to which you refer are ongoing prosecutions, I cannot comment on the specific facts or decision-making processes in those matters, other than to indicate that the process described above was observed.

14. Do you believe foreign terrorist fighters' engaging in combat with American military forces is best described as a conspiracy to murder American nationals?

**RESPONSE:** As indicated above, I believe strongly that the United States government must use every available tool, including detention of unlawful enemy combatants and military commission trials, as well as Article III prosecutions, to protect the American people. In Article III prosecutions, the government can bring a range of charges against a foreign terrorist fighter, and conspiracy to murder American nationals can be one such charge, depending on the facts. If I am confirmed as Attorney General, I will pursue an 'all-tools' approach, and where an Article III prosecution was the most effective tool, will continue to support the Department's longstanding approach of bringing the most serious charges the government could sustain at trial.

15. Are you concerned that Article III criminal trials afford enemy combatants the opportunity to summon our troops from their duties elsewhere in order to appear as witnesses in criminal court?

**RESPONSE:** As indicated above, I believe strongly that the United States government must use every available tool, including detention of unlawful enemy combatants and military commission trials, as well as Article III prosecutions, to protect the American people. If I am confirmed as Attorney General, I will support careful consideration of all appropriate factors in any decision about which tool to employ, including any burden on U.S. military personnel or operations. From my experience as United States Attorney leading an office that has prosecuted many of our nation's most significant terrorism cases, I know first-hand that our skilled prosecutors and law enforcement agents can obtain convictions in many cases without adversely affecting the mission of the U.S. military.

16. At your hearing, you testified that civil asset forfeiture was a “wonderful tool” for law enforcement. No doubt that can sometimes be true, when the person who owns the seized asset is in fact guilty of using the asset to commit crimes. But our current laws permit the government to seize assets without first proving that guilt. Please answer whether you believe it is fundamentally just for the government to seize a citizen’s bank account on the belief that it contains the proceeds of crime, but without having to carry a burden to prove the owner’s guilt.

**RESPONSE:** Assets can be seized by the government for civil forfeiture only if there is probable cause linking the particular asset to criminal activity. The probable cause requirement is a core tenet of our legal system, and there is nothing about the forfeiture process, civil or otherwise, that allows for the seizure of property in the absence of probable cause. Because civil asset forfeiture is a proceeding against property and not against an individual, it does not require an accompanying criminal conviction. Rather, to forfeit the asset, the government must ultimately prove by a preponderance of the evidence that the property at issue is linked to criminal activity. Civil forfeiture law further provides protection for any innocent owner of an asset who is unaware of its link to criminal activity.

17. I understand from news reports that in 2012 your office froze bank accounts belonging to the Hirsch brothers, but did not file a criminal or civil complaint, and ultimately agreed to return the funds only if the brothers agreed not to attempt to recover their expenses in trying to persuade you to return their money. Please explain whether you believe this case is a good example of why civil asset forfeiture is an important law enforcement tool.

**RESPONSE:** 31 U.S.C. § 5324 provides that “[n]o person shall, for the purpose of evading” certain statutory reporting requirements primarily set forth in 31 U.S.C. §§ 5313(a), 5325 and 5326 “cause or attempt to cause a domestic financial institution to fail to file a report” for the deposit of amounts in excess of \$10,000.00. In May 2012, my Office presented evidence to a federal magistrate judge that the Hirsch brothers’ business, Bi-County Distributors, Inc. (“Bi-County”), had deposited over \$1.4 million in cash in what the evidence indicated was likely a “structured” manner, intended to evade federal currency reporting requirements. Based upon this showing, the federal magistrate judge found that there was probable cause for the seizure of the structured deposits and issued a warrant to seize Bi-County’s account.

Frequently, structured cash deposits are designed to conceal crimes such as narcotics offenses, money laundering and tax evasion. The currency reporting requirements have been an effective tool in assisting law enforcement in its detection of such criminal conduct. In order for the forfeiture statutory scheme to achieve its purpose, it authorizes the seizure of structured funds at the outset of a case, regardless of whether the case is pursued civilly or criminally. If such seizures were not authorized, then the statutory scheme would be rendered largely ineffective as cash assets likely would be dissipated long before any court could issue an order of forfeiture.

In all cases like the Bi-County case, where bank accounts are seized, such seizures can be effectuated only after the review, approval and authorization of a United States Magistrate Judge.

Before seizure warrants even are submitted for judicial authorization, my Office carefully reviews all available information which has resulted in the declination of many civil asset forfeiture cases presented for prosecution. These judicial safeguards, in conjunction with my Office's internal vetting process, have prevented wrongful seizures in the past and will prevent them in the future. If, following a seizure, my Office is presented with or obtains information that leads to a determination that the forfeiture of the seized asset should not be pursued on the merits, then my Office has, and will continue to, consider settlement or a return of the asset, as appropriate.

18. You testified that you understood that the Attorney General had discontinued the federal government's previous program of adopting state and local seizures as its own. But the Attorney General's order to which you referred contains several exceptions, one of which is for "seizures pursuant to federal seizure warrants, obtained from federal courts to take custody of assets originally seized under state law." In your experience as a prosecutor, are you aware of any legal impediments to obtaining a federal seizure warrant, whether under Federal Rule of Criminal Procedure 41 or otherwise, for the types of property seized by state officials that were previously subject to asset-forfeiture adoption?

**RESPONSE:** Attorney General Holder's January 16, 2015, Order generally prohibited the practice of adoption by federal agencies of assets seized by state and local law enforcement. The use of federal seizure warrants is an altogether different practice. The obtaining of a federal seizure warrant necessitates an independent, judicial finding that the seizure is supported by evidence demonstrating probable cause that a federal crime has been committed and the asset in question is linked to that crime. Thus, where a federal prosecutor obtains a federal seizure warrant for an asset, there are enhanced safeguards that the case is federal in nature.

I have been informed that the Department's review of civil asset forfeiture is ongoing. The goal of this review, as I understand it, is to ensure that federal asset forfeiture authorities are used effectively and appropriately to take the profit out of crime and return assets to victims, while safeguarding civil liberties and the rule of law. If I am confirmed, I pledge to continue that review.

19. Dating back to the 1960's and 1970's, the Department of Justice has been concerned about organized crime and other criminal enterprises profiting from the proceeds of illegal gambling. By way of example, the American Gaming Association estimated that the Super Bowl would attract some \$3.8 billion in illegal wagers, which is 38 times the amount wagered lawfully. Please describe any actions you have taken as United States Attorney to combat illegal gambling; and please describe what can be done to better address the growing problem of illegal gambling.

**RESPONSE:** During my time as the United States Attorney for the Eastern District of New York, my Office has brought prosecutions for illegal gambling, including as part of larger racketeering cases. In 2011, my Office led the largest ever nationally coordinated organized crime takedown against organized crime in the United States. Twelve indictments were unsealed

in Brooklyn against eighty-five individual defendants, including charges against members of all five New York-based La Cosa Nostra families. Those charges included charges for illegal gambling, including illegal sports betting and operation of illegal card games and illegal gambling devices. As in other areas, when it comes to illegal gambling, we generally prioritize the most egregious conduct, including conduct tied to organized crime or instances where illegal gambling is part of a larger criminal scheme. I would welcome the opportunity to work with Congress to address this issue.

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

**QUESTIONS FROM SENATOR PERDUE**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

public interest would be served by such an appointment. I have no reason to question the ability of our dedicated career prosecutors and law enforcement agents to conduct the IRS investigation fairly and professionally. At the same time, I assure the Committee that, if I am confirmed as Attorney General, I will apply the Special Counsel regulations faithfully and will exercise my discretion as Attorney General in an appropriate manner.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**RESPONSE:** I believe strongly that the United States government must use every available tool, including detention of unlawful enemy combatants and military commission trials, as well as Article III prosecutions, to protect the American people. In any particular case, representatives of the agencies who are tasked with protecting the American people, including the Department of Defense, the Department of Homeland Security, the Department of Justice and agencies in the Intelligence Community, work together to determine the most effective tools to apply in that case, based on the particular facts and applicable law. As the United States Attorney for the Eastern District of New York, my role to date has been limited to determining whether or not there was a prosecutable federal case, not which was the appropriate tool to employ.

Because the cases to which you refer are ongoing prosecutions, I cannot comment on the specific facts or decision-making processes in those matters, other than to indicate that the process described above was observed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**RESPONSE:** I am not aware of any such cases.

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

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

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

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

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

c. Do they make the American people safer?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**RESPONSE:** I do not have any categorical views on these issues in the abstract. My general understanding is that the Department considers questions of the validity of voting practices, such as state voter identification laws, based on the particular requirements of the federal law being enforced, based on the particular facts of the practice being investigated and based on the particular laws and facts in the jurisdiction.

As the Supreme Court held in *Crawford v. Marion County Election Board*, voter identification laws are not per se unconstitutional. Nor do they necessarily violate the Voting Rights Act. I understand that before the *Shelby County* decision, the Department did preclear some voter identification laws, such as in Virginia and New Hampshire.

However, the analysis of a voter ID law is very specific to the particular law, the particular jurisdiction, and a wide range of factors that Congress has identified as relevant to determining whether a particular voting practice comports with the Voting Rights Act. As such, it is difficult for me to comment on the merits of any law (or in the abstract) without a full understanding of how the law actually operates in a particular jurisdiction.

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

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

**RESPONSE:** I am not personally familiar with the specifics of studies regarding these issues, nor do I have any categorical views on these issues in the abstract. One of the important responsibilities of the Department of Justice is to investigate and prosecute violations of the federal criminal laws, including those federal laws that criminalize various types of election fraud. If I am confirmed as Attorney General, I am committed to enforcing all of the federal laws within the Department's jurisdiction, including the federal criminal laws regarding election fraud, according to their terms, in a fair and even-handed manner.

