

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

QUESTIONS 19-41 FROM CHAIRMAN GRASSLEY

NOTE: Ms. Lynch submitted responses to Questions 1-18 on February 18, 2015.

- 19. Follow-up to Question 4:** In response to my question whether you would continue to reward grant funding to sanctuary communities, you responded that you would need to balance the punishment of a community for not cooperating with the federal government with the purpose for which the grant is being rewarded. What do you mean by this statement? Please explain.

RESPONSE: As I understand it, the purpose of Department of Justice grant programs is to provide criminal justice funding to state, local and tribal governments to reduce crime, address significant gaps in local funding, and respond to emerging criminal justice issues. Withholding grant funding can have a significant impact on important criminal justice programs at the local level. It is also worth noting that many Department of Justice grant funds are formula-based, with the eligibility criteria (and related penalties, if any) set firmly by statute. Accordingly, the Department must carefully consider whether suspending funding, when it has discretion to do so, would be in the best interest of public safety and national security. The Department's preference, wherever possible, is to work with states and localities to find out why they are not complying with a particular federal law or policy and work together to find solutions that can be supported by all. Penalties should be imposed by the federal government only as a last resort.

- 20. Follow-up to Question 2:** I asked you whether you would continue the Department's policy of filing complaints against States for passing pro-enforcement immigration laws. You answered that you would "continue the Department's efforts to work closely with . . . state and local law enforcement partners to ensure the national security and public safety are our top priorities." The problem is the Department's policy is the exact opposite. The Department has not made efforts to work with state or local law enforcement or jurisdictions, but on the contrary, it has punished states for passing pro-enforcement immigration laws, and rewarded states and communities for not cooperating with ICE. So, given your previous answer, it appears you support the department's lack of effort in working with local law enforcement and communities. Or, will you discontinue the practice of suing states who pass pro-enforcement immigration laws?

RESPONSE: Each individual situation would have to be reviewed on a case-by-case basis. If confirmed as Attorney General, I would continue to support the federal government's primary role in developing immigration policy. I would attempt, however, to support negotiations with states and localities in the first instance, rather than litigation, if it appears that a conflict may emerge.

21. **Follow-up to Question 3(a):** You did not answer my questions regarding sanctuary communities. I asked for your view on whether sanctuary communities that release criminal aliens back into the streets, rather than holding them until ICE can take custody of them, are a threat to national security and public safety. Your response was a general support of Department policy, not an answer to that question. In your view, is the release of criminal aliens by sanctuary communities a threat to national security and public safety?

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

22. **Follow-up to Question 5:** I want to know *your* opinion, not ICE's position, on whether aliens convicted of heinous crimes should be released outside a court order. Please provide me your opinion as to whether criminal aliens convicted of heinous crimes, such as homicide, sexual assault, abduction, and aggravated assault should be released for any reason besides a court order.

RESPONSE: As I noted in response to Question 5, ICE administers the immigration detention system and is responsible for determining whether to release particular aliens from its custody. 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.

23. **Follow-up to Question 7:** I understand that you were not part of the decision making process on whether to appeal *Martinez*. I was not asking you why it was not appealed. I want to know, in your opinion, should *Martinez* have been appealed?

RESPONSE: As I stated in my previous response, many factors go into the decision whether to seek review of a court of appeals decision, and I was not involved in the decision making process in this case. Going forward, I can assure you that, if I am confirmed as Attorney General, national security and public safety will be the basis for making decisions on how to handle these types of cases.

24. **Follow-up to Question 8(a):** I understand you were not part of implementing the 287(g) program. Again, my questions are aimed at understanding you, and your thoughts and position on these programs. Please tell me whether you personally support the 287(g) program and similar programs that authorize the federal government to delegate limited authority to state and locals who wish to participate in enforcing federal law.

RESPONSE: I believe that cooperation between federal, state, and local law enforcement agencies is essential to secure our borders and protect our national security. If confirmed, I will evaluate and support those programs that most effectively serve these critically important goals.

25. **Follow-up to Question 8(b):** Do you personally believe that the 287(g) programs should be made available to state and local law enforcement agencies that want to protect their communities and cooperate with the federal government with regard to immigration enforcement?

RESPONSE: Please see the answer to Question 24 above.

26. **Follow-up to Question 9:** Please answer the following questions regarding Justice Americorps and 8 USC §1362:

- a. Do you agree that § 1362 is clear: the government may not provide a lawyer to immigrants in a removal proceeding at the expense of the taxpayers?
- b. Do you agree that Justice Americorps by its very nature has due process and equal protection issues?
- c. 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?
- d. Couldn't such a policy lead to the requirement of providing a lawyer to all immigrants in removal proceedings?

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

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

I do not see any due process or equal protection issues with the program, as I understand that aliens in removal proceedings have only the right to a full and fair hearing— a guarantee that does not require the appointment of taxpayer-funded counsel in those proceedings.

27. Follow-up to Question 12: In response to my question on whether you support the catch-and-release actions of the administration, you responded that you would enforce the immigration laws “understanding the limited prosecutorial resources are best used to focus on the removal of criminals and those who pose a threat to safety of our nation.” Does this mean that you do support the catch-and-release actions of the administration? Please explain.

RESPONSE: I support the principles that limited prosecutorial resources are best used to focus on the removal of criminals and those who pose a threat to the safety and security of our nation, and that 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 or national security.

28. Follow-up to Question 43:

43(a): In your response you mentioned that the doctrine of Executive Privilege is constitutionally-based. It is well established that the *presidential communications* privileged is constitutionally based. It is equally well established that *deliberative process* materials may be privileged in limited circumstances, but that this privilege is one of judge-made common law.¹ The Department, however, has attempted to conflate the two, and withheld documents from this committee based on an overbroad notion of “executive privilege” that includes both presidential communications and deliberative materials, created by low-level department employees, that are both *post-decisional* and *purely factual*. Please answer this straight forward question: do you believe that the *constitution* shields these deliberative materials from a congressional subpoena?

RESPONSE: It is my understanding that constitutional principles support the application of Executive Privilege over these materials. That position has been explained more fully in the briefs filed by the Department on this subject in ongoing litigation. I would refer you to those briefs for additional information about the position taken by the Executive Branch.

43(b): In your response you stated that, in your understanding, 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. The district court did *not* accept the position the Department took in the Fast and Furious litigation that 64,000 documents were categorically shielded from a congressional subpoena because of “executive privilege,” due to separation of powers or otherwise. Rather, the court outlined the requirements for establishing a *deliberative process* privilege, noted that it was

¹ *In re sealed case*, 121 F.3d 729, 745 (D.C. Cir. 1997).

“*qualified*,” and stressed that the showing of need for those materials is subject to “a *lower threshold*.”² Moreover, the Attorney General stated that the Department had withheld materials that were *not privileged*.³ With that in mind, what authority does the Department have to withhold documents in response to a congressional subpoena that are *not privileged*, and from where does that authority derive?

RESPONSE: My understanding is that the Department and the Executive Branch have complied with the district court’s order and, as a result, have turned over more than ten thousand documents, either in full or in part. The litigation continues over several remaining issues.

43(c): Your response simply states an aspiration to avoid subpoenas. While I share your hope that improved DOJ cooperation with Congressional requests would eliminate the need for subpoenas, please provide an answer that is responsive to the question. Congressional subpoenas are a tool used by this committee and others in exercise of this branch’s oversight responsibilities, and your position on the scope of privilege with respect to congressional subpoenas is of key interest to me and to this committee. Moreover, given that your predecessor was held in contempt of Congress for failure to comply with a subpoena, and that the Department is still in litigation with the House of Representatives over that subpoena, it seems reasonable to expect you would have given some thought to the questions at issue in that litigation. Accordingly, with respect to the deliberative process privilege, do you believe that a congressional subpoena is entitled to more weight than a Freedom of Information Act request?

RESPONSE: I believe that different considerations would apply to a subpoena from a Committee of Congress to the Executive Branch, as significant constitutional issues, including the separation of powers, are at play. I would refer you to the Department’s brief on these issues in the ongoing litigation for more information.

43(d): In working to accommodate Congress’s legislative and oversight interests, are you willing to provide deliberative, pre-decisional documents as your predecessor did when he produced drafts of the February 4, 2011 letter to me and emails about the drafting of that letter?

RESPONSE: I would be sincerely interested in working with Congress to accommodate its legitimate oversight interests on any matter.

43(e): In working to accommodate Congress’s legislative and oversight interests, would you argue (as your predecessor did) for withholding an entire category of documents

² Order at 3, *Committee on Oversight and Government Reform, U.S. House of Representatives v. Holder*, 1:12-cv-1332 (D.D.C. Nov. 15, 2013) (emphasis added).

³ 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).

based on a general assertion of “executive privilege” even when individual documents within that category—according to precedent and the admission of the Department itself—are *not in fact privileged*?

RESPONSE: It would be my hope that I would not need to request an assertion of Executive Privilege on any category of documents or, indeed, any individual document if I am confirmed as Attorney General. I would prefer, instead, to negotiate with Congress in order to accommodate its interests.

43(f): In your response you stated that in some instances, it becomes necessary for the President to assert Executive Privilege in order to preserve the separation of powers. Do you believe it is necessary for the President to assert executive privilege in order to preserve the separation of powers over non-deliberative or purely factual agency documents unrelated to communications with the White House?

RESPONSE: It is my understanding that these issues are among the issues being considered in the ongoing litigation. I would refer you to the Department’s briefs for additional information.

43(g): As the Department itself has admitted, it asserted privilege over materials it does not deem to be protected under the traditional common law deliberative process doctrine. You state that you believe that “executive privilege,” broadly, is “constitutionally based.” Please explain how the constitution could protect agency documents that do not meet the qualifications for a common law deliberative process privilege.

RESPONSE: That issue has been briefed extensively in ongoing litigation between the Executive Branch and the House Committee on Oversight and Government Reform. I would refer you to the Department’s briefs on this issue for additional information.

29. **Follow-up to Question 44:** I appreciate your willingness to work with Congress to accommodate our “legitimate oversight interests.” However, as I stated in my initial set of questions, the experience in the Fast and Furious controversy seems to suggest that the congressional authority to pursue civil litigation is not sufficient to enforce its congressional subpoenas in a timely way, and that the Department’s policy and actions pursuant to 2 U.S.C. § 194 undermine congressional oversight activities and responsibilities. Given that you are familiar enough with the issues to cite the 1984 OLC opinion, please provide specific answers to the specific questions that I posed on the issue of contempt. Additionally, do you disagree that the experience in the Fast and Furious litigation demonstrates the insufficiency of the criminal and civil contempt procedures to vindicate congressional interests in a timely way? If so, please explain why, given that the litigation is still ongoing three years later.

RESPONSE: As I stated in my earlier response, I have not had occasion as the United States Attorney for the Eastern District of New York to acquaint myself with this dispute in depth. If I

am confirmed as Attorney General, I look forward to learning more concerning the Department's position with respect to 2 U.S.C. § 194. As I also stated before, I am committed to working with Congress to accommodate its legitimate oversight interests.

30. Follow-up to Question 47(b): Your response did not unequivocally condemn the use of DOJ and White House coordinated "leaks" against a Committee Chairman conducting oversight as an inappropriate use of the Department's Office of Public Affairs. While you may not have been previously familiar with the incident described in my question, the emails referenced are publicly available and have been written about in the press. Without regard to that incident, however, do you reject as improper any use of Justice Department resources or personnel to target Senators or Members of Congress with "leaks"? If no, please explain why not?

RESPONSE: Having reviewed the web article in the footnote of your original question to gain context, I am not certain that I understand the question's reference to leaks. If confirmed as Attorney General, I would not condone efforts to target Senators or Members of Congress in any form, leaked or otherwise. As I previously stated, I believe the Office of Public Affairs must interact with all journalists courteously and professionally at all times, and should focus on communicating information related to the Department's core law enforcement responsibilities and legal casework.

31. Follow-up to Question 49:

49(a): The DOJ OIG report regarding its investigation of Ms. Attkisson's complaint determined that it was unable to substantiate Ms. Attkisson's allegations with respect to her *personal* computer, but not with respect to her *work* computer.⁴ Moreover, CBS News has issued a public statement that Ms. Attkisson's work computer was compromised.⁵ The cyber-attacks on Sony and other U.S. companies have prompted the administration to launch a brand new agency.⁶ It would seem that the hack of a major news outlet would warrant similar concern. Moreover, the OIG has neither the resources nor the jurisdiction to investigate a hack of unknown origin into CBS News systems. In light of this information, do you believe the FBI has any responsibility to investigate and determine whether Ms. Attkisson's CBS computers were hacked and by whom? If not, please explain why not.

RESPONSE: As I stated before, I share your concerns about cybersecurity and the need to be vigilant against computer hacking. In this case, I understand 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. According to the Inspector General's

⁴ T. Becket Adams, Sharyl Attkisson: What was left out of reports on hacking, Washington Examiner (Feb. 3, 2015).

⁵ See E. Wemple, CBS News confirms multiple breaches of Sharyl Attkisson's computer, Washington Post Blog (June 14 2013).

⁶ Obama administration announces new cybersecurity agency, Fox News (Feb. 10, 2015).

report, that investigation did not cover Ms. Attkisson's work computers because CBS News declined to allow the Inspector General's investigators to forensically examine the CBS News computers that Ms. Attkisson used during her employment. It is my understanding that the Department has stated that it did not perform a broader investigation of this matter when the allegations were initially publicized because neither CBS News nor Ms. Attkisson followed up with the Bureau for assistance with these alleged incidents.

49(b): In your response you mentioned that it is your understanding that the Department's Office of Inspector General has conducted an independent investigation of this matter. Yet, given that the OIG's investigation could not include any examination of CBS computers, what steps will you take to ensure that there is a more complete and thorough investigation of the CBS hack while ensuring independent oversight in the event that evidence is uncovered of any potential government agency or contractor involvement?

RESPONSE: According to the Inspector General's report, that investigation did not cover Ms. Attkisson's work computers because CBS News declined to allow the Inspector General's investigators to forensically examine the CBS News computers that Ms. Attkisson used during her employment. If CBS News were to request the FBI's assistance with this matter, I would, if confirmed as Attorney General, ensure that the FBI appropriately considers any new evidence brought to its attention.

49(c): In light of the fact that the DOJ OIG was not able to fully investigate the CBS hack, please provide a specific response to my question in subsection c.

RESPONSE: Throughout my tenure as a career prosecutor and as a United States Attorney, I have gained a great respect for the career law enforcement agents at the FBI who work tirelessly to hold accountable those who violate our federal laws. I have complete confidence that these career law enforcement agents will fully consider any credible evidence of criminal misconduct, without any regard for the topic of litigation matters being handled by other components of the Department.