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

**RESPONSE:** As stated above, I do not have any categorical views on these issues in the abstract. My general understanding is that the Department considers questions of the validity of voting practices, such as state voter identification laws, based on the particular requirements of the federal law being enforced, based on the particular facts of the practice being investigated and based on the particular law and facts in the jurisdiction.

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The analysis of a voter ID law is very specific to the particular law, the particular jurisdiction, and a wide range of factors that Congress has identified as relevant to determining whether a particular voting practice comports with the Voting Rights Act. As such, it is difficult for me to comment on the merits of any law (or in the abstract) without a full understanding of how the law actually operates in a particular jurisdiction.

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

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

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

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

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

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

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

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

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

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

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

- c. Do you support the new guidelines?

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

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

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

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

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

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

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

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

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

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

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

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

**RESPONSE:** 31 U.S.C. § 5324 provides that “[n]o person shall, for the purpose of evading” certain statutory reporting requirements primarily set forth in 31 U.S.C. §§ 5313(a), 5325 and 5326 “cause or attempt to cause a domestic financial institution to fail to file a report” for the deposit of amounts in excess of \$10,000.00. In May 2012, my Office presented evidence to a federal magistrate judge that the Hirsch brothers’ business, Bi-County Distributors, Inc. (“Bi-County”), had deposited over \$1.4 million in cash in what the evidence indicated was likely a “structured” manner, intended to evade federal currency reporting requirements. Based upon this

showing, the federal magistrate judge found that there was probable cause for the seizure of the structured deposits and issued a warrant to seize Bi-County's account.

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

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

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

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

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

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

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

In all cases like the Bi-County case, where bank accounts are seized, such seizures can be effectuated only after the review, approval and authorization of a United States Magistrate Judge. Before seizure warrants even are submitted for judicial authorization, my Office carefully

reviews all available information which has resulted in the declination of many civil asset forfeiture cases presented for prosecution. These judicial safeguards, in conjunction with my Office's internal vetting process, have prevented wrongful seizures in the past and will prevent them in the future. If, following a seizure, my Office is presented with, or obtains information that leads to a determination that the forfeiture of the seized asset should not be pursued on the merits, then my Office has, and will continue to, consider settlement or a return of the asset, as appropriate.

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

**RESPONSE:** I am keenly aware of concerns about civil asset forfeiture, and I take those concerns very seriously. As mentioned above, the Department has embarked on an ongoing review of its Asset Forfeiture Program (which has so far resulted in the policy change on adoptions) and if I am confirmed as Attorney General, I look forward to continuing that review, to ensure that Asset Forfeiture tools are used effectively and appropriately to take the profit out of crime and return assets to victims, while safeguarding civil liberties and the rule of law.

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

**QUESTIONS FROM SENATOR SCHUMER**

- 1) My home state of New York has faced an exponential increase in abuse of opioids, particularly heroin, over the last several years. What are some of the steps you will take as Attorney General to combat this burgeoning epidemic?

**RESPONSE:** As a United States Attorney, I have seen the horrible damage done to families and communities by opioids. I know that the Department of Justice has worked closely with federal, state, and local partners to fight this growing epidemic through a mix of enforcement and treatment efforts. With respect to enforcement, DEA, the United States Attorneys' Offices, and the Criminal Division proactively investigate supply chains to prevent controlled substances from reaching the hands of non-medical users and to bring to justice traffickers who seek to profit from addiction. In addition, the following are vital components of a comprehensive approach to the heroin and prescription painkiller epidemic: to ensure prevention through education, early intervention, and expanded treatment options; to explore alternatives to incarceration; and to provide reentry programs focused on treatment and prevention of relapse. I know the Department has encouraged law enforcement agencies and first responders to train and equip their personnel with the overdose-reversal drug known as Naloxone, which can save lives, and that the Department has created an online tool kit to assist these efforts. If I am confirmed as Attorney General, I would expect the Department to continue all of these efforts.

- 2) I was glad to see that the President has requested an increase to the Community Oriented Policing Services Programs in his recent budget proposal. The funding provided by the COPS program ensures that local law enforcement agencies have the resources they need to keep our communities safe. Will you continue to support programs such as COPS and the Byrne JAG program as Attorney General?

**RESPONSE:** The COPS program is critical in funding the hiring of community policing professionals, and offering training, technical assistance and information resources to law enforcement, community members, and local government leaders. Likewise, the Byrne JAG program provides states, tribes, and local governments with the funding necessary to support law enforcement in a variety of ways. I understand that funding for COPS and the JAG program has been a priority for the Department under Attorney General Holder, and I would continue that commitment if I am confirmed as Attorney General.

- 3) In 2012, Congress gave the Attorney General broad authority to use emergency scheduling powers for dangerous synthetic narcotics compounds that are often marketed to young adults. These compounds, labeled by titles such as "K2" or "Spice" pose a serious threat to our citizens. I have asked that the Drug Enforcement Administration work with the

Department of Justice and the Attorney General to more quickly identify these compounds as they develop; as Attorney General, will you make this a priority in your work with the DEA?

**RESPONSE:** I share your concern regarding synthetic drugs, which are highly dangerous, do not have known legitimate medical uses, and are not approved by the FDA. They pose a great danger to the public, especially children and teenagers. I understand that the DEA has been carefully monitoring the emergence of new synthetic drugs, and employs a broad range of measures to combat their use, including investigation and prosecution, administrative scheduling, and education and training for law enforcement, health professionals, and communities. If confirmed as Attorney General, I will support these important efforts.

4) Over the last several years I have advocated that federal law enforcement aggressively work to disable websites on the “dark web” that have assisted in the illegal sale of controlled substances, guns, and other dangerous contraband. “Silk Road” and “Silk Road 2.0” have been successfully taken down through the excellent work of the FBI, but more must be done as other sites emerge in their place. This is one of many reasons why I believe that it is important to increase the Department’s efforts in cybercrime prevention. As Attorney General, how do you think the Department can improve in this area?

**RESPONSE:** If confirmed as Attorney General, I will embrace the Department's responsibility to protect Americans' privacy and security on-line, just as I have as the United States Attorney for the Eastern District of New York. I know that the Department is already working hard to address the wide variety of threats on the Internet, from child exploitation to large scale data breaches to terrorism. As a United States Attorney I saw firsthand the challenges involved in such cases. But I also saw how the Department rises to meet such challenges in complex international cybercrime cases like the \$45 million ATM cyber heist my office prosecuted.

As you recognize, the Department must be proactive and strive to prevent cybercrime and cyber-enabled crime to the greatest extent possible. The Department has already instilled this mission throughout the United States Attorneys’ Offices, each of which has assigned specialized prosecutors to participate in the Computer Hacking and Intellectual Property network and the National Security Cyber Specialists network. And many Offices, such as the Eastern District of New York, have created specialized units dedicated to combating criminal and national security threats in cyberspace. I am also encouraged that the Department is engaging with the rest of the federal government and with private industry to conduct valuable outreach and to implement broad cybercrime prevention strategies through entities like the Cybersecurity Unit in the Computer Crime and Intellectual Property Section of the Criminal Division. If confirmed as Attorney General, I will support and build on these efforts.

With regard to the “dark web” in particular, I will work to continue the progress that is already being made by the Department. As you know, a defendant was just convicted in the Southern District of New York for crimes relating to the operation of the Silk Road site, and another defendant is awaiting trial for his role in that site’s successor, Silk Road 2.0. Beyond those particularly infamous sites, I know that the Department recently coordinated with law enforcement in 16 other countries to take down dozens of illegal online marketplaces operating

as hidden sites on the Tor network. I believe that this type of technical innovation and international cooperation will be increasingly important as we face more sophisticated and more global threats. Successes like these should deter criminals who wrongfully believe that they are beyond justice on such dark markets. We must continue to pursue and disrupt the criminal activities of those who are not deterred.

Continued improvement in this area will require collaboration with Congress. There is no question that law enforcement's job protecting us online is getting bigger and it is getting more difficult. I look forward to working with Congress to ensure that law enforcement has the resources and the tools it needs to protect our country and its people online.

- 5) In late 2013, Avonte Oquendo, a child with Autism Spectrum Disorder (ASD) went missing from his school in Brooklyn, and, tragically, was found deceased after a city-wide search over several months. With the help of Attorney General Holder, I worked to expand the acceptable uses for Byrne JAG grants to include programs for voluntary autism tracking devices ran by local law enforcement. Should you be confirmed as Attorney General, will you help me continue to promote this application of JAG funds? Will you commit to continue the Department's efforts to find ways to address the issue of "wandering" in children with ASD?

**RESPONSE:** I am grateful for your leadership on this issue, and am sadly familiar with the tragic disappearance and death of Avonte Oquendo as it occurred in my hometown, Brooklyn. As a United States Attorney, I have not closely studied the grant funding issue, but I understand that the Department has determined that state and local recipients of funding through the Edward Byrne Memorial Justice Assistance Grant Program may use their funds to purchase transmitter bracelets to assist with locating missing children with ASD as part of a law enforcement program. If confirmed as Attorney General, I would look forward to working with you to protect children who have ASD.

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

**QUESTIONS FROM SENATOR SESSIONS**

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

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I have not been charged with determining when and whether the President has exceeded his executive authority.

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

Do you agree with that statement?