32. Follow-up to Question 52(a): In your response to my question about whether you would report your travel on FBI jets as required under OMB Circular A-126, you responded with "As the United States Attorney for the Eastern District of New York, I have not had the occasion to study this issue and am not familiar with the specific reporting requirement for the official travel on government aircraft." Regardless of your familiarity with the reporting requirement (footnoted below)⁷, do you pledge— in the

⁷ OMB Circular No. A-126, *Improving the Management and Use of Government Aircraft* (May 22, 1992). Agencies that use government aircraft shall report semi-annually to GSA each use of such aircraft for non-mission travel by senior Federal officials, members of the families of such officials, and any non-Federal travelers. Such reports shall be in a format specified by GSA and shall list all such travel conducted during the preceding six month period. The report shall include: (i) the name of each such traveler, (ii) the official purpose of the trip, (iii) destination(s)...

spirit of transparency—to report your non-mission travel to the General Service Administration semiannually? If not, please explain why not.

RESPONSE: It is my understanding that the Department manages Attorneys General travel in full compliance with OMB Circular A-126. Further, the Department has a well-established practice of releasing Attorneys General travel records upon request, including travel on government aircraft. If confirmed as Attorney General, I commit to doing the same. Further, if GSA clarifies its Property Management Regulations pertaining to unclassified travel on government aircraft, I understand the Department has no objections to reporting its data to GSA.

33. Follow-up to Question 53:

53(a-c): In your response, you noted that “administrative leave is appropriate in some circumstances.” Please describe the circumstances in which you believe administrative leave is appropriate.

RESPONSE: As noted in my initial response, in my experience as the United States Attorney for the Eastern District of New York, I am aware that the applicable regulation provides that administrative leave may be appropriate where there are allegations of misconduct or performance issues likely to lead to formal adverse actions against an employee. If the underlying allegations involve potentially criminal conduct and may present a risk to the safety of staff and/or the public, administrative leave during the investigative and personnel process may be necessary to keep the employee away from the workplace pending the investigation and potential administrative action. It is also my understanding that the Department’s policies and procedures governing the justification, review and approval process for paid administrative leave, including leave beyond 10 days, provide safeguards against abuse and ensure reasonable and responsible use of Department resources.

53(b): Given that the Department had 1,849 plus employees on administrative leave for more than 30 days from fiscal years 2011-2013— in spite of policy that limits it to 10 working days⁸—do you believe it should be used less frequently? If not, please explain why not. Will you pledge to review the use of administrative leave at the Department and work to ensure that exceptions to the Department’s 10-day limit are granted less frequently than they currently are? If not, please explain why not.

RESPONSE: If confirmed as Attorney General, I commit to reviewing the cited October 2014 Government Accountability Office (GAO) report and examining the implementation of the Department’s existing policies and procedures on administrative leave to ensure that they are being administered appropriately.

34. Follow-up to Question 54(b): Your response to this and several other questions about the Inspector General’s right of access to Department records indicated your willingness

⁸ GAO, *Use of Paid Administrative Leave*, GAO-15-79 (Washington, D.C : October 2014).

to provide documents “necessary for him to complete his reviews.” However, the law gives him access to all records of the Department without regard to any determination by the Attorney General about whether they are necessary for him to complete his reviews. When you say you are committed to providing the Inspector General everything necessary to complete his reviews, do you mean everything that is necessary in your judgment or everything that is necessary in the Inspector General’s independent judgment?

RESPONSE: I believe the Inspector General should receive all documents and information he believes are necessary for him to complete his reviews, consistent with the Inspector General Act.

35. Follow-up to Question 55(g): As justification for excluding attorney misconduct from the OIG’s jurisdiction, you cite the historical expertise of OPR in dealing with attorney misconduct allegations. However, the examples I cited in the other subparts of Question 55 illustrate that the lack of transparency, lack of statutory independence, and lack of consistency can lead to a diminished public trust in OPR’s ability to impose accountability. If confirmed, will you pledge to personally review the cases I cited that give rise to this concern? If not, please explain why not.

RESPONSE: If confirmed, I commit to you that I will be briefed on the matters you have cited.

36. Follow-up to Question 75(c): It is your understanding that the Department continues to monitor qui tam cases and may, in appropriate circumstances, further investigate, seek to intervene for good cause, and/or attempt to negotiate a settlement. 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? Did the Eastern District of New York, under your leadership, ever pursue settlement negotiations in a qui tam case, and did you consult with qui tam counsel?

RESPONSE: The Eastern District of New York consults and coordinates with relator counsel throughout the course of its investigation of qui tam claims. This includes settlement, where we seek a consensus position with relators on material terms, including the amount of settlement and relator share.

More broadly, it is my understanding that in the great majority of cases in which the United States declines to intervene and the relator pursues the litigation, the United States and the relator will work together to achieve an appropriate resolution. However, it remains the responsibility of attorneys for the Department of Justice to ensure that the best interests of the taxpayers are represented in all FCA matters, including those in which the United States has declined to intervene. Accordingly, in rare circumstances, where the facts and/or law warrant it, it is my understanding that the Department of Justice may pursue a settlement with a defendant in a declined case for either more or less than the amount sought by the relator. However, pursuant

to the statute, 31 U.S.C. § 3730(c)(2)(B), the relator may object to a proposed settlement and obtain a hearing on his or her objection.

37. Follow-up to Question 78(a-f): Please answer subparts (b), (c), and (e), which were not addressed in your response. Regarding subpart (d), you indicated that sometimes the USAO with a nexus to the matter is recused and another USAO investigates instead. Was another USAO recused from investigating in this instance? Was it the District of Arizona? If so, why was this matter not transferred to the Southern District of California, as the other Fast and Furious-related matters were, in light of the conflicts in the District of Arizona? Please describe in detail the process by which the matter came to your office and any communications you may have had about whether your office was appropriate one to take on the responsibility and why.

RESPONSE: Regarding subparts (b), (c), and (e), as I noted in my previous answer, 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. With respect to your questions above, the matter was brought to my office by the Department's Inspector General who, in coordination with the Office of the Deputy Attorney General, requested that the EDNY take the case, from which another United States Attorney's Office had been recused. My recollection is that we were not provided information as to which Office had been recused from the specific matter.

38. Follow-up to Question 79(b-c): Your response failed to address subparts (b) and (c). Please answer those specific questions about what steps you would take if confirmed to determine the extent to which ATF is photocopying or photographing form 4473s *en masse* during annual inspections and whether such a practice is appropriate or should be sanctioned by the Department.

RESPONSE: With respect to subparts (b) and (c), if confirmed, I would review ATF's handling of forms 4473 during annual inspections to ensure that current practice is appropriate.

39. Follow-up to Question 15: I asked you a question concerning Justice Breyer's dissenting opinion in *McCutcheon v. FEC*, in which he wrote 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). You stated that you "ha[d] not had the opportunity to delve into the academic debate about whether certain constitutional rights are individual or collective." You also stated in response to what other rights were collective that "[t]here 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."

a. Is there any actual "academic debate about whether certain constitutional rights are individual or collective"? Do you believe there is any serious debate to be had on this

subject? Has any Supreme Court decision ever found any right in the Bill of Rights to be collective?

RESPONSE: It is not clear to me that the abstract categorization of “individual” versus “collective” rights would be particularly useful in analyzing how our constitutionally guaranteed rights apply in any concrete circumstance. Instead, if I am confirmed as Attorney General, I would be guided and bound by existing Supreme Court precedent. I am not aware of any existing Supreme Court precedent that characterizes a right under the Constitution as “collective.”

- b. Regardless of whether you ever considered the question as United States Attorney, does the First Amendment protect “collective” rights?

RESPONSE: It is not clear to me that the abstract categorization of “individual” versus “collective” rights would be particularly useful in analyzing how our constitutionally guaranteed rights apply in any concrete circumstance. I do believe that there are some constitutional rights, including those enshrined in the First Amendment, that are sometimes most meaningful when exercised in connection with other people. These would include, by way of example only, the right to peacefully assemble.

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

RESPONSE: Please see the answer to Question 39(b) above.

40. Follow-up to Question 19: When I asked for your view 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, you replied, “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.” Respectfully, I asked for your view of the constitutional text, not its repetition. Please provide a detailed answer that reflects your view of the Executive’s obligations under the Take Care Clause.

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

41. Will you appeal the federal district court's ruling in *Mance v. Holder*, which held unconstitutional a federal ban on the direct sale of handguns for Federally Licensed Dealers to out of state residents?

RESPONSE: It is my understanding that the district court's decision in *Mance v. Holder* was issued on February 11, 2015, and the Department has 60 days from the date of decision in which to decide whether to appeal. Consistent with the usual practice in the event of an adverse district court decision, the Solicitor General is overseeing a process to determine whether appeal would be appropriate. I understand that that process includes soliciting recommendations from the affected components of the Executive Branch and the relevant components of the Department of Justice, and that no final decision on appeal has been made as of this time.

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QUESTIONS FROM SENATOR PERDUE

References to Senator Perdue's first set of Questions for the Record are referred to below as "QFR" followed by the number of the relevant question.

1. In QFR #1, I asked you to explain your understanding of the limits of the president's discretion to enforce federal law. In your answer, you referred me to the Office of Legal Counsel but conceded that there are "of course, recognized constitutional limitations on the President's authority." Please state with particularity your understanding of the limits on the president's authority, making specific reference to the "constitutional limitations" you mentioned in your original answer. Please consult any relevant legal authorities, including Supreme Court precedent, *see, e.g.*, Justice Jackson's *Youngstown* concurrence, in order to explain your understanding of the scope and nature of the limitations you cited.

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

2. In response to QFR #4a, you explained your "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 rather than remaining unemployed." Notwithstanding your personal belief, if you are confirmed as Attorney General, will you commit to enforcement all provisions of federal law that concern employment of illegal immigrants or other persons unlawfully within the United States?

RESPONSE: Yes.

3. In response to QFR #5a regarding whether you would commit to the assignment of a special prosecutor to the IRS targeting case, you stated that "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." Please explain whether you believe that the IRS targeting case would present: (1) a conflict of interest; or (2) other extraordinary circumstances in the public interest meriting the assignment of a special prosecutor. Essentially, please answer the original

question either negatively or affirmatively: Will you commit to the assignment of a special prosecutor in this matter? Please answer “yes” or “no” and explain your answer.

RESPONSE: In my current position as United States Attorney for the Eastern District of New York, I am not privy to the details of the current investigation concerning allegations of improper targeting of certain tax exempt organizations by IRS employees. 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. If confirmed as Attorney General, I can assure the Committee that I will request a briefing concerning the status of the investigation and can assure the Committee that all aspects of the investigation will be conducted in accordance with Department policies and procedures. Based on the information currently available to me, I have no reason to question the ability of our career prosecutors and law enforcement agents to conduct the IRS investigation fairly and professionally and therefore, have no reason to conclude that a conflict of interest exists that would preclude our career prosecutors from discharging their responsibilities.

4. In response to QFR #5b, you provided a form response that was identical to your responses to QFR #5a. This is a straightforward, binary question that I request you answer either negatively or affirmatively: Do you believe it was appropriate to assign management of the Department of Justice’s investigation of IRS targeting to a DOJ lawyer who contributed to President Obama’s campaign? Please answer “yes” or “no” and explain your answer.

RESPONSE: In my current position as United States Attorney for the Eastern District of New York, I am not privy to all of the facts concerning the assignment of a career prosecutor from the Civil Rights Division to the investigative team looking into allegations that IRS employees targeted certain tax-exempt organizations. It is my understanding that the attorney that you are referring to is a career prosecutor and one member of a team assigned to the investigation who is working alongside a career prosecutor from the Criminal Division along with agents from the FBI and TIGTA. It is also my understanding that the Department has concluded that the attorney’s engagement in lawful political activity did not amount to a conflict that disqualified the attorney from the investigation under applicable regulations. Lastly, I am aware that in 2014, then-Deputy Attorney James Cole publicly testified before the House Committee on Oversight and Government Reform and explained why the Department concluded that the attorney’s assignment to the investigation was in accordance with applicable regulations. If confirmed as Attorney General, I will ensure that that the investigation is conducted in accordance with Department policies and procedures.

5. In response to QFR #5c, you provided a form response that was identical to your responses to QFRs #5a and #5b. Again, this is a straightforward, binary

question that I request you answer either negatively or affirmatively: Do you believe that assigning management of the Department of Justice's investigation of IRS targeting to a Department of Justice 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 Department of Justice? Please answer "yes" or "no" and explain your answer.

RESPONSE: In my current position as United States Attorney for the Eastern District of New York, I am not privy to all of the facts concerning the assignment of a career prosecutor from the Civil Rights Division to the investigative team looking into allegations that IRS employees targeted certain tax-exempt organizations. It is my understanding that the attorney that you are referring to is a career prosecutor and one member of a team assigned to the investigation who is working alongside a career prosecutor from the Criminal Division along with agents from the FBI and TIGTA. It is also my understanding that the Department has concluded that the attorney's engagement in lawful political activity did not amount to a conflict that disqualified the attorney from the investigation under applicable regulations. Lastly, I am aware that in 2014, then-Deputy Attorney James Cole publicly testified before the House Committee on Oversight and Government Reform and explained why the Department concluded that the attorney's assignment to the investigation was in accordance with applicable regulations. If confirmed as Attorney General, I will ensure that that the investigation is conducted in accordance with Department policies and procedures.

6. QFR #7 asked whether your Department of Justice would use so-called "gunwalking" as a valid investigative technique. You did not answer the question and instead cited "guidance" issued to U.S. Attorney's Offices. Please state either negatively or affirmatively whether the Lynch Department of Justice will view gunwalking as a legitimate investigatory technique to be used by federal law enforcement agencies. Please answer "yes" or "no" and explain your answer.

RESPONSE: It is not clear to me what this question means by "gunwalking," but it is my understanding that the Attorney General has stated unequivocally, and the Inspector General's report found that the tactics employed in Operation Fast and Furious were flawed, and that the IG report also found that the operation failed to adequately mitigate risks to public safety, and that the Department has taken extensive steps to ensure that such tactics are not used again in the future.

7. In response to QFR #11 and its subparts regarding the Louisiana school voucher litigation, you stated that "I cannot comment on this issue because it is my understanding that it is in active litigation." Currently, the Department of Justice is not a party to that litigation. Accordingly, I again respectfully request that you answer QFR #11 and its subparts.

RESPONSE: The Department intervened and has been a party to the *Brumfield v. Dodd* case since 1975. *Brumfield* remains in active litigation. *Brumfield v. Dodd* is a case that was brought by black students and families four decades ago on behalf of all black schoolchildren in Louisiana. In

1975, the State of Louisiana was placed under federal court order to end the State's practice of directing resources to private schools in a manner that kept its education system segregated, in violation of the Constitution and federal law. That order remains in place today.

8. In response to QFR #11b, you stated that "I cannot comment on this issue because it is my understanding that it is in active litigation." That QFR, however, does not concern the Louisiana litigation but addresses prospective litigation that you may choose to undertake if you are confirmed. Accordingly, I again respectfully request that you describe whether you will use Justice Department resources, like your predecessor has, in an effort to obstruct, monitor, or regulate school-choice programs. Please answer "yes" or "no" and explain your answer.

RESPONSE: I cannot speculate on what litigation will be undertaken in the future. The Department does not oppose Louisiana's school voucher program, and has not sought to prevent any student from participating in the state's voucher program.

9. In response to QFR #11c, you stated that "I cannot comment on this issue because it is my understanding that it is in active litigation." The question asked only whether your Justice Department would consent to discontinue the reporting requirement if you are confirmed. The Department of Justice is not currently a party to the litigation. Please answer "yes" or "no" and explain your answer.

RESPONSE: The Department has been a party to the *Brumfield v. Dodd* case since 1975. *Brumfield* remains in active litigation. Since 1985, the State of Louisiana has had a legal obligation in *Brumfield* to report information about state assistance to private schools. Consistent with that requirement, the United States asked the State of Louisiana to provide basic information regarding the school voucher program and the impact of the State's funding and assignment of students through that program on the state's court-ordered desegregation obligations.

10. QFR #12 addressed the 2013 report by the DOJ's Inspector General that revealed disturbing systemic problems related to the operation and management of the DOJ's Civil Rights Division and specifically asked whether you would commit to implementing those recommendations. Instead of answering either negatively or affirmatively, you stated that you would commit to ensuring "responsive [ness]." Please specifically answer whether you will commit to implementation of the 2013 report's recommendations, not whether you will ensure "responsive[ness]," as a general matter, to recommendations by the Inspector General.

RESPONSE: I have not had an opportunity to review the Office of the Inspector General's (OIG) 2013 report about the Civil Rights Division. However, I understand that the Division has already taken steps to implement many of the recommendations contained in the report. If confirmed as Attorney General, I will ensure that the Civil Rights Division has responded, as appropriate, to the

recommendations in the OIG report.

11. In response to QFR #13c, you cited the “Smart on Crime” initiative as the basis for your decision to consent to Judge Gleeson's order to vacate Francois Holloway’s sentences for armed carjacking. One of the five principles of the Smart on Crime initiative announced in the Attorney General's August 2013 report is “Protecting Americans from *violent crime*” (emphasis added). *Smart on Crime: Reforming the Criminal Justice System for the 21st Century*, Department of Justice (Aug. 2013), available at <http://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf> at 2. The Attorney General explained that “Smart on Crime” is designed to target “*non-violent, low-level offenses*” and “certain people who have committed *low-level, nonviolent* drug offenses, *who have no ties to large-scale organizations, gangs, or cartels...*” (emphasis added). *Id.* at 3. The report further states that the Bureau of Prisons may consider reductions in sentences for inmates facing extraordinary and compelling circumstances “who did not commit *violent crimes*” (emphasis added). *Id.* The report repeatedly emphasizes that the initiative is aimed at low-level and nonviolent offenders. *See, e.g., id.* at 1-4. Accordingly, please explain your belief that the “Smart on Crime” initiative justified the early release of Francois Holloway, a violent, recidivist offender who organized and ran a chop shop that processed stolen and carjacked cars.

RESPONSE: As I described in my testimony before the Committee, our view of the matter was that we should review the case in a manner consistent with a number of initiatives being implemented by the Department—including, among others, the Smart on Crime initiative and the clemency initiative—focused on ensuring that offenders serve a period of time in prison proportional to the severity of their offenses. The ultimate sentencing determination was made by the Court.

12. Please explain whether the fact that Francois Holloway faced years of back-up time for a New York State drug-trafficking conviction factored into your decision to consent to Judge Gleeson's order to vacate Holloway's sentences for armed carjacking.

RESPONSE: It did not factor into my decision.

13. Please describe with specificity – citing case numbers, captions, etc. – all cases handled by the U.S. Attorney's Office for the Eastern District of New York during your tenure as U.S. Attorney in which the “Smart on Crime” initiative, or any other Department of Justice initiative, was cited in support of the early release of any offender from Bureau of Prisons' custody.

RESPONSE: In virtually all cases, defendants make requests and applications to the Court for

leniency or a reduction in sentence based on a wide variety of grounds. Indeed, the Eastern District of New York receives hundreds of such requests per year. It would be impracticable to determine how many of these applications (some of which are made orally) cited the Smart on Crime or other Department of Justice initiatives. In all cases, it is the Court that decides what sentence to impose on any individual defendant, and whether there is a valid basis to revisit that sentence.

14. If confirmed, will you promulgate Department of Justice initiatives that recommend early release for violent or recidivist offenders?

RESPONSE: Any early release of offenders from federal imprisonment terms can only come as a result of—and must be in accordance with—the laws as enacted by Congress. Current law strictly limits early release of federal offenders. If confirmed, I will follow and abide by all of the corrections laws, including those concerning the confinement of federal prisoners.

15. You responded to QFR #13d with generalities regarding the professional responsibilities of federal prosecutors and judges and did not answer the question. Please specifically identify any Department of Justice initiatives that recommend early release for violent offenders.

RESPONSE: Any early release of offenders from federal imprisonment terms can only come as a result of—and must be in accordance with—the laws as enacted by Congress. Current law provides for limited early release opportunities, including, for example, opportunities to earn prison credits for good behavior, and for completion of residential drug treatment in prison. All of the Department of Justice efforts and initiatives strictly comply with program requirements, as set forth in federal law.

16. In response to QFR #14e, you wrote that “I do not support release of violent offenders for no corrections or public safety purpose.” Do you believe that the release of Francois Holloway served a “corrections or public safety purpose”? If so, please explain your answer.

RESPONSE: I believe that under the unique circumstances of Mr. Holloway’s case, the Court had the authority to reconsider the sentence originally imposed. Of course, the decision as to whether or not to reduce Mr. Holloway’s sentence rested within the sole discretion of the Court. Ultimately, the Court determined, based on the circumstances of the offense, the punishment imposed on others involved in the same conduct, Mr. Holloway’s behavior during his twenty years of incarceration, and other factors, that a reduction in sentence was appropriate.

17. If confirmed as Attorney General, will you review the sentences of violent offenders and consent to early release if such release would, in your judgment, serve a “corrections or public safety purpose”?

RESPONSE: If confirmed as Attorney General, I will follow and abide by all corrections laws, including those concerning the confinement of federal prisoners. I will, for example, implement congressionally enacted good behavior laws that provide prison credits for most federal offenders who do not commit misconduct during their imprisonment terms.

18. In response to QFR #14f, you wrote that “I recognize that some reforms of existing mandatory minimum sentencing statutes are needed.” Please explain with specificity the nature of the reforms you state is necessary, citing relevant provisions of Title 18. Please state also whether you believe that the consecutive mandatory minimum provisions under 18 U.S.C. § 924 require reform and/or elimination.

RESPONSE: I agree with congressional policy, as embodied in the Sentencing Reform Act and subsequent legislation, that federal sentencing statutes should be reviewed periodically to determine whether the minimum and maximum penalties contained in those statutes should be modified. Because I have not studied data regarding the application of the many dozens of federal mandatory minimum sentencing statutes, I cannot at this time specify the particular reforms that may be needed. However, I can say that the Administration has indicated its support for the Smarter Sentencing Act, which would modify some mandatory minimum sentencing statutes, and I support some changes to the existing mandatory minimum structure for federal drug offenses. As to the mandatory minimum sentencing provisions contained in 18 U.S.C. § 924, I believe that strong penalties for those who use or possess weapons in the commission of violent and drug trafficking crimes, including mandatory minimum sentences, are important. At the same time, in certain circumstances, requiring 25-year consecutive sentences for successive instances that a weapon is possessed in connection with qualifying crimes can lead to exceedingly long sentences. I look forward to working with Congress to determine if any calibrations to the mandatory sentencing provisions for this offense might be appropriate.

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

QUESTIONS FROM SENATOR CRUZ

Questions on Executive Amnesty

I. Deferred Action

- Question 1(a)¹ asked if you agreed or disagreed with the legal conclusions of the Department of Justice’s Office of Legal Counsel (OLC) memorandum addressing the legality of President Obama’s deferred action decisions. Your answer, which addressed the basis for the OLC memorandum, did not answer the question asked.

- 1. Please take the opportunity to clarify or revise your answer: do you agree or disagree with the legal conclusions in the OLC memorandum?**

RESPONSE: As I indicated in my prior response, the legal analysis of the Office of Legal Counsel appears reasonable. Accordingly, I have no basis to disagree with its legal conclusions.

- Question 1(b) asked you to cite 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. You answered that it was your “understanding” that a Department of Justice brief that has been filed as part of pending litigation on the subject provided that information.

- 2. Are you familiar with, or have you personally read, the relevant portion(s) of the Department brief that you referenced in your original answer?**

RESPONSE: I am familiar with the Department’s brief. I am also familiar with the fact that a federal district court recently issued a preliminary injunction against the government, and believe that decision is subject to appeal.

- 3. Is your original answer an indication that you have no independent legal understanding of this particular legal issue, or is your answer an indication that you agree with the Department’s legal position?**

RESPONSE: As I am not a subject matter expert in this area, I have no basis to disagree with the position taken by the Department on this legal question.

¹ The original set of questions for the record and your responses to those questions as submitted to the Committee on or about February 9, 2015, are incorporated by reference. Please refer to them as needed.

4. Would you consider an independent understanding of an important legal issue such as this to be a prerequisite for holding the position of Attorney General?

RESPONSE: The advice and consent power of Article II, Section 2 of the Constitution rests with the Senate, and the ultimate determination of prerequisites to be Attorney General rests with that body. I would not presume to offer any opinion about how the Senate should carry out this responsibility. As a career prosecutor and two-term United States Attorney, I believe I have conducted myself with personal and professional integrity, and have acted with fidelity to the law and with reverence to the Constitution. If confirmed as Attorney General, I would hold myself to these same standards.

5. Are you under the impression that, because there is ongoing litigation involving the issue at hand, that you are not free to comment on the issue as a nominee for Attorney General?

RESPONSE: As I have stated previously, I am currently the United States Attorney for the Eastern District of New York, and am not in a position to know the details of why the Department has taken positions in certain litigation and what decisions have led to those positions.

- Question 1(d) asked if you thought that President Obama’s deferred action decisions represented a proper exercise of prosecutorial discretion (in accordance with your definition of prosecutorial discretion, in your answer to question 1(c)). You answered that “the memoranda issued by the Secretary of Homeland Security appears [*sic*] 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.”

6. Is it fair to assess your answer as agreeing with the statement that these memoranda do represent appropriate exercises of prosecutorial discretion?

RESPONSE: As I have indicated, the legal analysis by the Office of Legal Counsel appears reasonable. Accordingly, I have no basis to disagree with its conclusions, including the conclusion that the memoranda are legally valid.

- Question 2 asked if you thought that President Obama’s refusal to enforce the immigration laws for a distinct class of individuals who are not otherwise exempted by Congress violated the Take Care Clause of the United States Constitution. You answered that it was your “understanding” that a Department of Justice brief that has been filed as part of pending litigation on the subject provided that information.

7. Are you familiar with, or have you personally read, the relevant portion(s) of the Department brief that you referenced in your original answer?

RESPONSE: I am familiar with the Department’s brief. I am also familiar with the fact that a federal district court recently issued a preliminary injunction against the government, and believe that decision is subject to appeal.

8. Is your original answer an indication that you have no independent legal understanding of this particular legal issue, or is your answer an indication that you agree with the Department’s legal position?

RESPONSE: As I am not a subject matter expert in this area, I have no basis to disagree with the position taken by the Department on this legal question.

9. Would you consider an independent understanding of an important legal issue such as this to be a prerequisite for holding the position of Attorney General?

RESPONSE: The advice and consent power of Article II, Section 2 of the Constitution rests with the Senate, and the ultimate determination of prerequisites to be Attorney General rests with that body. I would not presume to offer any opinion about how the Senate should carry out this responsibility. As a career prosecutor and two-term United States Attorney, I believe I have conducted myself with personal and professional integrity, and have acted with fidelity to the law and with reverence to the Constitution. If confirmed as Attorney General, I would hold myself to these same standards.

10. Are you under the impression that, because there is ongoing litigation involving the issue at hand, that you are not free to comment on the issue as a nominee for Attorney General?

RESPONSE: As I have stated previously, I am currently the United States Attorney for the Eastern District of New York, and am not in a position to know the details of why the Department has taken positions in certain litigation and what decisions have led to those positions.

- Question 3 asked if “the President” (meaning either President Obama or any future president) had the authority to exercise executive discretion to categorically exempt a class of people from (a) enforcement of the Affordable Care Act, (b) enforcement of federal environmental laws, and/or (c) enforcement of the Internal Revenue Code. You answered that your “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,” but rather “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.”

11. Your answer mentions the application of a “series of factors” that “those individuals responsible for enforcing our nation’s immigration laws” are to apply on a “case-by-case basis.” To clarify, do you agree or disagree that federal employees of United States Citizenship and Immigration Services (USCIS) are free to ignore the deferred action criteria established by the Secretary of Homeland Security? If you disagree with this statement, please provide a detailed explanation as to why.

RESPONSE: As set forth in the OLC Memorandum, “the case-by-case discretion given to immigration officials under DHS’s proposed program alleviates potential concerns that DHS has abdicated its statutory enforcement responsibilities with respect to, or created a categorical, rule-like entitlement to immigration relief for, the particular class of aliens eligible for the program. An alien who meets all the criteria for deferred action under the program would receive deferred action only if he or she ‘present[ed] no other factors that, in the exercise of discretion,’ would ‘make[] the grant of deferred action inappropriate.’ Johnson Deferred Action Memorandum at 4. The proposed policy does not specify what would count as such a factor; it thus leaves the relevant USCIS official with substantial discretion to determine whether a grant of deferred action is warranted. In other words, even if an alien is not a removal priority under the proposed policy discussed in Part I, has continuously resided in the United States since before January 1, 2010, is physically present in the country, and is a parent of an LPR or a U.S. citizen, the USCIS official evaluating the alien’s deferred action application must still make a judgment, in the exercise of her discretion, about whether that alien presents any other factor that would make a grant of deferred action inappropriate.” OLC Mem. at 28-29.