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

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

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

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

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

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

Iraq, will also be tried in the Eastern District of New York. It is undisputed that these individuals are foreign terrorists, captured abroad while engaged in armed conflict against U.S. forces. Do you agree that these individuals are unlawful enemy combatants and, as such, could be tried before a military commission and detained for the duration of hostilities under the law of war?

**RESPONSE:** I believe strongly that the United States government must use every available tool, including detention of unlawful enemy combatants and military commission trials, as well as Article III prosecutions, to protect the American people. In any particular case, representatives of the agencies who are tasked with protecting the American people, including the Department of Defense, the Department of Homeland Security, the Department of Justice and agencies in the Intelligence Community, work together to determine the most effective tools to apply in that case, based on the particular facts and applicable law. As the United States Attorney for the Eastern District of New York, my role to date has been limited to determining whether or not there was a prosecutable federal case, not which was the appropriate tool to employ.

Because the cases to which you refer are ongoing prosecutions, I cannot comment on the specific facts or decision-making processes in those matters, other than to indicate that the process described above was observed.

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

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

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

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

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

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

9. Do you agree that in the civilian justice system, defendants are required to be told they have the right to remain silent and that interrogation must stop if they invoke that right, and that there is no such requirement in the military system for enemy combatants?

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

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

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

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

**RESPONSE:** Federal Rule of Criminal Procedure 5 requires that upon arrest either within or outside the United States, a federal law enforcement officer must promptly bring an arrestee before a magistrate judge “without unnecessary delay,” although an individual may voluntarily waive this requirement, as has occurred with some frequency in terrorism cases. I have not had the occasion as a United States Attorney to examine the requirements under the military commission system, but, if confirmed as Attorney General, I would support using all lawful tools of national power, including the military commission system, to protect the nation from terrorism.

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

**RESPONSE:** The Speedy Trial Act imposes a number of time limits within which a defendant must be indicted and brought to trial, although these may be suspended for good cause or by waiver of a defendant. I have not had the occasion as a United States Attorney to examine the requirements under the military commission system, but, if confirmed as Attorney General, I would support using all lawful tools of national power, including the military commission system, to protect the nation from terrorism.

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

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

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

**RESPONSE:** If confirmed as Attorney General, I would continue to support the approach of carefully evaluating all lawful options in the fight against terrorism, including both federal courts and military commissions in appropriate cases. The decision of whether and, if so, in what

forum to try a terrorist, must be based on the specific facts of a case and an evaluation of which options are available and in the best interests of our national security. I can attest, based on my firsthand experience as a United States Attorney, to the effectiveness of our criminal justice system as one of the tools in the fight against terrorism. Our criminal justice system has proven in hundreds of terrorism cases, since before 9/11, to be a swift, secure, and effective option, among others, to gather valuable intelligence, incapacitate terrorists, and ensure justice is served.

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

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

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

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

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

**RESPONSE:** Although I have not had the occasion to consider these particular provisions of the Foreign Intelligence Surveillance Act (FISA) as a United States Attorney, I believe that it is important that our intelligence and law enforcement professionals have the full panoply of tools to deal with evolving national security threats like international terrorism, while ensuring that we use those tools in a way that effectively protects privacy and civil liberties. As I mentioned during the hearing, as a prosecutor, I am quite familiar with the invaluable benefits provided by roving wiretaps in narcotics prosecutions; those wiretaps are critical to conducting electronic surveillance against those attempting to evade it and are only issued after judicial review.

I understand that the Administration supported the USA FREEDOM Act, which would have extended these three provisions of FISA while also providing additional privacy protections, including prohibiting bulk collection under Section 215. If confirmed as Attorney General, I look forward to working with this Committee, as well as the Intelligence committees, on legislation to counter serious national security threats in a manner that also protects the privacy and civil liberties of our citizens.

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

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

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

**RESPONSE:** I have not had occasion to address that statute in my role as a United States Attorney, but I have reviewed the statute and believe that it describes in plain terms the scope of immunity.

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

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

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

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

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

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

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

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

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

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

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

a. Do you agree with NAAUSA's statement?

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

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

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

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

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

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

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

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

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

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

**RESPONSE:** Whether or not a presumption of reasonableness standard of review would improve compliance with the guidelines is an empirical question that the Sentencing Commission began examining in its most recent *Booker* report. The Commission found that in fiscal year 2011, “the presumption of reasonableness did not appear to outweigh” other factors that influenced the rate of affirmances of sentencing appeals. The Commission found that “there was no consistent pattern among the circuits based on whether or not they chose to apply the presumption of reasonableness. The circuit with the highest affirmance rate in fiscal year 2011, the First Circuit, does *not* apply the presumption, whereas the circuit with the next-highest

affirmance rate, the Seventh Circuit, does apply the presumption. At the other end of the spectrum, the two circuits with the lowest affirmance rates, the Fourth and Tenth Circuits, *do* apply the presumption.” See U.S. Sentencing Commission, Report on the Continuing Impact of United States v. Booker on Federal Sentencing, Part B (2012). This suggests that adopting a presumption of reasonableness standard of review may not significantly impact appellate review of sentences and therefore may not improve guideline compliance. I look forward to working with the Sentencing Commission and with Congress to further exploring this issue in the coming years.

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

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

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

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

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

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

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

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

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

Do you agree with Attorney General Holder’s statement?

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

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

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

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

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

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

**RESPONSE:** I support efforts to engage with state and local law enforcement partners to achieve consistent policies for the apprehension, detention, and removal of undocumented aliens. If confirmed as Attorney General, I will continue the Department's efforts to work closely with the Department of Homeland Security and state and local law enforcement partners to ensure that national security and public safety are our top priorities in the enforcement of our immigration laws.

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

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

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

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

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

**RESPONSE:** I am committed to public safety in the enforcement of federal immigration laws and to working with federal and state law enforcement partners in continuing efforts to secure our borders and protect our national security.

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

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

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

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

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

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

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

42. To my knowledge, the Office of Legal Counsel opinion regarding the president’s executive action on immigration does not identify any statutory authority for the provision of Employment Authorization Documents to the majority of the individuals eligible for either the Deferred Action for Childhood Arrivals or the Deferred Action for Parents of Americans and Lawful Permanent Residents programs. Please identify the legal authority for the provision of Employment Authorization Documents to these individuals. If you find that such authority does not exist, will you ask the Office of Legal Counsel to revise its opinion?

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

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

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

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

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

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

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I have not been involved in any matters pending before the Board of Immigration Appeals, and I have not

had the opportunity to review the Board's decision in *Matter of Chiarez*. If confirmed as Attorney General, I look forward to learning more about these important issues.

46. 8 U.S.C. §1229a clearly states that an alien has the right of being represented – at no expense to the government – in removal proceedings. The Board of Immigration Appeals has a “*Pro Bono* Project,” in which it secures counsel for previously unrepresented aliens in cases on appeal with the Board.
- a. Do you believe that this program complies with federal law?
  - b. If confirmed, will you direct the Board to stop using taxpayer resources to find counsel for aliens and eliminate this program?

**RESPONSE:** The government does not have a constitutional obligation to provide counsel in this context. I am not personally familiar with programs or policies through which the government provides counsel in removal proceedings. If confirmed as Attorney General, I look forward to learning more about this important issue.

47. The Department of Justice has provided federal funds for an AmeriCorps program to provide attorneys to aliens in immigration proceedings.
- a. Do you believe that this program complies with federal law?
  - b. If confirmed, will you cease using taxpayer resources to provide attorneys for aliens in immigration proceedings and eliminate the program?

**RESPONSE:** The government does not have a constitutional obligation to provide counsel in this context. I am not personally familiar with programs or policies through which the government provides counsel in removal proceedings. If confirmed as Attorney General, I look forward to learning more about this important issue.

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

**RESPONSE:** If confirmed as Attorney General, I would welcome the opportunity to work with you and any members of the Committee on legislation that would help to fix the problems in America's broken immigration system. This would include legislation that is both consistent

with constitutional limits and designed to address the issues created by *Zadvydas*, including protecting the public from terrorists and criminal aliens who pose a threat to public safety.

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

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

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

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

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

**RESPONSE:** I have not had occasion to encounter this issue in my role as a United States Attorney. If Congress is considering legislation that would codify the fairness doctrine, I would

welcome, if confirmed as Attorney General, the opportunity for the Department of Justice to evaluate the constitutionality of such legislation.

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

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

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

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

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

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

situation. Today, however, all states have some form of asset forfeiture laws on the books. The Department's new adoption policy reflected, in part, recognition of this change in circumstances.

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

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

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

**RESPONSE:** As I testified before the Committee, I believe the death penalty is an effective penalty. In bringing such cases, I will be guided, as I was during my time as a federal prosecutor, by the evidence and the law.

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

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

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

**RESPONSE:** The Supreme Court has addressed the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), and held that it is unconstitutional under the Equal Protection component of the Due Process Clause. Accordingly, arguments in defense of the statute were rejected. I have not reviewed the filings the Department made before the Attorney General's letter to Speaker Boehner in February 2011. In any event, the Supreme Court has now resolved the constitutionality of Section 3 of DOMA.

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

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

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

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

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

**RESPONSE:** Yes.

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

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

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

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

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

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

64. Have you ever expressed a view regarding whether it is appropriate for a United States judge to rely on foreign law in deciding the meaning of the U.S. Constitution? If so, what was that opinion? If not, do you have such an opinion?

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

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

**RESPONSE:** I have not had occasion to encounter questions concerning the jurisdiction of the International Criminal Court in my role as a United States Attorney, and as a result, I do not have developed views on this issue at this time.