12. Your answer mentions the application of a “series of factors” that “those individuals responsible for enforcing our nation’s immigration laws” are to apply on a “case-by-case basis.” From a legal perspective, would you have concern about the soundness of the deferred action programs if you knew (for example) that the deferred action applications were not being carefully inspected by USCIS employees, but were rather being screened through some automated process?

RESPONSE: I am unclear what you mean by “being screened through some automated process.” If confirmed as Attorney General, I would seek to ensure that any advice provided by the Department concerning the implementation of such programs is consistent with the law.

13. In the event the Department of Homeland Security or USCIS uses some sort of automated review during any stage of the deferred action application review process, do you agree or disagree that such a process cannot be considered to be the result of the application of a “series of factors” on a “case-by-case basis”?

RESPONSE: I am unclear what you mean by “some sort of automated review.” If confirmed as Attorney General, I would seek to ensure that any advice provided by the Department concerning the implementation of such programs is consistent with the law.

14. Could President Obama or a future president refuse to enforce some or all of the Affordable Care Act, some or all federal environmental laws, and/or some or all of the Internal Revenue Code if he or she “establishes a series of factors, to be applied on a case-by-case basis, by those individuals responsible for enforcing our nation’s ... laws in order to prioritize the limited resources afforded to the [relevant] agency”?

RESPONSE: Prosecutorial discretion is a longstanding principle that exists in a number of different areas. Each exercise of such discretion depends on the facts of the individual circumstances, including the discretion afforded the agency by Congress. As I understand it, that discretion is particularly broad in the immigration context.

- Question 3² asked if you agreed that President Obama’s decision to defer removal actions for certain categories of illegal aliens is unreviewable by Article III courts. You answered that it was your “understanding” that a Department of Justice brief that has been filed as part of pending litigation on the subject provided that information.

15. Are you familiar with, or have you personally read, the relevant portion(s) of the Department brief that you referenced in your original answer?

RESPONSE: I am familiar with the Department’s brief. I am also familiar with the fact that a federal district court recently issued a preliminary injunction against the government, and believe that decision is subject to appeal.

16. Is your original answer an indication that you have no independent legal understanding of this particular legal issue, or is it an indication that you agree with the Department’s legal position?

RESPONSE: As I am not a subject matter expert in this area, I have no basis to disagree with the position taken by the Department on this legal question.

² This second “Question 3” was a typographical error, and should have been sent to you as “Question 4.”

17. Would you consider an independent understanding of an important legal issue such as this to be a prerequisite for holding the position of Attorney General?

RESPONSE: The advice and consent power of Article II, Section 2 of the Constitution rests with the Senate, and the ultimate determination of prerequisites to be Attorney General rests with that body. I would not presume to offer any opinion about how the Senate should carry out this responsibility. As a career prosecutor and two-term United States Attorney, I believe I have conducted myself with personal and professional integrity, and have acted with fidelity to the law and with reverence to the Constitution. If confirmed as Attorney General, I would hold myself to these same standards.

18. Are you under the impression that, because there is ongoing litigation involving the issue at hand, that you are not free to comment on the issue as a nominee for Attorney General?

RESPONSE: As I have stated previously, I am currently the United States Attorney for the Eastern District of New York, and am not in a position to know the details of why the Department has taken positions in certain litigation and what decisions have led to those positions.

19. In your independent legal judgment, under what circumstances do courts not have authority to review the legality of the President's conduct in a case where standing can be established?

RESPONSE: There are numerous instances in which courts are barred from reviewing the merits of a claim despite the existence of Article III standing. Those include, but are not limited to, matters that are committed to agency discretion, the lack of a waiver of sovereign immunity, and lawsuits that present a political question. Many of these limitations are imposed by Congress.

II. Work Authorization

- Question 3 asked if you agreed or disagreed that the statutory language cited in the question meant that the Secretary of Homeland Security had complete discretion to grant work authorizations to any alien. You answered that it was your "understanding" that a Department of Justice brief that has been filed as part of pending litigation on the subject provided that information.

1. Are you familiar with, or have you personally read, the relevant portion(s) of the Department brief that you referenced in your original answer?

RESPONSE: I am familiar with the Department's brief.

- 2. Is your original answer an indication that you have no independent legal understanding of this particular legal issue, or is it an indication that you agree with the Department's legal position?**

RESPONSE: As I am not a subject matter expert in this area, I have no basis to disagree with the position taken by the Department on this legal question.

- 3. Would you consider an independent understanding of an important legal issue such as this to be a prerequisite for holding the position of Attorney General?**

RESPONSE: The advice and consent power of Article II, Section 2 of the Constitution rests with the Senate, and the ultimate determination of prerequisites to be Attorney General rests with that body. I would not presume to offer any opinion about how the Senate should carry out this responsibility. As a career prosecutor and two-term United States Attorney, I believe I have conducted myself with personal and professional integrity, and have acted with fidelity to the law and with reverence to the Constitution. If confirmed as Attorney General, I would hold myself to these same standards.

- 4. Are you under the impression that, because there is ongoing litigation involving the issue at hand, that you are not free to comment on the issue as a nominee for Attorney General?**

RESPONSE: As I have stated previously, I am currently the United States Attorney for the Eastern District of New York, and am not in a position to know the details of why the Department has taken positions in certain litigation and what decisions have led to those positions.

- Question 4 asked if you agreed or disagreed that the statutory language cited in the question meant that the Secretary of Homeland Security had complete discretion to grant work authorizations to all aliens. You answered that it was your "understanding" that a Department of Justice brief that has been filed as part of pending litigation on the subject provided that information.

- 5. Are you familiar with, or have you personally read, the relevant portion(s) of the Department brief that you referenced in your original answer?**

RESPONSE: I am familiar with the Department's brief.

- 6. Is your original answer an indication that you have no independent legal understanding of this particular legal issue, or is it an indication that you agree with the Department’s legal position?**

RESPONSE: As I am not a subject matter expert in this area, I have no basis to disagree with the position taken by the Department on this legal question.

- 7. Would you consider an independent understanding of an important legal issue such as this to be a prerequisite for holding the position of Attorney General?**

RESPONSE: The advice and consent power of Article II, Section 2 of the Constitution rests with the Senate, and the ultimate determination of prerequisites to be Attorney General rests with that body. I would not presume to offer any opinion about how the Senate should carry out this responsibility. As a career prosecutor and two-term United States Attorney, I believe I have conducted myself with personal and professional integrity, and have acted with fidelity to the law and with reverence to the Constitution. If confirmed as Attorney General, I would hold myself to these same standards.

- 8. Are you under the impression that, because there is ongoing litigation involving the issue at hand, that you are not free to comment on the issue as a nominee for Attorney General?**

RESPONSE: As I have stated previously, I am currently the United States Attorney for the Eastern District of New York, and am not in a position to know the details of why the Department has taken positions in certain litigation and what decisions have led to those positions.

III. Advance Parole as Pathway to Citizenship/Benefits

- Question 1 asked if you agreed or disagreed that the Secretary of Homeland Security lacked 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). You answered that you are “not an expert in immigration law,” and that you are “not familiar with the authority that the Secretary of Homeland Security exercises over parole decisions.” (You provided an identical response to Question 2, which asked if you thought that the Secretary of Homeland Security had the legal authority to grant “advance parole” to illegal aliens covered by DAPA, and whether you agreed or disagreed 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.”)

1. Please familiarize yourself with the relevant legal authorities and provide your best independent legal assessment.

RESPONSE: It is my understanding that the statutory framework for paroling aliens into the United States is set forth in 8 U.S.C. § 1182(d)(5)(A). The memorandum issued by the Secretary of Homeland Security in November 2014 regarding Deferred Action for Childhood Arrivals and Deferred Action for Parental Accountability does not authorize the parole of any alien. Independently, any alien who is granted deferred action for any reason may separately apply for advance parole to travel abroad for a limited period of time if the alien can establish that the requisite statutory criteria are met.

IV. Driver’s Licenses to DACA and DAPA Recipients

- Question 3 asked if you thought that federal law compelled states to issue driver’s licenses to DACA and DAPA recipients who are in the United States illegally. You answered that you were not involved in on-point litigation in the Eastern District of New York, but that “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.”

1. If a state can deny driver’s licenses to all deferred action recipients, then why, in your independent legal opinion, can it not deny driver’s licenses to a subset of deferred action recipients?

RESPONSE: As I understand from the Department’s prior filing, what a state cannot do is attempt to redefine categories of aliens that differ from those established by federal law. Otherwise a state has broad discretion in structuring its system for providing driver’s licenses.

2. Is it your understanding that deferred action confers a federal alien classification under federal law?

RESPONSE: My understanding from the OLC Memorandum is that “[d]eferred action does not confer any lawful immigration status, nor does it provide a path to obtaining permanent residence or citizenship.” OLC Mem. at 2.

3. Is there any federal statute that authorizes deferred action for illegal aliens covered by DACA and DAPA?

RESPONSE: As you are aware, this issue is currently the subject of pending litigation and 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. If not, then on what legal basis can states ever be compelled to provide driver's licenses to DACA and DAPA recipients?

RESPONSE: Federal preemption extends both to law created by statute as well as law created by administrative action, such as regulation. If a state classification of alien status attempts to redefine categories of aliens in a manner inconsistent with federal law, then it is preempted by that law.

Questions on DOJ Legal Positions and Practices

I. Attorney General's Advisory Committee

- Question 2 asked if you provided any written or verbal advice, feedback, or information, or communicated in any direct or indirect way, via official or non-official channels, with either the Attorney General, the Deputy Attorney General, or the Associate Attorney General, on an array of important legal subjects or issues that have been handled by the Obama Administration. Your answer referred us to the Advisory Committee “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.” Your answer also stated 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.” While appreciated and helpful, your answer is only partially responsive.

1. With respect to the Obama Administration’s approach to immigration policies:

a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?

b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?

2. With respect to the Obama Administration’s approach to the Defense of Marriage Act (DOMA), including the Administration’s decision to no longer defend DOMA in federal court:

a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?

- b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?**
- 3. With respect to the Obama Administration's approach to enforcement of the Voting Rights Act or other federal laws pertaining to voting rights:**
 - a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?**
 - b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?**
- 4. With respect to the Obama Administration's resistance to states' efforts to enhance or enact voter identification laws:**
 - a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?**
 - b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?**
- 5. With respect to the Obama Administration's approach to enforcement of federal drug laws:**
 - a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?**
 - b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?**

- 6. With respect to the Obama Administration's refusal to appoint a special prosecutor to investigate alleged Internal Revenue Service (IRS) political targeting of private organizations seeking tax-exempt status:**
 - a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?**
 - b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?**

- 7. With respect to the Obama Administration's handling of Operation Fast and Furious, including Attorney General Holder's handling of his contempt citation:**
 - a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?**
 - b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?**

- 8. With respect to the Department of Justice's surveillance of reporters:**
 - a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?**
 - b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?**

- 9. With respect to the Department of Justice's application of the Foreign Corrupt Practices Act (FCPA):**
 - a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?**

- b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?**
- 10. With respect to the Department of Justice's investigative response to the terrorist murder of U.S. citizens in Benghazi, Libya, on September 11, 2012:**
 - a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?**
 - b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?**
- 11. With respect to the Obama Administration's decision to close the Guantanamo Bay Detention Facility (GTMO), including decision-making regarding the transfer of individual detainees or groups of detainees:**
 - a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?**
 - b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?**
- 12. With respect to the Obama Administration's decision to close its Office of Political Affairs (OPA) in January 2011:**
 - a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?**
 - b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?**

- 13. It is our understanding that the Executive Office for United States Attorneys is the component of the Department of Justice that provides logistical support for the Advisory Committee meetings. Given your leadership roles within the Advisory Committee, please provide information about the number of Department personnel who worked on Advisory Committee issues, the physical resources of the Department used in support of the Advisory Committee meetings, and any relevant cost estimates.**
- 14. In the event that you are confirmed to serve as Attorney General, will you commit or not commit to release some or all of the Advisory Committee materials to the general public? If you will not commit to this step, please provide a detailed explanation as to why.**

RESPONSE (Questions 1-14): No. However, as I stated in my previous answer, the best and most comprehensive record of my work in connection with the Attorney General’s Advisory Committee (AGAC) would be reflected in the AGAC meeting minutes that the Department made available to the Committee for review.

With respect to your question about the resources that the Executive Office for United States Attorneys devotes to AGAC activities, the AGAC meets at the Robert F. Kennedy Main Justice building in Washington, D.C., and comprises ten subcommittees and sixteen working groups; these smaller groups meet both in Washington and outside of the Washington area depending on the nature of the subcommittee/working group. As is reflected in the minutes made available to the Committee, the AGAC has worked hard to conserve costs in recent years, including by conducting business through teleconferences.

In general, every subcommittee/working group has an EOUSA staff attorney liaison (former or current Assistant United States Attorney) assigned to each group. Very often these staff attorney liaisons cover more than one committee/working group and assist the subcommittee/working groups as a subject matter expert and assist with meeting logistics. These staff attorneys’ time commitments are best described as a wide range from a few hours every few months to daily interaction when the AGAC is in session in Washington. The AGAC and its subcommittees and working groups spent \$490,743 on travel for meetings last fiscal year.

It is my understanding that when the Department provided the Committee with access to the minutes for the AGAC in connection with my nomination, it was with the explanation that the AGAC’s value derives in large part from the United States Attorneys’ ability to deliberate fully and frankly in meetings about operational, management, and policy issues with the understanding that such discussions would not be made public.

II. DOJ Refusal to Defend DOMA

- Question 1 asked if you agreed or disagreed 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. You responded that no reasonable

arguments could be made in defense of such a law given that discrimination on the basis of sexual orientation is reviewed under heightened scrutiny.

1. To date, is there any Supreme Court authority holding that classifications based on sexual orientation are subject to heightened scrutiny?

RESPONSE: The Supreme Court’s decision in *Windsor v. United States* appears to reflect a less deferential review than that traditionally associated with rational basis review, but the Court did not explicitly address what standard of review applies to classifications based on sexual orientation.

2. If not, then is it fair to say that there are reasonable grounds for defending a law that defines marriage as limited to one man and one woman since the Department is free to argue that a lower standard of scrutiny should apply?

RESPONSE: As the Attorney General stated in a February 23, 2011 letter to Speaker Boehner, the determination that heightened scrutiny applies to classifications based on sexual orientation was based on criteria previously set forth by the Supreme Court in cases such as *Bowen v. Gilliard* and *City of Cleburne v. Cleburne Living Center*. It is my understanding that based on prior Supreme Court precedent, the Attorney General determined that no reasonable argument could be made that the classification made in Section 3 of the Defense of Marriage Act (DOMA) is substantially related to an important government objective.

3. Do you think it is unreasonable for an individual to define marriage as the union between one man and one woman?

RESPONSE: I do not believe it would be unreasonable for an individual to adopt that view of marriage as his or her personal belief. The question of what is unreasonable for an individual to believe, however, is different from the question of what is unreasonable for a government to require. Most constitutional provisions, including the Equal Protection Clause and the Due Process Clause, constrain the actions of governments, not of individuals.

- Question 2 asked if you agreed or disagreed with Attorney General Holder’s decision to not defend the Defense of Marriage Act (DOMA). Your answer appears as if it contains an inadvertent typographical error.

1. Please take this opportunity to complete your answer.

RESPONSE: Thank you for the opportunity to correct the typographical error. The last sentence of my answer to your question should read: “With respect to DOMA, the Supreme Court has now invalidated Section 3, the provision of the statute that the Attorney General determined not to defend.” You are correct that I inadvertently omitted the underlined text from the response I submitted. My answer as a whole is: “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, the provision of the statute that the Attorney General determined not to defend.”

III. DOJ Refusal to Enforce Federal Marijuana Laws

- Question 4 asked if you agreed or disagreed with the statement that states that have legalized marijuana for medicinal use have done so in violation of existing federal law. Your answer stated that 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.” Your answer did not answer the question asked.

1. Please take the opportunity to clarify or revise your answer: do you think that states that have passed so-called medical marijuana laws are in compliance with federal law?

RESPONSE: The Controlled Substances Act (CSA) does not distinguish between medicinal and recreational uses of marijuana. Accordingly, my response applies equally to marijuana intended for either use.

2. Please take the opportunity to clarify or revise your answer: do you think that states with so-called medical marijuana laws cannot, by definition, be in compliance with federal law, given your own admission that “[m]arijuana is a Schedule I controlled substance with no currently accepted medical use in the United States”?

RESPONSE: As stated in response to Question 1 above, the CSA does not distinguish between medicinal and recreational uses of marijuana. Accordingly, my response applies equally to marijuana intended for either use. The statement that “marijuana is a Schedule I controlled substance with no currently accepted medical use in the United States” is the determination of the Department of Health and Human Services and the Drug Enforcement Administration. As previously stated, the potential for medicinal uses of marijuana and its components is the subject of ongoing research. Such research is appropriately assessed and evaluated by the Department of Health and Human Services within the statutory framework of the CSA, which I understand has occurred in the past, as recently as 2011, in the consideration of petitions to reschedule marijuana.

- Question 9 asked you what steps you would take to require states that have legalized the cultivation, distribution, and sale of marijuana to cease and desist in their support of such activities (in order to come into compliance with federal law). You answered that you

were “not in a position to take the types of action” suggested because of your current position. The question could have been more clearly phrased.

3. In the event you are confirmed to serve as the next Attorney General, what specific steps will you take as Attorney General 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: If confirmed as Attorney General, I can assure you that the Department of Justice will continue to enforce the CSA in *all* states and will focus federal resources on the most significant threats to our communities. As 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 doing so, the Department’s August 29, 2013 memorandum 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 also explains the Department’s expectation that state and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems to address the threat those state laws could pose to public safety, public health, and other law enforcement interests. The system not only must have robust controls and procedures in place, but also be effective in practice.

- Question 12 asked if you agreed or disagreed 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. You answered that “[n]either 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,” and went on to cite Department guidance on marijuana enforcement.

4. Would you agree or disagree with the statement that the Department of Justice’s guidance on marijuana enforcement, in the form of four separate memoranda that have been issued over the course of the Obama Administration, amount to a rollback of federal marijuana enforcement efforts? If you disagree with this statement, please provide a detailed explanation as to why.

RESPONSE: I respectfully disagree with this statement. As noted above and as I can assure you from my experience as the United States Attorney for the Eastern District of New York, the Department of Justice continues to enforce CSA in *all* states, focusing federal resources on the most significant threats to our communities in its exercise of prosecutorial discretion in the area of marijuana enforcement. The Department has not suspended or rolled back enforcement of the CSA in states that have legalized the cultivation, distribution, or sale of marijuana. The Department’s August 2013 memorandum simply provides guidance, applicable to federal 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.

IV. DOJ Refusal to Appoint Special Prosecutors for IRS Matters

- Questions 1 and 2 asked you if you agreed with Attorney General Holder's decision to not appoint a special prosecutor to investigate potential IRS abuses, and also if you would commit to appointing a special prosecutor to investigate those abuses. Your joint answer to those two questions praised the objectivity of Department of Justice officials and deferred to the judgment of Attorney General Holder. Your answer did not answer the question asked.

1. Please take the opportunity to clarify or revise your answer: will you or will you not commit to appointing a special prosecutor to investigate the reported IRS abuses?

RESPONSE: In my current position as United States Attorney for the Eastern District of New York, I am not privy to the details of the current investigation concerning allegations of improper targeting of certain tax exempt organizations by IRS employees. 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. If confirmed as Attorney General, I can assure the Committee that I will request a briefing concerning the status of the investigation and will ensure that all aspects of the investigation will be conducted in accordance with Department policies and procedures. Based on the information currently available to me, I have no reason to question the ability of our career prosecutors and law enforcement agents to conduct the IRS investigation fairly and professionally.

2. During your time as Vice Chair and (subsequently) Chair of the Attorney General's Advisory Committee, but prior to revelations of these IRS abuses entering the public domain, were you aware of any contact or communication between former IRS Commission Lois Lerner and any other Department of Justice officials, including, but not limited to, Attorney General Holder?

RESPONSE: No.

V. Operation Fast and Furious

- Question 1 asked if you agreed or disagreed that Operation Fast and Furious was effective in tracking and monitoring how Mexican drug cartels obtained firearms. You answered that you “share[d] the perspective of many, including the Department of Justice’s Inspector General and Attorney General Holder, that [Operation Fast and Furious] was a flawed operation.”
 1. **Please take the opportunity to clarify or revise your answer: by stating that you believe that Operation Fast and Furious was a “flawed operation,” would you admit that it is fair to say that it was ineffective?**
 2. **Please take the opportunity to clarify or revise your answer: by stating that you believe that Operation Fast and Furious was a “flawed operation,” would you admit that it may have jeopardized the safety of both U.S. citizens and Mexican nationals?**
 3. **Please take the opportunity to clarify or revise your answer: by stating that you believe that Operation Fast and Furious was a “flawed operation,” would you admit that it may have increased the flow of firearms into Mexico, whereas traditional enforcement measures would have prevented some of those weapons from entering cartel members’ hands?**
 4. **In the event you are confirmed to serve as the next Attorney General, as Attorney General, will you commit or not commit to at least conferring with the relevant congressional committee chairs prior to initiating any similar law enforcement operations (particularly if there is an international dimension to the operation)? If you will not commit to the above course of action, please provide a detailed explanation as to why.**

RESPONSE (Questions 1-4): It is my understanding that the Attorney General has stated unequivocally, and the Inspector General’s report found, that the tactics employed in that operation were flawed, that the IG report also found that the operation failed to adequately mitigate risks to public safety, and that the Department has taken extensive steps to ensure that such tactics are not used again in the future.

- Question 3 asked for your legal understanding of the origins, nature, and purpose of the doctrine of executive privilege (which is the doctrine President Obama invoked, and to some degree is still invoking, to withhold documents pertaining to Operation Fast and Furious). You answered, in substance, that the “doctrine is constitutionally-based,” that it is a tool available to the executive branch “in order to preserve the separation of powers.” Respectfully, your answer demonstrates a potential, significant misunderstanding of the doctrine and application of executive privilege, and clarification is required, particularly insofar as you view it as a device for preserving the separation of powers.

5. **Please take the opportunity to clarify or revise your answer: by stating that the “doctrine [of executive privilege] is constitutionally-based,” is it your position that the doctrine of executive privilege is authorized by a specific clause or clauses of the United States Constitution? If your answer is yes, please cite the clause or clauses that serve as the basis for position.**

RESPONSE: As the Supreme Court explained in *United States v. Nixon*, the seminal case on Executive Privilege, “[t]he privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” 418 U.S. 683, 708 (1974).

6. **Please take the opportunity to clarify or revise your answer: by stating that the doctrine of executive privilege exists “in order to preserve the separation of powers,” is it your position that executive privilege is available for use on any occasion when a president or his personnel do not wish to disclose potentially problematic or embarrassing information to Congress? If your answer is yes, please provide a detailed explanation of your position, with appropriate citations to existing provisions in the United States Code and precedential federal case law.**

RESPONSE: It is not my understanding that the President has invoked Executive Privilege over information because it is “potentially problematic or embarrassing.” Rather, the privilege was invoked to protect important constitutional considerations, including the separation of powers. If confirmed as Attorney General, I would ask the President to invoke Executive Privilege, if at all, only in appropriate circumstances, and not because the information is “potentially problematic or embarrassing.”

7. **Please take the opportunity to clarify or revise your answer: by stating that the doctrine of executive privilege exists “in order to preserve the separation of powers,” is it your position that executive privilege can be invoked in circumstances other than the narrow circumstance of shielding advice and counsel provided by a president’s “inner circle” of advisors? If your answer is yes, please provide a detailed explanation of your position, with appropriate citations to existing provisions in the United States Code and precedential federal case law.**

RESPONSE: Yes. Executive Privilege has been invoked by administrations of both parties to protect against the disclosure of a wide variety of information from across the Executive Branch, including national security information and sensitive information concerning foreign relations. It is my understanding that the district court presiding over the lawsuit filed by the House Committee on Oversight and Government Reform has determined that Executive Privilege may be asserted over materials going beyond “advice and counsel provided by a president’s ‘inner circle’ of advisors.” For additional information about this topic, I would refer you to the brief filed by the Department on this issue in that litigation.

8. Existing case law on the subject of executive privilege seems to support the principle that the doctrine of executive privilege is very limited, and can only be applied in the narrow circumstance of shielding advice and counsel provided by a president’s “inner circle” advisors. Do you agree or disagree with this view of the limits of application of the doctrine of executive privilege? If you disagree with this view, please provide a detailed explanation as to why, with appropriate citations to existing provisions in the United States Code and precedential federal case law.

RESPONSE: Please see my answer to the previous question. It is my understanding that your question does not accurately capture the existing precedent on this issue.

9. In the event you are confirmed to serve as the next Attorney General, as Attorney General, will you commit or not commit to advising the President of the current, precedent-based limitations of the application of the doctrine of executive privilege? If you will not commit to the above course of action, please provide a detailed explanation as to why.

RESPONSE: Yes. In any instance in which I or any other Executive Branch official would request the assertion of Executive Privilege, I would commit to advising the President about the applicable law and precedent underlying the assertion.

- Question 5 asked you if you would commit to turning over to both chambers of Congress any and all remaining documents that Attorney General Holder has refused to provide during prior congressional investigation of Operation Fast and Furious. You answered that you would only 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.”

10. Please take the opportunity to clarify or revise your answer: by stating that you would be “open to a negotiated resolution,” is it your position that the executive branch can never be required to produce documents, even in accordance with a duly issued subpoena? If your answer is yes, please provide a detailed explanation of your position, with appropriate citations to existing provisions in the United States Code and precedential federal case law.

11. Please take the opportunity to clarify or revise your answer: by stating that you would be “open to a negotiated resolution,” is it your position that the executive branch can never be compelled to produce documents, even if it is an Article III federal court that compels that production? If your answer is yes, please provide a detailed explanation of your position, with appropriate citations to existing provisions in the United States Code and precedential federal case law.

12. One could interpret your answer as an indication that the executive branch can never be compelled to produce documents, even under circumstances where an Article III federal court compels that production. Would you agree that the executive branch is compelled to produce documents when instructed to do so by an Article III federal court? If you would not agree with this statement, please provide a detailed explanation as to why, with appropriate citations to existing provisions in the United States Code and precedential federal case law.
13. Please take the opportunity to clarify or revise your answer: by stating that you would be “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,” is it your position that the executive branch gets to make the determination about what materials to turn over or not to turn over to Congress based on what the executive branch believes Congress needs for legislative purposes? If your answer is yes, please provide a detailed explanation of your position, with appropriate citations to existing provisions in the United States Code and precedential federal case law.
14. Please take the opportunity to clarify or revise your answer: by stating that you would be “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,” is it your position that the legislative branch does not possess independent constitutional authority to compel production of documents for oversight purposes? If your answer is yes, please provide a detailed explanation of your position, with appropriate citations to existing provisions in the United States Code and precedential federal case law.
15. In the event you are confirmed to serve as the next Attorney General, as Attorney General, will you commit or not commit to complying with all duly issued subpoenas and Article III federal court orders that call for the production of Department of Justice documents? If you will not commit to the above course of action, please provide a detailed explanation as to why.

RESPONSE (Questions 10-15): 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. I also understand that the scope of the privilege is the subject of ongoing litigation. It is also my understanding that in the course of that litigation, the Department has produced documents consistent with the district court’s order. I commit that, if I am confirmed as Attorney General, I would work closely with Congress to accommodate its legislative interests, consistent with the constitutional and statutory obligations of the Executive Branch. I would hope that these efforts would eliminate the need for a congressional subpoena.

- Question 6 asked you if you would 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 they so chose). You answered that you would only commit to “ensuring that the Department complies with its preservation obligations.”

16. Please take the opportunity to clarify or revise your answer: by stating that you would only commit to “ensuring that the Department complies with its preservation obligations,” is it your position that the Department has the authority to dispose of investigation-related documents or other sensitive documents? If your answer is yes, please provide a detailed explanation of your position.

RESPONSE: According to the Federal Records Act (44 U.S.C. § 3101) and the National Archives and Records Administration Act (NARA) regulations (36 C.F.R. §§ 1225 and 1226), the Department has the authority to dispose of records only in accordance with the applicable NARA-approved records retention schedules, and, if applicable, only consistent with independent preservation obligations, such as those required in civil litigation.

17. In light of recent concerns about federal agency record destruction and federal agency failure to preserve records, and your knowledge as the United States Attorney for the Eastern District of New York, please provide detailed information about the following:

a. Your understanding of the Department’s statutory record preservation obligations.

RESPONSE: Please see the answer to Question 16 above.

b. Your understanding of the Department’s regulatory record preservation obligations.

RESPONSE: Please see the answer to Question 16 above.

c. Your understanding of the Department’s internal (i.e., Department-established) record preservation obligations.

RESPONSE: My understanding is that the Department has numerous internal record preservation obligations, including DOJ Order 802, Management of Preservation Responsibilities, which was issued on July 17, 2014. The Department also has independent record preservation obligations, such as in response to litigation.