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

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

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

**QUESTIONS FROM SENATOR TILLIS**

1. During the January 28, 2015 hearing on your nomination to serve as United States Attorney General, you were asked several questions about litigation filed by the United States Department of Justice against North Carolina regarding election law changes enacted by the state during 2013. During the course of those questions, I pointed out that one of the claims in the North Carolina litigation involved North Carolina's elimination of seven days of so-called "early voting" by reducing the early voting window from 17 to 10 days. The Department of Justice claimed the 7 day reduction was a violation of the law. However, numerous states do not offer any form of early voting. Therefore, if you are confirmed to serve as the next United States Attorney General, will you instruct the Voting Rights Section of the Department to pursue litigation against states that do not offer early voting at all on the same basis as the Department has brought suit against NC for merely reducing the number of early voting days from 17 to 10? If not, would you please explain the rationale for why you would not have the Department pursue such states?

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I have not analyzed closely the election laws of North Carolina and other states. My general understanding is that the Department considers questions of the validity of voting practices based on a variety of factors, including the requirements of the federal law being enforced, the particular facts of the practice being investigated, and the specific facts in the jurisdiction. A number of these questions are at issue in pending litigation in which the Department is participating, and for this reason I cannot comment further.

2. During the January 28, 2015 hearing on your nomination to serve as United States Attorney General, you were asked several questions about litigation filed by the United States Department of Justice against North Carolina regarding election law changes enacted by the state during 2013. During the course of those questions, I pointed out that one of the claims in the North Carolina litigation involved North Carolina's elimination of "same day registration." However, numerous states have never offered "same day registration." Therefore, if you are confirmed to serve as the next United States Attorney General, will you instruct the Voting Rights Section of the Department to pursue litigation against states that never offered "same day registration" on the same basis as the Department has brought suit against NC for eliminating "same day registration?" If not, would you please explain the rationale for why you would not have the Department pursue such states?

**RESPONSE:** As set forth above, in my current position, I have not had occasion to analyze closely the election laws of North Carolina and other states. My general understanding is that the Department considers questions of the validity of voting practices based on the particular requirements of the federal law being enforced, the particular facts of the practice being

investigated, and the particular facts in the jurisdiction. A number of these questions are at issue in pending litigation in which the Department is participating, and for this reason, I cannot comment further.

3. During the January 28, 2015 hearing on your nomination to serve as United States Attorney General, you were asked several questions about litigation filed by the United States Department of Justice against North Carolina regarding election law changes enacted by the state during 2013. During the course of those questions, I pointed out that one of the claims in the North Carolina litigation involved North Carolina's elimination of the counting of votes cast on election day outside the precinct where a voter is registered. Given that numerous states do not count votes cast out of precinct on election day, will you, if you are confirmed to serve as the next United States Attorney General, instruct the Voting Rights Section of the Department to pursue litigation against those states? If not, please explain why not.

**RESPONSE:** My general understanding is that the Department considers questions of the validity of voting practices based on the particular requirements of the federal law being enforced, the particular facts of the practice being investigated, and the particular facts in the jurisdiction. A number of these questions are at issue in pending litigation in which the Department is participating, and for this reason, I cannot comment further.

4. During the January 28, 2015 hearing, you testified that "the right and obligation to work is shared by everyone in this country, regardless of how they came here." Do you believe the citizens of any foreign country in the world has the right to work in the United States if they can only reach America's shores? Do you believe individuals who have entered the country illegally also have the right to vote in local, state, or national elections? Please explain your answer.

**RESPONSE:** With respect to my comment during my congressional testimony, I was stating my personal belief that it would be better for individuals in this country to be working to support themselves and their families and contributing to our economy than remaining unemployed. But it is my understanding that only citizens and those duly authorized to seek employment by the Department of Homeland Security are legally able to work. With regard to voting, it is my understanding that individuals who have entered the country illegally do not have any federal right to vote in our elections. I understand that various federal statutes enacted by Congress provide criminal penalties for false assertions of United States citizenship in connection with registration and voting, as well as criminal penalties for aliens voting in elections for federal office. If I am confirmed as Attorney General, I am committed to enforcing those statutes in an even-handed manner.

5. In July of 2014, during a preliminary injunction hearing in the case of *Holder v. North Carolina*, 997 F. Supp. 2d 322 (M.D.N.C. 2014), an expert testifying on behalf of the United States Department of Justice opined:

Also, understanding within political science, that people who register to vote the closer and closer one gets to Election Day tend to be less sophisticated voters, tend to be less educated voters, tend to be voters who are less attuned to public affairs. . . . People who correspond to those factors tend to be African Americans, and, therefore, that's another vehicle through which African Americans would be disproportionately affected by this law.

Are you willing to condemn the reasoning of this expert witness insofar as his testimony effectively asserted that African American voters tend to be "less sophisticated" than non-minority voters? If not, please explain why not. Would you agree that the Department of Justice should not use taxpayer dollars to retain such experts who hold such opinions?

**RESPONSE:** Because this question relates to pending litigation in which the Department is participating, I cannot comment.

6. Without regard to the context of the statement referenced in Question 5, above, do you agree that any assertion that minority voters are somehow "less sophisticated" than non-minority voters should be rejected as repugnant and offensive? If not, please explain why not.

**RESPONSE:** Because this question relates to pending litigation in which the Department is participating, I cannot comment.

7. Do you believe an attorney disciplined by a state bar, or one found to have committed prosecutorial misconduct, should be allowed to serve as an attorney at the United States Department of Justice?

**RESPONSE:** I am committed to ensuring that all Department attorneys carry out their duties with the highest level of integrity and professionalism, and to pursuing appropriate discipline for those who do not. The Department takes into consideration all aspects of a candidate's suitability for employment when making hiring decisions, including whether the attorney has a history of professional misconduct. By their nature, professional misconduct findings are fact-based and varied, and the Department carefully considers the allegations and conclusions of any prior discipline or misconduct findings when evaluating an attorney's suitability for employment. I will follow the Department's suitability rules and policies as applied at the time of hiring, and will support measures that ensure Department attorneys carry out their duties using excellent judgment and consistently adhering to all applicable professional responsibilities. Public service is a public trust, and I believe it is important for the Department to maintain the highest standards for all of its employees.

8. In January of 2014, you presented remarks at the Martin Luther King, Jr. Center in Long Beach, New York. During the course of those remarks, you stated the following:

There is still more work to do. People tell us the dream is not realized because dreams never are. Mandela and King knew that we had to continue working. I'd be remiss if I didn't tell you that under this President and under this Attorney General the Department of Justice is committed to following through with those dreams. 50 years after the march on Washington, 50 years after the Civil Rights Movement, we stand in this country at a time when we see people trying to take back so much of what Dr. King fought for. We stand in this country, people try and take over the state house and reverse the goals that have been made in voting in this country. But I am proud to tell you that the Department of Justice has looked at these laws and looked at what's happening in the Deep South and in my home state of North Carolina has brought lawsuits against those voting rights changes that seek to limit our ability to stand up and exercise our rights as citizens. And those lawsuits will continue. [Emphasis added.]

With regard to the comment that "people try and take over the state house," please state to whom the term "people" refers, what "state house" was taken over, and what "goals that have been made in voting" are that have been reversed.

**RESPONSE:** The speech as a whole was a commentary on the common struggles of Nelson Mandela and the Reverend Martin Luther King, Jr., and the importance of individual commitment and perseverance, particularly in education, to help advance civil rights goals. This portion of the speech was about the importance of protecting the constitutional right to vote and the need to ensure that all eligible citizens can exercise that right free from discrimination. Whenever warranted by the facts and law, it is important to use all legal tools to safeguard the right of every eligible citizen to register to vote and to cast a ballot, as the Department has done, and continues to do in circumstances in which the facts and the law permit. The highlighted text does not refer to any specific person or jurisdiction. Rather, it is about the continued need to remain vigilant and use all legal authorities where appropriate based on the facts and law.

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

**QUESTIONS FROM SENATOR VITTER**

1. On what statutory authority does the President, the Attorney General, or the Secretary of Homeland Security have the power to grant work authorization to illegal aliens?

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

2. What is the purpose of the Immigration and Nationality Act?

**RESPONSE:** Although as the United States Attorney for the Eastern District of New York I am not an expert in immigration law, I am aware that the Immigration and Nationality Act (INA) is the principal law governing immigration to the United States.

3. Why do you think Congress set numerical limitations on the number of visas for foreign nationals and guest workers?

**RESPONSE:** The Department of Justice does not administer visa programs. Because your question involves matters outside the purview of the Department of Justice's responsibilities and expertise, and this issue is not part of my practice as the United States Attorney for the Eastern District of New York, I respectfully recommend that you direct your question to the agencies responsible for administering visa programs.

4. Does hiring unauthorized workers lower wages for U.S. workers?

**RESPONSE:** Because your question involves matters outside the purview of the Department of Justice's responsibilities and expertise, and this issue is not part of my practice as the United States Attorney for the Eastern District of New York, I respectfully recommend that you direct your question to the U.S. Department of Labor.

5. All other things being equal, doesn't increasing the labor supply depress wages for workers?

**RESPONSE:** Because your question involves matters outside the purview of the Department of Justice's responsibilities and expertise, and this issue is not part of my practice as the United States Attorney for the Eastern District of New York, I respectfully recommend that you direct your question to the U.S. Department of Labor.

6. Where does the executive branch derive its authority to create a “deferred action” program for an entire class of illegal aliens?

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

7. Where in the law does it grant the President, Attorney General, or Secretary of Homeland Security the authority to parole into the United States an entire class of illegal aliens?