18. As the United States Attorney for the Eastern District of New York, you should be familiar with the array of statutory options for criminal prosecution of individuals who violate record or information preservation requirements. Please provide a complete list of the federal criminal statutes that would apply to individuals who violate record or information preservation requirements (including the relevant statutes of limitation for each of those options).

RESPONSE: In certain circumstances, an individual who violates record or information preservation requirements with criminal intent could be prosecuted for Obstruction of Justice offenses under Chapter 73 of Title 18. For example, a person may be prosecuted under 18 U.S.C. § 1505 where such individual corruptly “influences, obstructs, or impedes or endeavors to influence, obstruct, or impede” a pending proceeding before a United States agency or department or “any inquiry or investigation . . . being had by either House, or any committee of either House or any joint committee of the Congress.” 18 U.S.C. § 1515(b) clarifies that this can include withholding or concealing a document or other information. Similarly, under 18 U.S.C. § 1519, it is a crime to knowingly conceal or cover up any record or document with the intent to influence a matter within the jurisdiction of any department or agency of the United States. The relevant statute of limitations for these and most other federal crimes is five years. *See* 18 U.S.C. § 3282(a).

19. As the United States Attorney for the Eastern District of New York, please explain if the above list of federal criminal statutes covering the destruction of record or information preservation requirements would be applicable to federal employees.

RESPONSE: Depending on the facts, these federal criminal statutes could potentially apply to federal employees.

20. As the United States Attorney for the Eastern District of New York, do you think that, if it is determined that a Department of Justice employee destroyed Department records (regardless of subject matter), and that destruction in fact violated federal law, the employee who violated federal law should be prosecuted? If you disagree with this view, please provide a detailed explanation as to why.

RESPONSE: If it is determined that a Department of Justice employee destroyed Department records in violation of federal law, I would exercise prosecutorial discretion using similar—but not identical—factors I use in weighing whether to prosecute non-Department employees. These would include evaluating the strength of the evidence, including evidence of requisite criminal intent, the duration and magnitude of the alleged misconduct, and any potential defenses. In addition, if the acts were committed by a Department employee, I would take into account the elevated responsibility we have to uphold the law and maintain the public’s trust and confidence.

21. In the event you are confirmed to serve as the next Attorney General, as Attorney General, will you commit or not commit to prosecuting a Department of Justice employee under the above circumstances? If you will not commit to the above course of action, please provide a detailed explanation as to why.

RESPONSE: Please see the answer to Question 20 above.

22. Putting aside formal preservation requirements, do you agree or disagree that most, if not all, Department of Justice documents in connection with Operation Fast and Furious investigation now have significant historical value, and ought to be preserved out of an abundance of caution for ensuring the completeness of the historical record? If you disagree with this view, please provide a detailed explanation as to why.

RESPONSE: While the requirements of applicable records schedules are mandatory, the Department may determine that particular groups of records merit longer retention periods, depending on the circumstances, in coordination with (and subject to approval by) NARA. The Department may make such a determination with respect to the Operation Fast and Furious investigation documents, in coordination with (and subject to approval by) NARA, as necessary based on the appropriate factors and circumstances.

VII. DOJ Foreign Corrupt Practices Act Abuses

- Question 1 asked if you agreed or disagreed with the claim that the ability of the Department of Justice to keep and use FCPA settlement fines incentivized application of the Foreign Corrupt Practices Act (FCPA). You answered that you disagreed with the claim, which you “believe[d] is built on a faulty premise regarding the process by which criminal fines and other financial penalties are paid and subsequently put to use.” You went on to say that FCPA-related fines were not “kept” or “used” by the Department, that “no such use incentivizes application of the FCPA,” and that funds from these fines were “paid into the U.S. Treasury [and] are not available for use by the Department except through the appropriations process or by statute.” In subsequent parts of your answer, you specifically cited 42 U.S.C. 10601 and 28 C.F.R. 527 as the basis for your claim that the Department does not keep these funds, although you acknowledge the existence and use of the “3% Fund” and its ability to be used to “support certain litigation, data administration, and personnel costs.” Additional information is required about the Department’s ability to access and use the resources of the Crime Victim Fund.

1. Please take the opportunity to clarify or revise your answer: by stating that funds resulting from FCPA fines were “paid into the U.S. Treasury [and] are not available for use by the Department except through the appropriations process or by statute,” is it your position that the Crime Victim Fund is not

an offsetting account, set apart from the general fund? If your answer is yes, please provide a detailed explanation of your position.

RESPONSE: The Crime Victims Fund is governed by statute and is a separate account set apart from the general fund.

- 2. 42 U.S.C. 10601(c) essentially states that sums that are deposited in the Crime Victim Fund are available for expenditure without fiscal year limitation.³ Would you agree or disagree that this means that the Department of Justice’s access to the Crime Victim Fund is not restricted by the “appropriations process,” at least insofar as it means the Fund’s revenue is not dependent on the distribution of additional revenue from the general fund of the Treasury? If you disagree with this statement, please provide a detailed explanation as to why.**

RESPONSE: Fines in criminal cases are imposed by courts and directed to the Crime Victims Fund, pursuant to Title 42, United States Code, Section 10601. The expenditure of these funds is controlled by statute and can only be disbursed for victim-related purposes. As I understand it, the disbursement of funds for victim-related purposes is restricted by the appropriations process.

- 3. During your most recent tenure as the United States Attorney for the Eastern District of New York, did you ever require, as part of an FCPA settlement, that a corporation or individual had to contribute funding to a non-profit or for-profit organization, rather than paying just a fine to the federal government? If your answer is yes, please describe the circumstances when this was done and, for each instance, provide the name of the organization and the justification for this approach.**

RESPONSE: During my tenure as the United States Attorney for the Eastern District of New York, I have not required, as part of an FCPA settlement, that a corporation or individual contribute funding to any non-profit or for-profit organization, rather than paying a monetary penalty to the federal government.

³ 42 U.S.C. 10601(c) states in its entirety: “Sums deposited in the Fund shall remain in the Fund and be available for expenditure under this chapter for grants under this chapter without fiscal year limitation. Notwithstanding subsection (d)(5) of this section, all sums deposited in the Fund in any fiscal year that are not made available for obligation by Congress in the subsequent fiscal year shall remain in the Fund for obligation in future fiscal years, without fiscal year limitation.”

- 4. Please take the opportunity to clarify or revise your answer: would you agree or disagree that, by virtue of the existence of the 3% Fund (which you acknowledge), the Department does receive revenue as a result of its FCPA investigations? If you disagree with this statement, please provide a detailed explanation as to why.**

RESPONSE: Pursuant to Public Law 113-234 and 28 C.F.R. Section 527, three percent of penalties associated with certain financial recoveries, which may or may not constitute FCPA resolutions, are paid into the 3% Working Capital Fund. As I understand it, the Collection Resources Allocation Board, overseen by the Justice Management Division, undertakes a review and determines whether and how the Department may award funds from the 3% Fund to support certain litigation, data administration, and personnel costs.

- 5. Please take the opportunity to clarify or revise your answer: would you agree or disagree that, by virtue of the fact that the 3% Fund permits the Department to use Fund revenue to “support certain litigation, data administration, and personnel costs,” that it arguably does incentivize the initiation of FCPA investigations, even if indirectly? If you disagree with this statement, please provide a detailed explanation as to why.**

RESPONSE: I disagree. As with all cases, including all financial crime cases, career prosecutors evaluate leads, such as whistleblower complaints and referrals from law enforcement agencies and regulators, to make independent decisions regarding whether or not to initiate FCPA investigations. Career prosecutors subsequently consider 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 the appropriate charging and/or resolution decision for each particular investigation, regardless of whether that decision results in a contribution to the 3% Fund. Moreover, the ultimate allocation of money from the 3% Fund is determined by the Collection Resources Allocation Board and overseen by the Justice Management Division, not by the Criminal Division, where the prosecutors who initiate, investigate and prosecute FCPA cases work.

- 6. During your most recent tenure as the United States Attorney for the Eastern District of New York, please indicate:**
- a. How much revenue your office has received from the 3% Fund since FY 2010.**
 - b. If any revenue, how much of that revenue went to “support certain litigation.”**
 - c. If any revenue, how much of that revenue went toward “data administration.”**
 - d. If any revenue, how much of that revenue went toward “personnel costs.”**
 - e. If any of that revenue went toward “personnel costs,” how much of that revenue was paid out in the form of bonuses, cash awards, or non-salary payments.**

- f. If any of that revenue went toward “personnel costs,” and any of that “personnel costs” revenue was paid out in the form of bonuses, cash awards, or non-salary payments, if any of that revenue was paid to Eastern District of New York attorneys who handled FCPA investigations.**

RESPONSE: As noted above, my Office does not make determinations about whether and how the Department disburses 3% Fund monies to support certain litigation, data administration and personnel costs. However, I can tell you that since FY 2010, the Eastern District of New York (EDNY) received roughly \$5.7 million in resources in 3% Fund monies.

Of that, approximately \$978,000 has been allocated for litigation and other non-personnel purposes, and approximately \$4.8 million has been allocated to support personnel costs. As I understand it, of the 3% Fund monies used for personnel costs, none of these funds were directed to salaries of the attorneys in the EDNY who have handled FCPA investigations.

Additionally, approximately \$1.9 million was allocated from the Department’s Civil Division 3% Funds to EDNY to support contractors working on civil enforcement in the Residential Mortgage-Backed Securities arena.

- Question 2 asked if the Eastern District of New York, during your tenure as United States Attorney, has actually tried any FCPA cases to a verdict in federal court. You answered that your office has brought several “significant FCPA investigations [to] corporate resolutions.” The hyperlinks to two news stories describing major FCPA investigations make clear, however, that none of these cited investigations were in fact resolved at trial, but actually involved out-of-court resolution. Your citation to the news story recounting the conviction of former Morgan Stanley managing director Garth Peterson did involve a court, but it was in connection with Peterson’s guilty plea on criminal charges for evading Morgan Stanley’s own internal accounting controls. You acknowledge in your answer that “the United States Attorney’s Office for the Eastern District of New York has not had an FCPA trial to date.”

- 7. Would you agree or disagree that the absence of federal court involvement in FCPA cases (given that all of the FCPA cases you have handled within the Eastern District of New York) prevents the establishment of precedent that could serve as important public-domain guidance for companies seeking to remain in compliance with the provisions of the FCPA?**

RESPONSE: I disagree that there has been an absence of federal court involvement in FCPA cases. Within the past year alone, a circuit court has rendered two opinions interpreting various aspects of the FCPA, and two district courts have similarly issued written opinions on the FCPA. The Second Circuit, Fifth Circuit, Eighth Circuit, and Eleventh Circuit, as well as a number of district courts in other circuits, have rendered opinions regarding the scope and application of the FCPA. Courts also have presided over and approved a significant number of corporate and individual guilty pleas relating to the FCPA, including ten in 2014 alone.

In addition to the cases that have been and are being litigated in court, the Department resolves many cases short of trial. While the Department is prepared to litigate cases, which might lead to additional court rulings regarding the FCPA, the Department does not litigate cases where a defendant seeks a resolution short of trial that is an advantageous outcome for the United States. The Department, however, makes its FCPA resolutions publicly available, including corporate resolution documents containing the factual basis and relevant considerations for such resolutions.

The Department also recently issued *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the “*Resource Guide*”), as well as over 60 opinion letters in response to opinion requests concerning its enforcement intent about actions that may be perceived as violating the anti-bribery provisions of the FCPA, many of which advised that the Department did not intend to take any enforcement action. These steps by the Department all provide significant guidance to companies seeking to remain in compliance with the FCPA.

- Question 13 asked you if you would commit as Attorney General to publishing information about the FCPA cases that the Department has decided not to pursue or prosecute (in order to help provide guidance to companies who are seeking to avoid running afoul of federal law). You answered that you would 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,” but would not commit to sharing declination cases publicly.

8. With the understanding that providing information about declinations could allow some companies to circumvent federal law (which may be the Department’s primary concern), would you acknowledge that some companies would use information about declinations to improve their FCPA compliance practices?

RESPONSE: I recognize the benefit of providing information about declinations and commit to continuing these efforts, in keeping with Department of Justice policy and fundamental fairness to individuals and companies that are not being prosecuted. The United States Attorneys’ Manual (USAM) describes situations in which a United States Attorney can exercise discretion to provide notice that an investigation is being closed in all areas of corporate criminal prosecution, including FCPA cases. *See* USAM § 9-11.155. While the Department has a longstanding general practice of refraining from discussing non-public information on matters it has declined to prosecute, in large part to protect the privacy rights and other interests of the uncharged parties involved, the Department has provided anonymous examples of declinations in the *Resource Guide*, as well as in over 60 opinion letters often indicating that the Department did not intend to take any enforcement action. In addition, companies looking to improve their FCPA compliance practices have a number of guideposts that are publicly available. The United States Sentencing Commission Guidelines Manual contains a section titled, “Effective Compliance and Ethics Program,” which includes several pages of in-depth commentary. The Department also discusses compliance programs at length in the *Resource Guide*, devoting ten pages to the “Hallmarks of Effective Compliance Programs” and providing a “Compliance

Program Case Study” and several hypothetical questions and answers. Moreover, in each of the Department’s FCPA resolutions with companies, the company agrees to enhance its compliance program consistent with a detailed compliance undertaking that is attached to the resolution and made available to the public on the Department’s website.

9. Would you at least acknowledge that the Department’s refusal to share information about declinations contributes to the perspective that the Department prefers ambiguity of what will and will not be pursued by the Department for revenue-generating purposes?

RESPONSE: The Department has responsibly shared information about several declinations, and I have committed to continue to explore ways by which the Department can responsibly share information while protecting the many sensitive interests that federal criminal investigations implicate. The Department has taken significant steps to provide clarity and transparency in the FCPA context, including making all of its corporate FCPA resolutions, together with the corresponding resolution documents, publicly available on the Department’s website; issuing more than 60 opinion letters, which are also available on the Department’s website; and releasing the *Resource Guide*, which provides more than 100 pages of discussion regarding the FCPA and which can be downloaded from the Department’s website.

The Department does not pursue any case for revenue-generating purposes. The Department considers the strength of the evidence and other long-standing policy considerations (*see, e.g.*, USAM 9-28.300) in determining whether to bring and how to resolve an FCPA prosecution, just as it does in all areas of corporate criminal prosecution.

VIII. DOJ Civil Asset Forfeiture Abuses

- Throughout your testimony and your question responses, you have hit upon the important theme of “taking the profit out of crime and preserving the availability of assets for return to crime victims.” Admittedly, this an important goal, and I do not think there is any disagreement with the concept that reducing the profit potential of crime reduces the incidence of crime. This theme, however, raises precisely the concern that exists among individuals who support reining in what are perceived to be excesses in the federal government’s civil asset forfeiture authority.

1. Would you agree or disagree that it is at least possible that civil asset forfeiture has resulted in the permanent forfeiture of assets of innocent parties (i.e., individuals who have committed no crimes)?

RESPONSE: By the very nature of civil forfeiture, there may be instances in which assets are seized and forfeited from individuals who did not commit the crimes that generated the seized property. This is due to the fact that criminals often go to great lengths to insulate themselves from the proceeds and instrumentalities of their criminal acts—including by providing those proceeds and instrumentalities to individuals who knowingly accept and retain the criminally tainted property, even though they did not engage in the criminal activity themselves. Civil

forfeiture is often the only mechanism by which the government can take such assets out of circulation and, whenever possible, compensate victims for their losses.

At the same time, I agree that it is essential that we protect the due process rights of innocent individuals. Recognizing the importance of protecting the innocent, Congress put safeguards in place to protect innocent property owners when it passed the Civil Asset Forfeiture Reform Act (CAFRA). Even where the government has borne its burden of proving that property is linked directly to crime, CAFRA allows a property owner to defeat forfeiture where he is an innocent owner. In such cases, the government must return the seized assets to the innocent owner, who may also be entitled to attorney's fees. These protections are essential to preserve the integrity of the Asset Forfeiture Program and to ensure that individual due process rights are preserved and protected.

- 2. In situations where it is determined that a civil asset forfeiture effort resulted in the seizure of assets of innocent parties, would you agree or disagree that those seized assets ought to be returned to the innocent owners? If you disagree with this statement, please provide a detailed explanation as to why.**

RESPONSE: Please see the answer to Question 1 above.

- 3. As the United States Attorney in charge of the Eastern District of New York, has your office ever encountered an instance where Assistant United States Attorneys and/or the law enforcement with whom you collaborate seized the property of individuals who were ultimately determined to not be involved in any criminal activity or wrongdoing? If the answer to the above is yes, please indicate if:**

- a. The seized property was ever returned to the owner(s).**

RESPONSE: In each case in which the U.S. Attorney's Office for the Eastern District of New York (the "Office") assists law enforcement in obtaining a warrant to seize an asset, the seizure is approved by a magistrate judge and based upon a showing of probable cause. The Office would not seek a warrant or file a forfeiture action unless there was probable cause to believe that the subject asset was linked to a crime and that pursuing its forfeiture was consistent with the law enforcement goals of taking the profit out of crime and ensuring victims are compensated. The interests of justice and public safety, as well as our credibility with the court, are of paramount importance, and certainly more important than forfeiting any particular asset.

I know that there have been instances where the Office has declined to pursue forfeiture of assets seized by law enforcement. In such instances, the Office has ensured that law enforcement returned the assets to their owners; such decisions, however, do not mean that the underlying seizures were unlawful. For example, in connection with the recent seizure of the contents of a safe deposit box owned by a drug trafficker that was seized pursuant to a state court warrant, hundreds of thousands of dollars in cash proceeds of drug trafficking were forfeited. However, the Office declined to pursue forfeiture of jewelry found with the cash, and ensured the return of

that jewelry to a claimant who had no connection to the crime, without the need for any litigation.

Similarly, in connection with an investigation into an international drug trafficking organization, agents presented to the Office evidence that a target's residence was a drug distribution site and, as such, subject to forfeiture as facilitating property of the target's offenses. Further investigation, however, revealed that the residence was, in fact, owned by the target's parents and that the parents had taken steps to evict the target. Accordingly, at the Office's direction, no forfeiture action of any kind was taken against the residence.

b. Any internal review was conducted as to the circumstances that led to the seizure of such property.

RESPONSE: The Office has not conducted internal reviews as described in your question. As indicated above, the fact that property was seized and subsequently returned to the owner does not necessarily mean that the seizure was unlawful or improper. Evidence of, or information as to, a claimant's innocent ownership may be presented only after a seizure has taken place. The Department is currently engaged in a review of the asset forfeiture program, and the Office is providing support, as needed, in this important process.

c. If there was an internal review into the circumstances of a seizure, if there were any findings of inappropriate seizure (or use of inappropriate tactics in a seizure).

RESPONSE: As described above, there was not such a review.

d. If there was an internal review into the circumstances of a seizure, and there were any findings of inappropriate seizure (or use of inappropriate tactics in a seizure), if there were any disciplinary measures instituted.

RESPONSE: As described above, there was not such a review.

- Question 5 asked about the Department of Justice's ability to keep and use proceeds from civil asset forfeitures, and whether that ability incentivizes the Department's use of civil asset forfeiture. You answered that "[f]ederally forfeited assets are deposited into the Assets Forfeiture Fund," and that "[t]hese funds are in turn used to compensate victims of crime, pay administrative costs, and provide critical resources to state and local law enforcement." You also answered that, "[i]f forfeited assets were deposited into the General Treasury instead of the Assets Forfeiture Fund, they would no longer be available for victims of crime." Additional information is required about the Assets Forfeiture Fund.

4. Please cite the statutory authority for the Assets Forfeiture Fund.

RESPONSE: The Department of Justice Assets Forfeiture Fund (the “Fund”) is a special fund created by the Comprehensive Crime Control Act of 1984 (P.L. 98-473, dated October 12, 1984), codified at title 28, United States Code, Section 524(c), and established in the Treasury to receive the proceeds of forfeitures pursuant to any law enforced or administered by the Department of Justice.

5. Would you agree or disagree with the statement that the Assets Forfeiture Fund is an offsetting account, which can be accessed without specific appropriations from Congress? If you disagree with this statement, please provide a detailed explanation as to why.

RESPONSE: As I understand it, the same statute that serves as the legal basis for the Assets Forfeiture Fund (28 U.S.C. 524(c)) also governs how the money in the Fund is to be used. The uses delineated by the statute include, but are not limited to, payments to victims, payments of the costs associated with the maintenance and disposal of forfeited property, and payments to cover the costs of pursuing illicit assets. My Office is not involved in the oversight and management of the Assets Forfeiture Fund. If confirmed, I look forward to learning more about the permitted uses of the Fund.

6. Are any of the funds held in the Assets Forfeiture Fund available in the form of funding or grants for non-profit or for-profit organizations? If Assets Forfeiture Fund resources are available in the form of funding or grants for non-profit or for-profit organizations, please provide the following:

a. A list of all organizations that have received funding from the Assets Forfeiture Fund in the Eastern District of New York.

RESPONSE: The monies deposited into the Fund are available to cover all expenditures in support of the Asset Forfeiture Program that are permitted by the Fund statute. Separately, after all victims are compensated for their losses, and fund expenses are paid, state and local law enforcement agencies may receive forfeited funds through the Equitable Sharing Program. As I understand it, state and local authorities may expend those funds for law enforcement purposes, in accordance with Departmental guidelines governing the Equitable Sharing Program and subject to state and local appropriation and procurement rules. While I am not personally aware of any funds going to non-profit or for-profit organizations in the Eastern District of New York, my Office is not involved in the oversight and management of the Equitable Sharing Program or the Assets Forfeiture Fund. If confirmed as Attorney General, I look forward to learning more about the permitted uses of the Fund.

- b. **If any organizations have received funding from the Assets Forfeiture Fund in the Eastern District of New York, the amounts each group has received (broken down by calendar year, if necessary).**

RESPONSE: Please see the answer to Question 6.a above.

- c. **An explanation as to why that group received funding from the Assets Forfeiture Fund, when such funds are asserted to be for crime victims.**

RESPONSE: Please see the answer to Question 6.a above.

7. **Please explain how, “[i]f forfeited assets were deposited into the General Treasury instead of the Assets Forfeiture Fund, they would no longer be available for victims of crime.” Why would it not be possible, for instance, for forfeited assets to be deposited into the “General Treasury,” with Congress appropriating funding annually for crime victim assistance or reimbursement?**

RESPONSE: Victims are compensated with assets forfeited in the case in which they are identified as victims, after costs are deducted for the seizure, maintenance, and liquidation of the assets forfeited in the case. I believe that since 2000, the Assets Forfeiture Fund has provided approximately \$4 billion in compensation to victims for their losses. If the Fund were discontinued, victims would not be compensated absent specific appropriations. In addition, prior to creation of the Fund, costs associated with execution of asset forfeiture functions were absorbed by agency operating funds, resulting in a lesser ability to pursue illicit assets due to resource competition and insufficient funding. If the Fund were discontinued, in the absence of agency appropriations dedicated to asset forfeiture, we would be likely to see a significant decline in the quantity of assets forfeited and returned to victims.

Questions on Voting Rights

I. The Voting Rights Act’s Preclearance Requirement

- Questions 1-3 asked you about your perspectives on the Supreme Court’s *Shelby County v. Holder* Voting Rights Act decision, in which the Court invalidated Section 4 of the Voting Rights Act (thereby essentially striking down the functional aspects of the Voting Rights Act’s preclearance requirement). In your answers, you declined to answer these questions on the ground that there was ongoing litigation on the subject. As a result, you did not answer the question.

1. **Please take the opportunity to clarify or revise your answer: would you agree or disagree with the statement that the Voting Rights Act formula, which was based on social conditions in 1965, is no longer an accurate reflection of**

today's social conditions, and therefore cannot adequately serve as the foundation for a current statute? If you disagree with this statement, please provide a detailed explanation as to why. (Please note that this question is now not litigation-specific.)

RESPONSE: My understanding is that the Voting Rights Act (VRA) was reauthorized by Congress in 2006. As you note, the “coverage” formula in Section 4 of the VRA was invalidated by the Supreme Court in the *Shelby County* case. The decisions of the Supreme Court are the law of the land.

- 2. Please take the opportunity to clarify or revise your answer: would you agree or disagree with the statement 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. (Please note that this question is not litigation-specific.)**

RESPONSE: The decisions of the Supreme Court are the law of the land. In *Shelby County*, the Supreme Court stated: “We issue no holding on §5 [the federal preclearance requirement] itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an ‘extraordinary departure from the traditional course of relations between the States and the Federal Government.’” *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013).

- a. If you believe that the current Question 2 is litigation-specific, please explain why.**

RESPONSE: Please see the answer to Question 2 above.

- 3. Please take the opportunity to clarify or revise your answer: would you agree or disagree with the statement 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. (Please note that this question is not litigation-specific.)**

RESPONSE: Please see the answer to Question 2 above.

- a. If you believe that the current Question 3 is litigation-specific, please explain why.**

RESPONSE: Please see the answer to Question 2 above.

- 4. You indicated in your prior answers that the reason you could not answer these questions about the Voting Rights Act was that the *Shelby County v. Holder* litigation was ongoing. Please provide an update of the status of the *Shelby County* litigation.**

RESPONSE: My understanding is that the attorneys for Shelby County have filed an application for attorneys' fees in the *Shelby County v. Holder* litigation in the District Court. I understand that this application for attorneys' fees was denied by the District Court. I further understand that part of the District Court's decision on the fees application found that the Department of Justice's litigation position on the merits in defending the constitutionality of Section 5 in the case was not frivolous, unreasonable or without foundation. The county's attorneys have filed an appeal on the attorneys' fees issue to the Court of Appeals, which remains pending. Because this case remains in litigation, I cannot comment further.

II. Voter Identification Laws and Legislation

- Several questions under this section drew from public, recorded comments you made in Long Beach, California, about states' voter identification law efforts in the days immediately following your nomination to serve as the next Attorney General. Those comments raise serious questions about your perspectives regarding federal efforts to obstruct states' efforts to enhance or secure their voting rights laws.

- 1. Please provide the following answers about this speech and the circumstances that led to this speech:**
 - a. The nature of this trip to Long Beach, California.**
 - b. Whether this trip was personal or professional, and, if professional, whether this was financed by the Department of Justice.**
 - c. If this trip was both professional and financed by the Department, the official basis for the trip.**
 - d. If this trip was both professional and financed by the Department, whether the speech that was recorded on the video is considered part of your official duties while on this trip.**

RESPONSE: This question appears to be based on the misconception that the speech that I made regarding the common struggles of Nelson Mandela and the Reverend Martin Luther King, Jr., occurred while I was on a trip to Long Beach, California sometime in November of 2014; I have never been to Long Beach, California. In fact, it was a speech given on January 20, 2014 (Martin Luther King Day) in Long Beach, New York, which is in Nassau County and in my district as the United States Attorney for the Eastern District of New York.

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

QUESTIONS FROM SENATOR VITTER

In your response to the Senate Judiciary Committee's "Questions for the Record," you explicitly noted that you were answering questions regarding the HSBC Deferred Prosecution Agreement (DPA) which you negotiated in lieu of criminal prosecution "in the context of recent media reports regarding the release of HSBC files pertaining to its tax clients." The media reports may be recent, but the knowledge of HSBC shielding clients from their tax liabilities was known to the U.S. Department of Justice at least as early as April 2010. Reports of these serious violations of U.S. law are nearly five years old, yet no criminal charges have ever been brought against HSBC for the alleged tax evasion scheme under your leadership of the Eastern District of New York.

- 1) When did the U.S. Department of Justice receive the leaked information from French authorities detailing HSBC's scheme to shield its clients from their tax liabilities?

RESPONSE: During the course of the investigation of HSBC for Bank Secrecy Act and sanctions violations, I do not recall reviewing or being aware of the information reportedly provided to French authorities and have no knowledge of when such information may have been provided to the Department.

- 2) When did you personally become aware of the HSBC leaked information detailing the tax evasion scheme?

RESPONSE: I was not aware of the HSBC leaked information prior to the execution of the Deferred Prosecution Agreement (DPA), and only learned generally about the existence of these documents through media reports.

If the media reports are correct, the U.S. Department of Justice received this information as early as 2010, yet in 2012 you negotiated a Deferred Prosecution Agreement with HSBC to avoid criminal prosecution only for the crimes of money laundering and facilitating transactions with countries sanctioned by the U.S. It has been reported that you had full prior knowledge of HSBC's alleged earlier fraud and tax evasion violations.

- 3) Why did you choose not to immediately prosecute?

RESPONSE: First, it is important to note that the 2012 DPA did not charge HSBC with money laundering. Rather, as set forth in the Statement of Facts accompanying the 2012 DPA, our investigation centered on HSBC's failure to maintain an adequate anti-money laundering program, which violated the Bank Secrecy Act by creating a corporate environment that failed to stop others from laundering money through HSBC, as well as HSBC's sanctions-violating

conduct. Importantly, HSBC received no protection from prosecution for tax or fraud violations, or in fact, any conduct not described in the Statement of Facts. As set forth above, I was not aware of the HSBC leaked information prior to the execution of the DPA. I am confident that the Department will thoroughly review these allegations and will take whatever enforcement action is appropriate.