**RESPONSE:** My understanding is that the deferred action guidance issued by the Department of Homeland Security does not rely on DHS's parole authority. Further, my understanding is that that guidance does not grant deferred action on a systematic basis. Instead, it establishes a series of factors, to be applied on a case-by-case basis, by those individuals responsible for enforcing our nation’s immigration laws in order to prioritize the limited resources afforded to the agency.

8. How do you justify the administration’s use of parole authority in the November 2014 executive action for a class of millions of illegal aliens with a clear statutory grant of authority to only grant parole on a “case-by-case basis”?

**RESPONSE:** My understanding is that the deferred action guidance issued by the Department of Homeland Security does not rely on DHS’s parole authority. Further, my understanding is that that guidance does not grant deferred action on a systematic basis. Instead, it establishes a series of factors, to be applied on a case-by-case basis, by those individuals responsible for enforcing our nation’s immigration laws in order to prioritize the limited resources afforded to the agency.

9. In 2013, a Ninth Circuit Court of Appeals Judge wrote in a published opinion that “There is an epidemic of *Brady* violations abroad in the land.” Judge Kozinski was of course referring to the principal identified in *Brady v. Maryland*, 373 U.S. 83, a 1963 case in which the Supreme Court held that government prosecutors are required to turn over all exculpatory evidence to the Defendants.

- a. Do you agree with the holding of *Brady v. Maryland*?

**RESPONSE:** Yes.

- b. Does the Circuit Court of Appeals' finding that there is an epidemic of Brady violations trouble you?

**RESPONSE:** As United States Attorney and a federal prosecutor, I take very seriously the obligation not only to vigorously prosecute criminal cases but also to zealously uphold defendants' rights in the criminal justice system. Both the actual fairness of criminal trials and their perceived fairness are critically important. *Brady* violations undermine a defendant's right to a fair trial and can undermine the public's perception of the fairness of the criminal justice process.

- c. Do you agree there is an epidemic of *Brady* violations?

**RESPONSE:** No, although I believe even one *Brady* violation is too many.

- d. What steps will you take to address this epidemic of *Brady* violations by Department of Justice prosecutors?

**RESPONSE:** If I am confirmed as Attorney General, I will take very seriously the professionalism of all attorneys and staff of the Department of Justice. The Department's dedicated career professionals devote their lives to keeping our communities safe and to ensuring that criminals are brought to justice honorably and ethically. If a *Brady* violation occurs, the personnel responsible must be held accountable.

10. *Brady* is founded on the constitutional right to due process, and courts have long held that defendants sued by the government in civil proceedings are entitled to due process.

- a. Do you agree that the Department of Justice's obligations to safeguard the constitutional rights of defendants under *Brady* should apply equally in civil matters prosecuted by the Department of Justice? If not, why not?

**RESPONSE:** As I understand the law, federal courts have in only a few instances found *Brady* applicable in civil proceedings, such as in unusual cases where the potential consequences "equal or exceed those of most criminal convictions." *Demjanuk v. Petrovsky*, 10 F.3d 338, 50 (6th Cir. 1993). I agree that *Brady* should apply in such cases.

- b. As Attorney General, would you be willing to issue directives to Department of Justice prosecutors of civil matters to produce materials to the defense in accordance with *Brady v. Maryland*?

**RESPONSE:** If I am confirmed as Attorney General, in leading the Department, I will take appropriate actions to ensure that Department attorneys comply with the Constitution and the laws enacted by Congress as interpreted by the Supreme Court.

11. In a January 9, 2015 article written by George F. Will, a Pulitzer Prize winning Commentator for the Washington Post, entitled “Questions for Attorney General Nominee Loretta Lynch,” Mr. Will provided a number of questions you should answer during the confirmation process. Please answer these specific questions from Mr. Will:

- a. Many progressives say that the 34 states that have passed laws requiring voters to have a government-issued photo ID are practicing “vote suppression.” Does requiring a photo ID at airports constitute “travel suppression”?

**RESPONSE:** I am not specifically familiar with the rules regarding all of the permissible types of identification that may presently be required at airports. However, we have many instances of violence, and credible threats of violence, directed towards airports and airplanes. As a New Yorker, I know first-hand the loss of life that terrorists have caused through plane hijackings. There is no doubt that certain security measures are imperative.

- b. Visitors to the Justice Department are required to present photo IDs. Do you plan to end this “visit suppression”?

**RESPONSE:** As with airports, we have many instances of violence, and credible threats of violence that have been directed towards government buildings, including the horrific attack on the Alfred P. Murrah Federal Building in Oklahoma City. There is no doubt that certain security measures are imperative.

12. Hans von Spakovsky, senior legal fellow at the Heritage Foundation’s Edwin Meese III Center for Legal and Judicial Studies, former member of the Federal Election Commission, and former Counsel to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice, and J. Christian Adams, former counsel for the Voting Rights Section at the U.S. Department of Justice and blogger for PJ Media, wrote a January 27, 2015 article in the National Review entitled “The Questions Loretta Lynch Needs to Answer”. Please answer the following questions from their article:

- a. Do you “believe, as Eric Holder does, that voter-ID laws are racist?”

**RESPONSE:** I cannot speak to Attorney General Holder’s views, nor do I have any categorical views on these issues in the abstract. My general understanding is that the Department considers

questions of the validity of voting practices, such as state voter identification laws, based on the particular requirements of the federal law being enforced, based on the particular facts of the practice being investigated, and based on the particular law and facts in the jurisdiction.

As the Supreme Court held in *Crawford v. Marion County Election Board*, voter identification laws are not per se unconstitutional. Nor do they necessarily violate the Voting Rights Act. I understand that before the *Shelby County* decision, the Department did preclear some voter identification laws, such as in Virginia and New Hampshire.

The analysis of a voter ID law is very specific to the particular law, the particular jurisdiction, and a wide range of factors that Congress has identified as relevant to determining whether a particular voting practice comports with the Voting Rights Act. As such, it is difficult for me to comment on the merits of any law (or in the abstract) without a full understanding of how the law actually operates in a particular jurisdiction.

- b. Do you “disagree with the Supreme Court’s decision upholding such laws in 2008 in *Crawford v. Marion County*?”

**RESPONSE:** The decisions of the Supreme Court represent the law of the land.

- c. Do you share Attorney General Holder’s apparent view that federal anti-discrimination laws such as the Voting Rights Act do not need to be executed in a race-neutral manner?

**RESPONSE:** I cannot speak to Attorney General Holder’s views. If I am confirmed as Attorney General, I am committed to enforcing all the federal laws within the Department’s jurisdiction, including the Voting Rights Act, according to their terms, in an even handed manner.

- 13. In your legal opinion, is there an allowable method for states to require photographic identification in order to vote?

**RESPONSE:** As the Supreme Court held in *Crawford v. Marion County Election Board*, voter identification laws are not per se unconstitutional. Nor do they necessarily violate the Voting Rights Act. I understand that before the *Shelby County* decision, the Department did preclear some voter identification laws, such as in Virginia and New Hampshire.

The analysis of a voter ID law is very specific to the particular law, the particular jurisdiction, and a wide range of factors that Congress has identified as relevant to determining whether a particular voting practice comports with the Voting Rights Act. As such, it is difficult for me to comment on the merits of any law (or in the abstract) without a full understanding of how the law actually operates in a particular jurisdiction.

14. Do you oppose state laws requiring a potential voter to present valid, government-issued photographic identification in a vacuum?

**RESPONSE:** As the Supreme Court held in *Crawford v. Marion County Election Board*, voter identification laws are not per se unconstitutional. Nor do they necessarily violate the Voting Rights Act. I understand that before the *Shelby County* decision, the Department did preclear some voter identification laws, such as in Virginia and New Hampshire.

The analysis of a voter ID law is very specific to the particular law, the particular jurisdiction, and a wide range of factors that Congress has identified as relevant to determining whether a particular voting practice comports with the Voting Rights Act. As such, it is difficult for me to comment on the merits of any law (or in the abstract) without a full understanding of how the law actually operates in a particular jurisdiction.

15. Does in-person voter fraud exist?

**RESPONSE:** I am not personally familiar with the specifics of studies regarding these issues. Accordingly, I do not have any categorical views on these issues in the abstract.

16. Is voting essential to a democracy?

**RESPONSE:** Yes. Enforcing the federal laws that protect the right of our citizens to vote and protect of integrity of our elections are both core missions of the Department of Justice.

17. Should legal permanent residents have the right to vote in federal elections?

**RESPONSE:** Aliens do not have any federal right to vote in our federal elections. Various federal statutes enacted by Congress provide criminal penalties for false assertions of United States citizenship in connection with registration and voting, as well as criminal penalties for aliens voting in elections for federal office. If I am confirmed as Attorney General, I am committed to enforcing those statutes in an even-handed manner.

18. Should felons who have served their sentences have the right to vote in federal elections?

**RESPONSE:** This presents legal questions that I have not studied in depth, but my understanding is that the laws regarding the eligibility to vote of felons who have served their sentences vary from state to state.

19. Should undocumented persons in the country without felony convictions have the right to vote in federal elections?

**RESPONSE:** Aliens do not have any federal right to vote in our federal elections. Various federal statutes enacted by Congress provide criminal penalties for false assertions of United States citizenship in connection with registration and voting, as well as criminal penalties for aliens voting in elections for federal office. If I am confirmed as Attorney General, I am committed to enforcing those statutes in an even-handed manner.

20. As Attorney General, will you commit to equal investigation and enforcement of Section 7 and Section 8 of the National Voter Registration Act (NVRA)?

**RESPONSE:** The Department enforces a number of federal voting rights statutes, including the NVRA. If I am confirmed as Attorney General, I am committed to enforcing all of those laws in an even-handed manner.

21. In 2013, the Department of Justice filed a lawsuit against Louisiana's school voucher program, known as the Louisiana Scholarship Program, alleging that the program violated federal desegregation orders resulting from the 1975 case *Brumfield v. Dodd*. The Department argued that allowing voucher students to transfer out of their public schools would disrupt the racial balance in public school systems that the desegregation orders are meant to protect. However, subsequent research commissioned by Louisiana found that in the majority of districts the movement of students improved or did not affect racial balance. In districts where the program had a negative impact, the effect was "miniscule". Nevertheless, the Eastern District of Louisiana ruled that Louisiana must provide detailed information to the Department of Justice on each student applicant at least 10 days before the vouchers are awarded. Please answer the following questions detailing how this information will be used if you are confirmed:

- a. Will the Department of Justice use this information to prevent students from participating in the voucher program, even in cases where the program would have little to no effect on racial imbalance in the public school, simply to promote the anti-school choice views of President Obama and the Department of Education?

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

- b. Will you promise that the Department will not block students from participating in the Louisiana Scholarship Program, which is meant to give underprivileged

students, many of whom are African-American, access to quality schools in accordance with federal law and judicial precedents?

**RESPONSE:** Every child should have access to a good education, in a quality school, regardless of his or her race. The Department has worked for decades to ensure that every student is able to enjoy the fundamental rights guaranteed by the Constitution and the Supreme Court's decision in *Brown v. Board of Education*.

22. The Treasury Department and the federal banking regulators reported that many banks are engaging in a process called "de-risking," which can be defined as banks ending services to existing businesses that might prevent a risk of scrutiny and regulations. Usually these businesses are completely legal and engaged in legitimate business such as short-term lending, check cashing, tobacco sales or legal sales of firearms.

a. What is your view on this practice?

**RESPONSE:** I believe it is important for lawful businesses to be able to have access to our nation's banking system, and that banks should assess risk on an individualized, rather than categorical, basis. As the United States Attorney for the Eastern District of New York, I have not had occasion to gain personal familiarity with the "de-risking" process you describe, but, If I am confirmed as Attorney General, I commit to learning more about and working with Congress on these issues.

b. Should banks be terminating relationships with these types of legal businesses?

**RESPONSE:** As noted above, I believe it is important for lawful businesses to be able to have access to our nation's banking system, and I agree with banking regulators that banks should make case-by-case determinations rather than assess risk on a categorical basis.

23. What is the appropriate role of the Department of Justice in deciding which legal businesses should have access to financial institutions and which should not and how will you make that judgment if you are confirmed?

**RESPONSE:** The role of the Department of Justice is to enforce the law and as a career prosecutor and the United States Attorney for the Eastern District of New York, I can assure you that I, and my fellow prosecutors and law enforcement partners, take this role seriously. Our job is to investigate specific evidence of unlawful conduct and enforce the law. Our cases should target businesses that are violating the law, not those acting lawfully.

I also know from my time as United States Attorney that the Department's professionals work every day to uphold the law and protect the American people. I believe that, to ensure that our efforts are effective, the Department also must make sure to prevent any potential misunderstanding of its efforts that could be detrimental to lawful businesses. If confirmed as

Attorney General, I will make clear that it is imperative that we inform financial institutions that any investigations of financial institutions are based on specific evidence that a financial institution is breaking the law, and not on the institution's relationships with lawful industries or companies.

24. In a Senate Judiciary Committee hearing Attorney General Holder was quoted as saying, "I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if we do prosecute — if we do bring a criminal charge — it will have a negative impact on the national economy, perhaps even the world economy." Do you agree with Attorney General Holder that some companies be exempted from criminal prosecution due to their impact on the nation's financial system or economy?

**RESPONSE:** I believe that no individual or company, no matter how large or how profitable, is above the law, and none is categorically exempt from prosecution. Rather, when evidence suggests beyond a reasonable doubt that a company or individual has engaged in criminal conduct, the Department will prosecute to the full extent of the law, consistent with longstanding Department of Justice policy. As with all cases, the Department considers the strength of the evidence and other long-standing policy considerations (*see, e.g.*, United States Attorney's Manual (USAM) 9-28.300) in determining whether to prosecute a financial institution.

25. In advance of your hearing you failed to include on your questionnaire an interview in which you defended a settlement you reached with a megabank. This bank was accused of allowing dangerous Mexican drug cartels to launder money through their bank. In a deal you orchestrated the bank paid a fine instead of being prosecuted. Why did you omit this interview from your questionnaire? How will you handle oversight of this settlement given the role you played creating it?

**RESPONSE:** I believe the exchange you reference occurred in connection with a press conference, which the Department counsels nominees should not be considered interviews for the purpose of the Senate Judiciary Questionnaire. Nonetheless, I am happy to discuss below the HSBC matter you have cited. On December 11, 2012, the Department filed an information charging HSBC Bank USA with violations of the Bank Secrecy Act and HSBC Holdings with violating U.S. economic sanctions (the two entities are collectively referred to as "HSBC"). Pursuant to a deferred prosecution agreement ("DPA"), HSBC admitted its wrongdoing, agreed to forfeit \$1.256 billion, and agreed to implement significant remedial measures, including, among other things, to follow the highest global anti-money laundering standards in all jurisdictions in which it operates. In order to ensure that HSBC fulfills its commitments, the Department required the installation of a corporate monitor, who supervises HSBC's implementation of remedial measures and evaluates HSBC's ongoing compliance with anti-money laundering requirements and U.S. economic sanctions. As the United States District Judge who approved the deferred prosecution found, "the DPA imposes upon HSBC significant, and in some respect extraordinary, measures" and the "decision to approve the DPA is easy, for

it accomplishes a great deal.” The Department will monitor compliance with the DPA and act appropriately to ensure implementation.

I want to reiterate, particularly in the context of recent media reports regarding the release of HSBC files pertaining to its tax clients, that the Deferred Prosecution Agreement reached with HSBC addresses only the charges filed in the criminal information, which are limited to violations of the Bank Secrecy Act for failures to maintain an adequate anti-money laundering program and for sanctions violations. The DPA explicitly does not provide any protection against prosecution for conduct beyond what was described in the Statement of Facts. Furthermore, I should note the DPA explicitly mentions that the agreement does not bind the Department’s Tax Division or the Fraud Section of the Criminal Division.

26. The Health Insurance Portability and Accountability Act (HIPAA) exists primarily to protect patients’ right to privacy and requires abortion clinics to acquire a signed disclosure before releasing any information about the patient to anyone else, especially the public. There are several cases in which abortion clinics have clearly broken this law. In light of these serious violations of HIPAA, aggressive action must be taken against the clinics, and they must be held accountable for their illegal practices. It is all too common that clinics are not penalized for these types of violations. I understand that the number of HIPAA violation complaints received by the Department of Health and Human Services has increased since 2013, according to an article from InformationWeek published last July 8, 2014 titled “HIPAA Complaints Vex Health Care Organizations.” The article states: “Jerome Meites, an HHS chief regional civil rights counsel, warned late last year that the government would pursue organizations more aggressively for HIPAA violations. Audits, which began in 2013, will continue through 2015, he said. In addition, states enacted their own data security and enforcement policies. Of the approximately 90,000 complaints received through 2013, only 32,000 fell under the jurisdiction of the HHS Office of Civil Rights. Of these, 22,026 required corrective action, while investigation of 9,899 found no violation. Of the 521 complaints the OCR referred to the Department of Justice for potential criminal justice, the DOJ has agreed to pursue only 54 of them.”

- a. If you become the Attorney General, what role will the DOJ play in prosecuting these violations?
- b. Will you prosecute more of these cases than the DOJ has in previous years?
- c. Will you make protecting patients privacy through pursuing HIPAA violators a priority of yours, should you be confirmed as Attorney General?

**RESPONSE:** Protection of patient privacy under HIPAA remains of paramount concern to the Department, and HIPAA criminal violations have been and will continue to be prosecuted when warranted. It is my understanding that criminal matters have been referred to the Department by the Secretary of Health and Human Services (HHS) as well as the Federal Bureau of Investigation (FBI). In addition to prosecution, the Department is committed to offering training

and guidance about HIPAA. After the 2003 effective date of the original HIPAA medical privacy rules, the Department provided training for prosecutors and agents regarding the HIPAA criminal statute and continues to provide periodic updates regarding HIPAA prosecutions and other medical privacy statutes through the United States Attorney's bulletin and training sessions. If I am confirmed as Attorney General, the Department will continue its commitment to protecting patient privacy under my stewardship.

27. As you know, U.S. Magistrate Judge Gary Brown, who oversees the FEMA Sandy claims case of Deborah Raimey and Larry Raisfeld v. Wright National Flood Insurance Co. (14-mc-41 and Case 2:14-cv-00461-JFB-SIL), recently issued a Memorandum and Order dated November 7, 2014 (14-CV-461, Docket Entry No. 82 & 14-MC-41, Docket Entry No. 637) exposing insurance fraud by a fraudulent engineering company hired to deny a Sandy victim's claim. Judge Brown found evidence that the fraud may be "widespread" and the conduct "outrageous," and also found indications that the fraud may be "widespread" practices. He found the fraud so bad that he sanctioned the defense attorneys for not disclosing the evidence. (*See attached Order – Doc #35*) The Judge ordered the WYOs in the litigation to turn over engineering reports in approximately 1,000 cases. The U.S. Senators from New York and New Jersey have demanded the same fraud investigation ordered by this Federal Judge. One would think that with a NY Federal Judge's ruling exposing widespread insurance fraud and both NY Senators calling for a document disclosure, the New York U.S. Attorney would weigh in. In a shocking move, as the New York U.S. Attorney, you filed a brief to try to block the document disclosure. In this brief, you argue that the documents which may reveal the fraud are "unnecessary" and "unduly burdensome," and asked the court to amend the ruling to end the inquiry with the one case of discovered fraud. (*See attached FEMA Motion to Set Aside Doc #36*). The move is nothing short of a cover-up. This is even more striking given the fact that we learned FEMA received incontrovertible evidence of this fraud in another case over a year ago and intentionally ignored it. (*See attached letter from Mostyn to Judge Brown dated 12/1/14*). I find it very odd that the U.S. Attorney in New York would file a motion to limit discovery of widespread insurance fraud perpetrated against Long Island residents in Sandy.