- 4) Given that HSBC admitted in the DPA to money laundering and conducting business with five countries sanctioned by the US, and given the strong evidence it also committed tax evasion, fraud and possibly other crimes, do you believe that HSBC's "penalty" truly fits the severity of its conduct against the US?

RESPONSE: The penalties and remedial measures encompassed in the DPA were appropriate to address the compliance failures and sanctions violations enumerated in the Statement of Facts. As the United States District Judge overseeing the case observed in his opinion approving the DPA, "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."

For example, the anti-money laundering provisions of the Bank Secrecy Act apply only to domestic U.S. financial institutions. The DPA requires HSBC to engage in anti-money laundering and compliance efforts beyond the requirements of the Bank Secrecy Act, and it requires such efforts worldwide, and that HSBC follow the highest or most effective anti-money laundering standards available in any location in which it operates. That means, at a minimum, all of HSBC worldwide must adhere to U.S. anti-money laundering standards. We could not have accomplished this by obtaining a conviction at trial. This provision of the DPA represents a significant benchmark for future anti-money laundering compliance and enforcement.

In addition, the other terms of the DPA are perhaps the most stringent ever imposed on a financial institution. The DPA has a five-year term, which is among the longest that has ever been imposed on a financial institution for anti-money laundering or sanctions violations. This term reflects the seriousness of HSBC's conduct and allows for an extended period during which the government will closely monitor HSBC. HSBC is also required to retain and pay for an independent monitor to ensure that remedial measures are implemented. The DPA also ensures that HSBC will continue to cooperate with the government in any criminal investigation for the term of the agreement. Additionally, HSBC was required to forfeit \$1.256 billion, which was the largest ever forfeiture in a bank prosecution to that point.

I want to reiterate that the DPA 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 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 expressly mentions that the agreement does not bind the Department's Tax Division or the Fraud Section of the Criminal Division.

- 5) As has been noted, the HSBC DPA that your office negotiated while you were U.S. Attorney for the Eastern District of New York does not preclude future prosecutions for HSBC's other criminal violations for tax evasion, fraud or for failure to meet its duties and responsibilities under the DPA, but why, nearly 5 years after the Department of Justice became aware of the tax evasion scheme, have no criminal charges been brought?

RESPONSE: I am not in a position to comment on the status of any tax-related investigation, or even to confirm or deny any particular investigation, but if I am confirmed as Attorney General, I look forward to learning more about the Department's enforcement efforts in this area.

The details of HSBC Money Laundering Deferred Prosecution Agreement has hardly been made public.

- 6) Exactly how much did HSBC profit from the transactions, loans, accounts, etc... associated with the money-laundering accusations included in the DPA?

RESPONSE: As set forth in the Statement of Facts accompanying the DPA, HSBC's anti-money laundering control failures and sanctions violations resulted in the bank processing hundreds of millions of dollars in tainted transactions. However, it is important to note that HSBC's profit from processing these transactions was a small fraction of the value of the transactions themselves. Indeed, the forfeiture judgment paid by the bank far exceeds the revenue and dramatically exceeds the profits that HSBC realized from processing these transactions.

- 7) Who in your office or at the Department of Justice determined the penalty paid by HSBC and how did they come to that amount?

RESPONSE: The forfeiture judgment was determined by career prosecutors in my office and within the Criminal Division of the Department of Justice. The penalty was based on the specific facts and circumstances of the case, including the value of the transactions that HSBC illegally processed and the scope and severity of the bank's misconduct.

- 8) What process(es) were used to ensure that the penalty matches the crime?

RESPONSE: As noted in my previous answer, the forfeiture penalty was assessed based on a thorough evaluation of the scope of HSBC's conduct and in conjunction with the other remedial measures encompassed in the DPA.

9) If the alleged identity theft took place, during the course of HSBC's participation in a money laundering scheme, have all affected persons been notified?

RESPONSE: I do not have sufficient information about the alleged identity theft to which you refer to comment on victim notification issues.

Nomination of Loretta E. Lynch to be Attorney General of the United States
Questions for the Record
Submitted February 20, 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 a number of questions that related to transparency at the Department of Justice. As you know, the Inspector General serves as an independent checking power to deter fraud and promote efficiency within the Department of Justice and other agencies. Under the Inspector General Act, the Inspector General has the authority, “to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act.” 5 U.S.C. App. § 6 (a)(1). This information includes Title III wiretap information, grand jury documents, and consumer credit information under the Fair Credit Reporting Act. In some situations, the Attorney General may prohibit investigations, audits, or issuance of subpoenas if the Attorney General provides written notice to the Inspector General explaining the reason such action complies with 5 U.S.C. App. § 8E (1), (2), and (3).

According to testimony from Inspector General Michael Horowitz in 2013, the Department of Justice obstructed his authority to access non-privileged documents. Instead, the practice of Attorney General Holder required the Inspector General to receive written permission before the Inspector General obtained access to non-privileged records. In my view, this practice violates the plain reading of the statute and requires the Inspector General to give deference to its auditing agency, which clearly defeats the statutory purpose and independence vested in the Inspector General.

If confirmed as Attorney General, would you continue the same practices as your predecessor?

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 interaction of the Inspector General Act and other statutes that specifically limit the dissemination of certain information. 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.

- a. If yes, specifically explain your statutory interpretation that gives the Attorney General the ability to violate the plain meaning of the statute.
 - i. Furthermore, specifically explain where you find statutory authority to require the Inspector General to comply with the current administration’s practice of requiring written permission to access non-privileged documents?

- ii. Specifically explain what power the Inspector General holds to effectively audit, recommend efficiency proposals, and eliminate waste if the Attorney General can unilaterally withhold access information that is not privileged?
 - iii. If the Attorney General can unilaterally withhold information from the Inspector General without statutory justification, what prevents other federal agencies from obstructing investigations and interfering with the independent powers given to the Inspector General?
- b. If no, please specifically explain what steps you will take ensure the independence of the Inspector General's ability to audit the Department of Justice?

RESPONSE: I agree that an independent Inspector General is vital to ensuring a well-functioning Department of Justice. If confirmed, I am confident that the Inspector General and I will form a good working relationship, as we share the same goals.

2. In written questions submitted by this office previously, you responded that some of those questions related to pending litigation and that you therefore could not respond. Please explain why you were able to comment on pending litigation before a January 2014 audience in Long Beach, New York, but you are unable to do so when testifying before Congress.

RESPONSE: In my January 2014 speech, I commented on the Department's obligation to protect the constitutional right to vote and stated generally that the Department had brought suit in North Carolina. The questions that you previously asked, and which it would not be appropriate for me to answer, were those seeking responses on live issues in or details from the pending litigation.

3. In a December 2014 Report entitled "Professional Misconduct: DOJ Could Strengthen Procedures For Disciplining Its Attorneys," the Government Accountability Office concluded: "The Department of Justice (DOJ) has made changes to improve its processes for managing complaints of attorney professional misconduct since 2011 but has not implemented plans to improve processes for demonstrating that discipline is implemented, or achieving timely and consistent discipline decisions."

In light of the GAO's conclusion, one of my previous questions to you was whether 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. Your response indicated that you would be committed to pursuing appropriate discipline for individuals who do not carry out their duties with integrity and professionalism. Surely we can agree that attorneys who have committed prosecutorial misconduct or who have been disciplined by a state bar have not always carried out their duties with integrity and professionalism. Do you, in fact, agree with that statement? Secondly, would you, consistent with any due process rights of such an employee, dismiss an employee who does not uphold the "highest standards" about which you spoke in your previous response?

RESPONSE: As I stated previously, I will pursue appropriate discipline for Department employees who do not carry out their duties with integrity and professionalism. Without knowing the facts and circumstances of a particular case, I am not in a position to respond categorically to whether “an employee who does not uphold the ‘highest standards’” will be dismissed; for instance, I understand that under applicable civil service laws and regulations, the Department must consider a number of factors concerning the employee and the findings of misconduct in determining what appropriate discipline to impose.

4. In December of 2012, you represented the Department of Justice in civil settlements with HSBC in your capacity as U.S. Attorney. You stated that the bank “routinely did business with entities on the U.S. sanctions list,” and the bank helped dangerous drug cartels move large amounts of money. In addition to your own statements, there are reports that American citizens’ personal information, such as names and social security numbers, were used to perpetuate fraud or were otherwise exposed.
 - a. Did you have knowledge that HSBC was using or had used American citizens’ personal information to perpetuate fraud when you settled the United States’ suit against HSBC?

RESPONSE: No, I was not aware of these allegations when my office entered into the 2012 Deferred Prosecution Agreement (DPA) with HSBC.

- b. Without revealing privileged information regarding the settlement reached in the HSBC matter, please describe what metric, standards, or guiding principles you would use to determine an appropriate settlement amount for similar cases going forward?

RESPONSE: In any criminal investigation regarding allegations of wrongdoing by financial institutions or other large corporations, an analysis of appropriate penalties, both financial and otherwise, should be predicated upon a thorough review of the scope and severity of the wrongdoing, the reliability of the available evidence, the viability of prosecutions of individual perpetrators, and the other factors identified in the Department’s Principles of Federal Prosecution of Business Organizations.

- c. Please explain the Department’s rationale for not pursuing criminal prosecution in the HSBC matter.

RESPONSE: In the HSBC case, the penalties and remedial measures encompassed in the DPA were appropriate to address the compliance failures and sanctions violations enumerated in the Statement of Facts. As the United States District Judge overseeing the case observed in his opinion approving the DPA, “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.”

For example, the anti-money laundering provisions of the Bank Secrecy Act apply only to domestic U.S. financial institutions. The DPA requires HSBC to engage in anti-money laundering and compliance efforts beyond the requirements of the Bank Secrecy Act, and it requires such efforts worldwide, and that HSBC follow the highest or most effective anti-money laundering standards available in any location in which it operates. That means, at a minimum, all of HSBC worldwide must adhere to U.S. anti-money laundering standards. We could not have accomplished this by obtaining a conviction at trial. This provision of the DPA represents a significant benchmark for future anti-money laundering compliance and enforcement.

In addition, the other terms of the DPA are perhaps the most stringent ever imposed on a financial institution. The DPA has a five-year term, which is among the longest that has ever been imposed on a financial institution for anti-money laundering or sanctions violations. This term reflects the seriousness of HSBC’s conduct and allows for an extended period during which the government will closely monitor HSBC. HSBC is also required to retain and pay for an independent monitor to ensure that remedial measures are implemented. The DPA also ensures that HSBC will continue to cooperate with the government in any criminal investigation for the term of the agreement. Additionally, HSBC was required to forfeit \$1.256 billion, which was the largest ever forfeiture in a bank prosecution to that point.

- d. If confirmed, will you commit to imposing harsher penalties against entities that willfully ignore interests of national security and use American citizens’ personal information to perpetuate fraud?

RESPONSE: If confirmed as Attorney General, I will ensure that the prosecution of perpetrators of identify theft is a significant priority of the Department and that all appropriate penalties are pursued, particularly where interests of national security are implicated.

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

QUESTIONS FROM SENATOR SESSIONS

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

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

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

“I believe strongly that the United States government must use every available tool, including detention of unlawful enemy combatants and military commission trials, as well as Article III prosecutions, to protect the American people. In any particular case, representatives of the agencies who are tasked with protecting the American people, including the Department of Defense, the Department of Homeland Security, the Department of Justice and agencies in the Intelligence Community, work together to determine the most effective tools to apply in that case, based on the particular facts and applicable law. As the United States

Attorney for the Eastern District of New York, my role to date has been limited to determining whether or not there was a prosecutable federal case, not which was the appropriate tool to employ.”

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

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

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

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

RESPONSE: With respect to Question 9 concerning interrogation and the right to remain silent, I explained that the Miranda warning would not be required for interrogations that are solely for the purposes of intelligence collection and will not be used in a criminal prosecution. Moreover, the government may make use of the public safety exception as articulated by the Supreme Court in *New York v. Quarles* under which public safety-focused questions may be admissible at trial even if Miranda warnings are not provided. Accordingly, I disagree with the categorical statement that in the civilian justice system, defendants are required to be told they have the right to remain silent and that interrogation must stop if they invoke that right. I agree, however, that there is no such requirement in the military commission system, which applies to certain “unprivileged belligerents” as defined in the Military Commissions Act.

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

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

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

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

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

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

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

"Although I have not had the occasion to consider these particular provisions of the Foreign Intelligence Surveillance Act (FISA) as a United States Attorney, I believe that it is important that our intelligence and law enforcement professionals have the full panoply of tools to deal with evolving national security threats like international terrorism, while ensuring that we use those tools in a way that effectively protects privacy and civil liberties. As I mentioned during the hearing, as a prosecutor, I am quite familiar with the invaluable benefits provided by roving wiretaps in narcotics prosecutions; those wiretaps are critical to conducting electronic surveillance against those attempting to evade it and are only issued after judicial review.

I understand that the Administration supported the USA FREEDOM Act, which would have extended these three provisions of FISA while also providing additional privacy protections, including prohibiting bulk collection under Section 215. If confirmed as Attorney General, I look forward to working with this Committee, as well as the Intelligence committees, on legislation to counter serious national security threats in a manner that also protects the privacy and civil liberties of our citizens."

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

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

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

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

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

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

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

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

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

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

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

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

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

"I support efforts to engage with state and local law enforcement partners to achieve consistent policies for the apprehension, detention, and removal of undocumented aliens. If confirmed as Attorney General, I will continue the Department's efforts to work closely with the Department of Homeland Security and state and local law enforcement partners to ensure that national security and public safety are our top priorities in the enforcement of our immigration laws."

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

RESPONSE: I believe that all efforts should be undertaken to support state and local law enforcement authorities to notify ICE of pending releases of criminal aliens during the time that these individuals are otherwise in custody under state or local authority so that the individuals

can be taken into ICE custody for removal. I believe this is a valid and important law enforcement objective to protect the public safety.

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

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

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

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

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

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

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

RESPONSE: As I noted in response to Question 39, I am committed to public safety in the enforcement of federal immigration laws and to working with federal and state law enforcement

partners in continuing efforts to secure our borders and protect our national security. If confirmed as Attorney General, I would also work with Congress in order to achieve these critically important objectives, and I am certainly committed to working with Congress to determine the best path forward, whether it is the 278(g) program or some other program.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RESPONSE: As I noted previously, in my role as United States Attorney, I have not had occasion to encounter questions concerning the jurisdiction of the International Criminal Court (ICC). As a result, I have not had the opportunity to consider the basis for the ICC's jurisdiction,

and do not have developed views at this time. If confirmed as Attorney General, I would look forward to learning more about this issue.