- a. Upon learning of the fraud discovered by a Federal Judge, why would your office seek to limit the investigation into this potential Federal criminal activity?

**RESPONSE:** My Office has been a leader in aggressively prosecuting disaster fraud committed in the wake of Hurricane Sandy, charging eight defendants with attempting to illegally exploit the horrific damage caused by that superstorm. In addition, allegations related to the possibility of fraud identified in Magistrate Judge Brown's November 7, 2014 Memorandum and Order are being evaluated by the Office of Inspector General at the Department of Homeland Security.

Upon entry of the November 7, 2014 Memorandum and Order, my Office worked closely with FEMA to achieve compliance and obtain the additional information from third party contractors the court had ordered to be disclosed. On November 10, 2014, FEMA contacted its Direct Servicing Agent and requested it to obtain the information described in the order from its

contractors. Because FEMA lacks control of the third party contractors and was relying solely on voluntary cooperation of the third party contractors to achieve compliance, on November 21, 2014, FEMA also sought reconsideration and objected to the order. On December 8, 2014, Magistrate Judge Brown issued a clarification order. The December 8th Order directed that, to the extent that third party contractors did not voluntarily provide additional information, FEMA was authorized to issue subpoenas to the firms to compel production of the materials. Consistent with the December 8th Order, on December 12, 2014, my Office issued subpoenas to third party contractors that did not voluntarily comply with the court's order and then produced all of the information it obtained to the plaintiffs. My Office was thus able to ensure full compliance with the court's order.

b. Do members of your staff know about this fraudulent activity?

**RESPONSE:** Members of my staff work with FEMA in identifying allegations of fraudulent activity that should be referred to the Office of Inspector General at the Department of Homeland Security.

c. Do you have plans to pursue these cases of fraud now that you know about them? If no, then what is preventing you from going after possible corruption and fraud from the insurance companies that are taking advantage of the victims of this horrible natural disaster?

**RESPONSE:** These are matters that are currently under investigation and in active litigation, so I cannot comment on them. As set forth above, my Office has been a leader in prosecuting disaster fraud committed in the wake of Hurricane Sandy.

d. Do any of your colleagues, employees, or attorneys at the U.S. Attorney's office for the Eastern District of New York have pre-existing relationships with officials and attorneys for the WYO insurance companies that have been accused of committing fraud? Please submit their names, positions, and who it is they know representing the WYO companies.

**RESPONSE:** I am unaware of any pre-existing relationships of employees of my Office with officials and attorneys for the WYO carriers.

28. According to the Treasury Inspector General for Tax Administration (TIGTA), the Internal Revenue Service (IRS) used "inappropriate criteria to identify tax-exempt applications for review," as early as March of 2010.<sup>[1]</sup> Subsequently, the Department of Justice, numerous Congressional Committees, and TIGTA have all initiated additional investigations into IRS improprieties, which the IRS has used to justify not disclosing

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<sup>[1]</sup> "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review", 5/14/13, <http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>, pg. 30

information related to public FOIA requests<sup>[2]</sup> and which have brought to light attempts by the IRS to avoid public scrutiny of their actions.<sup>[3]</sup>

- a. Considering that the IRS was targeting organizations on a content-specific basis with regards to their potential political speech, do you think it's important for any subsequent investigation to be conducted in a neutral and objective manner?

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

- b. In response to a question from Senator Cruz on appointing a special prosecutor to investigate the IRS targeting allegations, you responded "(m)y understanding is that the matter has been considered and the matter has been resolved."<sup>[4]</sup> Considerations of the moment aside, do you believe the potential political motivations of civil service officials and employees in carrying out their duties are sufficient justification to appoint a special prosecutor? If not, why?

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

It is my understanding that the investigation into IRS targeting of certain tax-exempt organizations is being conducted by career prosecutors in the Department's Criminal Division and Civil Rights Division, working alongside professional law enforcement agents with the FBI and the Treasury Inspector General for Tax Administration (TIGTA). I also understand that the Attorney General has committed that those career professionals will carry out this investigation thoroughly and fairly, and he has determined that there is no need for the appointment of a

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<sup>[2]</sup> Defendant's Opposition to Plaintiff's Motion Seeking Discovery, *Judicial Watch, Inc. v Internal Revenue Service*, Case No. 1:13-cv-1559-EGS-JMF, 10/17/14, <http://www.judicialwatch.org/wp-content/uploads/2014/11/JW-v-IRS-01559-def-oppo.pdf>, pg. 4

<sup>[3]</sup> *Lois Lerner cautioned against email chatter amid lawmaker probes*, 7/9/14, <http://www.politico.com/story/2014/07/lois-lerner-irs-lawyer-email-108722.html>

<sup>[4]</sup> *Ted Cruz Leads the New Conservative Crusade Against the IRS*, 1/28/15, <http://www.bloomberg.com/politics/articles/2015-01-29/ted-cruz-leads-the-new-conservative-crusade-against-the-irs>

Special Counsel under the Department's regulations, 28 C.F.R. § 600.1. Under those regulations, which I understand have been used very rarely, the Attorney General has the discretion to appoint a Special Counsel if an investigation or prosecution by the Department of Justice would present a conflict of interest, or in other extraordinary circumstances such that the public interest would be served by such an appointment. I have no reason to question the ability of our dedicated career prosecutors and law enforcement agents to conduct the IRS investigation fairly and professionally. At the same time, I assure the Committee that, if I am confirmed as Attorney General, I will apply the Special Counsel regulations faithfully and will exercise my discretion as Attorney General in an appropriate manner.

- c. Do you believe the investigation of the IRS targeting of nonprofits would be better conducted by a single party, organization, or office, like a special prosecutor?

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

29. November 5, 2014, during a White House press briefing, President Obama, indicated his intention to enter into discussions with congressional leaders to develop a new Authorization of Use of Military Force (AUMF) to specifically target the Islamic State, in order to "right-size and update whatever authorization Congress provides to suit the current fight, rather than previous fights" authorized by the 2001 and 2002 AUMFs. During his 2015 State of the Union, Obama also called on Congress to pass a resolution to authorize using military force against the extremist group Islamic State of Iraq and Syria (ISIS).

- a. Do you support further engagement by the U.S. Congress to address an updated Authorization of Use of Military Force (AUMF)?

**RESPONSE:** I have not had occasion as United States Attorney to consider this question, but if I am confirmed as Attorney General, I would support the President's efforts to engage with Congress on this issue.

30. The United States Congress is reviewing consideration of providing President Barack Obama with an updated Authorization for Use of Military Force (AUMF) against the Islamic State and related terrorists. In 2010, court rulings such as *Al-Aulaqi v. Obama* concluded that the questions raised fell under the political question doctrine, and found in particular that [j]udicial resolution of the 'particular questions' posed would require the court take into account complex, military, strategic, and diplomatic considerations – e.g. to “assess the merits of the President's (alleged) decision to launch an attack on a foreign target” – that it was simply not competent to handle. Handling these questions is something that Congress is equipped, under Article I, Section 8, Clause 1-15, Section 9, and Section 10 of the Constitution to do.

- a. Given the surrounding legal questions, do you agree that in an effort to better "right-size" and update whatever authorization (AUMF) Congress provides to the President, that the Senate Judiciary Committee should have a direct role to examine its tie-ins, in coordination with other relevant Committees, in crafting any new proposal to update the AUMF against the Islamic State, and its potential impacts on U.S. citizens as it is considered?

**RESPONSE:** I have not had occasion as United States Attorney to consider this question, but I agree with the President that Congress has an important role to play. I would defer to Congress on how these important issues should be deliberated within the legislative branch.

31. My office has received information that a division within the DOJ working with the Institute of Electrical and Electronics Engineers Standards Association (IEEE-SA), is in the process of drafting a Business Review Letter (BRL), in support of a policy which will change how wireless (Wi-Fi) technology operates, and how Wi-Fi research is conducted and could potentially impact the competitiveness of American innovators. In 2006 a PAE suit almost caused the shutdown of BlackBerry wireless service. Since then, according to the White House Patent Assertion and U.S. Innovation Executive document, published in 2013, technology companies have spent billions in large part to prevent patent suits from competitors. I have also seen various reports that efforts by intellectual property legal experts to discuss the negative impacts of this policy change with the DOJ have been refused. While I support the DOJ's review of whether current policy is consistent with U.S. antitrust laws, it is imperative that any action taken by the DOJ does not unintentionally undermine the rights and competitiveness of U.S. inventors.

- a. Can you provide an update to my office regarding the DOJ's position and plan to move forward with a BLR that appears to be contrary to U.S. law, and on what appears to be a *de facto* change of U.S. policy without prior backing from the Executive or Congress, and based purely on the DOJ Antitrust Division staff opinion?
- b. Has the DOJ in its BLR reviewed the fact that the Board of Directors of IEEE-USA, the US-based branch of the organization, voted on November 21 expressing its concerns about the proposed policy changes?

**RESPONSE:** It is my understanding that on February 2, 2015, the Department issued a business review letter to the Institute of Electrical and Electronics Engineers, Inc. (IEEE) announcing that the Department had no present intention to challenge under the antitrust laws an IEEE proposal to clarify the terms under which holders of patents essential to IEEE standards commit to make licenses available for use in implementing IEEE standards. That letter is available at <http://www.justice.gov/atr/public/busreview/311470.htm>. My understanding is that the Antitrust Division engaged in a thorough review, including reviewing submissions of, and numerous meetings with, both proponents and opponents of the proposed policy revision, prior to issuing the business review letter.

32. The Computer Crime and Intellectual Property Section, or CCIPS, implements DOJ's strategies for enforcing the theft of intellectual property (IP). Established in 1991 with only five prosecutors, CCIPS plays a crucial role in protecting our nation's IP. More than 20 years later, it is safe to say computer and intellectual property theft has become more sophisticated, consisting of international networks targeting U.S. innovations and content. The Computer Hacking/Intellectual Property (CHIP) Unit is another tool in the Department's chest to prosecute cybercrimes and assist in investigations.

- a. If confirmed, will you commit to this Committee that you will ensure CCIPS and the CHIP Units are operating at full strength with the necessary resources to carry out its missions?

**RESPONSE:** I appreciate the opportunity to address the important, and often challenging, task of protecting the intellectual property ("IP") of American creators and businesses. As your question properly acknowledges, the protection of IP is increasingly linked with our ability to secure computer systems and to protect content online. Given the importance of this issue to the Department, if confirmed as Attorney General I look forward to supporting the continued work of CCIPS and the CHIP units both through staffing and increased technical capabilities. I also would work with Congress to ensure that the Department is able to address future threats in this area, particularly in developing the tools and resources to address the challenge posed by the cross-border nature of IP and computer crime.

My experience in the Eastern District of New York has shown that the CHIP program—a network of experienced and specially-trained federal prosecutors who aggressively pursue computer crime and IP offenses—is an essential part of the Department's work in this area.

CHIP attorneys are responsible for prosecuting computer crime and IP offenses; serving as the district's legal counsel on matters relating to those offenses, and the collection of electronic evidence; training prosecutors and law enforcement personnel in the region; and conducting public and industry outreach and awareness activities. In my district, as in many other districts confronting significant cybercrime and intellectual property crime threats, our CHIP attorneys are located within a larger unit with cybercrime responsibilities to ensure that there are sufficient resources to handle what may be complex and long-term cases. Specifically, our CHIP unit is located in our National Security and Cybercrime Section, and the prosecutors in that section are trained and experienced with both the cyber tools necessary to prosecute modern crimes and the national security tools necessary to provide the appropriate response when national security actors such as nation states or terrorists may be involved. I thus know from personal experience that the CHIP network is very important to the Department's efforts to deter IP and computer crimes, and I would fully support its efforts if confirmed as Attorney General.

My Office has also been fortunate to work together with CCIPS on a number of important cybercrime and IP cases. As you note, CCIPS was created at a time when computer technology and the global markets for digital IP were quite new. Today, however, computer crimes and modern IP property crimes are often extremely sophisticated and difficult to address.

Successfully prosecuting those crimes require prosecutors who are not only versed in the specialized areas of the law, but who also understand the specialized factual contexts in which the crimes occur. Even in an Office such as mine which is home to an entire unit of prosecutors with those skills, we have found that collaborating with CCIPS on our cases adds value in many areas. For example, we collaborated closely with CCIPS on a recent case involving the large-scale manufacture of consumer products on Long Island. This case involved an initial seizure of more than four semi-trailer truckloads of evidence in five locations, including counterfeit ChapStick, Johnson's Baby Oil, Vicks VapoRub, Vicks Inhaler, Vaseline, Always sanitary pads, and other over-the-counter cold medicines and painkillers. My Office also regularly capitalizes on training programs established and run by CCIPS to ensure that our prosecutors stay on the cutting edge legally and technologically. Finally, CCIPS also contains a core group of computer forensics experts in its Cybercrime Lab who provide digital evidence forensics, as well as training and advice to prosecutors across the country and law enforcement agencies around the world. I know that assistance provided by the Cybercrime Lab has been crucial in a broad range of cases, from traditional cybercrime to terrorism. This important mission is critical to the Department's overall success in addressing the threat of computer and IP crime, and if confirmed, I would work with Congress to assure that CCIPS has the necessary resources to accomplish it.

33. During your confirmation hearing, you stated that you do not support the legalization of marijuana. As you may know, DC is continuing to proceed with implementation of the initiative even though language preventing DC from moving forward with legalization efforts was included in the bill.

- a. What is your position on DC's Initiative 71 given the passage of HR 83, the Consolidated and Further Continuing Appropriations Act, which was signed into law by the President on December 16, 2014?

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I am not familiar with the details of the legislation you have cited. As I noted during my testimony before the Committee, it is not the position of the Department of Justice to support the legalization of marijuana, nor would it be the position if I am confirmed as Attorney General.

- b. As the chief law enforcement official of the Executive Branch, will you enforce federal law including the Controlled Substance Act and the Anti-Deficiency Act in DC given marijuana is a Schedule 1 controlled substance and not subject to the Cole Memo since DC is not a state? If not, why not?

**RESPONSE:** As United States Attorney, and if I am confirmed as Attorney General, I am committed to enforcing the Controlled Substances Act (CSA). The Cole Memorandum sets out eight priority areas for federal marijuana enforcement, one of which is preventing the diversion of marijuana from states where it is legal under state law in some form to other states where it is not. In addition, the Cole Memorandum expressly states that the federal government reserves the right to challenge a state marijuana law if that state does not implement strong and effective regulatory and enforcement systems that will address the threat that state law could pose to public safety, public health, and other law enforcement interests. These same considerations and limitations apply in the District of Columbia. The Department's focus is on applying its limited investigative and prosecutorial resources to enforcing the CSA in a manner that addresses the most significant threats to public health and safety, as discussed in the Cole memorandum.

34. A *U.S. News & World Report* article dated August 27, 2014 titled “School Prayer Fight Begins Anew: Tennessee and North Carolina implement religious expression laws in public schools,” highlights the increasing number of attacks on the presence of prayer in public schools by special interest advocacy groups like Americans United for Separation of Church and State. Several states, including Louisiana and North Carolina, have passed laws to clarify students’ rights to engage in prayer and religious activity in school. Furthermore, many states have laws that allow the school day to start with a moment of silence for students to quietly pray to themselves, and even these laws are facing aggressive action from anti-prayer groups.

- a. In your opinion, should American public schools begin every day with a prayer?

**RESPONSE:** School prayer is not an area that I have studied closely. I know that the First Amendment protects religious freedom through the Establishment Clause, which protects against government interference and overbearing in religious matters, and the Free Exercise Clause, which protects the right of individuals and religious communities to pursue their faiths as their consciences lead them. The First Amendment’s Free Speech Clause also provides protections to individuals and religious communities to express their faiths.

It is my understanding that Supreme Court precedent establishes the principle that public schools may not sponsor official school prayer, may not endorse or prefer any particular religion, and may not prefer religion over nonreligion. I also understand that the Supreme Court has recognized a critical difference between school-sponsored religious speech, which the Establishment Clause proscribes, and student religious speech, which the Free Exercise Clause and Free Speech Clause protect.

- b. Should public schools permit the allowance of a moment of silence at the beginning of the day so that students can pray quietly to themselves?

**RESPONSE:** It is my understanding that students have the right to pray, either alone or with other students, before, during or after school on the same basis that students are permitted to gather for other expressive purposes.

- c. If you are confirmed as U.S. Attorney General, would you assist secular advocacy groups in attacking states' laws that clarify students' rights to engage in prayer and religious activity in school?

**RESPONSE:** It is my understanding that the Department, through its Civil Rights Division, enforces Title IV of the Civil Rights Act of 1964, which permits the Department to bring suit where a school board has denied a student or students "equal protection of the laws" on the basis of religion. I understand that this provision is typically invoked when a student suffers harassment on the basis of religion, and does not ordinarily arise in the context of prayer. The only cases relating to student prayer or other student expression of religious belief or devotion in public schools of which I am aware of Department involvement in recent years are briefs filed by the Department in support of a student group in Pennsylvania that wanted to hold a Bible study and prayer group during an activities period, and a brief filed in support of a student who wished to sing a religious song in an evening talent show sponsored by the school.

- d. What will you do to protect states' laws from secular attacks on students' rights to prayer in school?

**RESPONSE:** If I am confirmed as Attorney General, I will protect constitutional guarantees to freedom of religion.

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

**QUESTION FROM SENATOR WHITEHOUSE**

1. As you know, the Senate Select Committee on Intelligence conducted an extensive investigation into the CIA's so-called "enhanced interrogation program." The resulting report – which includes a 499-page executive summary and a full history of the program that is more than 6,000 pages – documents in exhaustive detail how our nation came to employ techniques such as waterboarding, which you rightly characterized at your hearing as torture, and how certain officials lied to Congress and others about the use and effectiveness of these techniques. The report also discusses the role played by the Justice Department in this sorry episode, and in particular details how lawyers in the Office of Legal Counsel enabled the use of techniques that are indisputably torture. As a result, it is essential reading for anyone in a position of leadership at the Department. Will you commit that, if confirmed or prior to your confirmation, you will read the executive summary as well as those portions of the full report discussing the role of Justice Department attorneys?

**RESPONSE:** If confirmed, I will review the executive summary and other appropriate materials to help ensure that the Department lives up to the high standards of conduct and legal rigor that are essential to its mission.