**Nomination of Jeff Sessions to be Attorney General of the United States**
**Questions for the Record**
**Submitted January 17, 2017**

# QUESTIONS FROM SENATOR GRASSLEY

## Sue-and-Settle and Settlement Slush Funds

Under the Obama administration, the Justice Department arranged for settling defendants to donate money to non-victim third-parties, including politically favored groups. This was simply another tool by which the Obama Justice Department would pick winners and losers based on a politically-driven agenda. Payments ordered by settlements with the Department of Justice should only be used to punish the defendant and to make actual victims whole again, not to benefit favored groups.

The Obama Justice Department also abused its settlement authority by signing off on settlements and consent decrees with interest groups that committed agencies to fast-track new regulations. This practice, known as sue-and-settle, undermines transparency and accountability in the rulemaking process and offends the intent of Congress.

As Attorney General, will you commit to working with Congress and this Committee to ensure that settlements entered into by the Department, and any payments derived from them, are used appropriately for punishment of defendants and redress of actual victims? Will you likewise commit to working with Congress and this Committee to end abusive sue-and-settle tactics?

**RESPONSE:** Yes.

## FOIA

The Obama administration promised a new era of open government. President Obama even called his administration the most transparent in history. But the facts demonstrate otherwise. Under President Obama, FOIA lawsuits and FOIA request denials reached record highs. And it's no secret that some of his top officials used methods that totally circumvented transparency and accountability protections.

With a new administration comes an opportunity to set a new standard for transparency. And the Justice Department plays a central role in ensuring government-wide compliance with FOIA, our nation's premier transparency law. Accordingly, as Attorney General, will you commit to working with Congress and this Committee to ensure that both the letter and the spirit of FOIA are carried out?

**RESPONSE:** The Freedom of Information Act (FOIA) is an important law that has played in integral role in helping the public hold the government accountable by rooting out waste, fraud, and abuse. If confirmed, I will ensure that the Department and the Executive Branch appropriately complies with FOIA, as well as works with you and this Committee to ensure that FOIA is carried out as intended.

**Prescription Drug Prices**

As you know, the high cost of prescription drugs is an increasing concern for American consumers. President-Elect Trump agrees and has pledged to "bring down drug prices." Do you believe that the Antitrust Division at the Justice Department has a role to play with respect to these concerns? Can you assure me that drug competition issues will be a priority for the Justice Department, if you are confirmed to be U.S. Attorney General?

**RESPONSE:** I agree that the high cost of prescription drugs is a concern for the American consumer. The Justice Department's antitrust division enforces the antitrust laws to ensure competition in the marketplace and to protect consumers from anti-competitive action. If confirmed as Attorney General, the antitrust division will be vigilant in evaluating drug competition issues to determine whether they constitute a violation of federal antitrust law and harm consumers.

**Bankruptcy**

I believe the bankruptcy system has been made much better and fairer thanks to the enactment of comprehensive bankruptcy reform legislation in 2005. Nevertheless, critics desire to weaken the statute.

1. Will you commit to actively supporting, defending, and making enforcement of the bankruptcy laws a priority for the U.S. Trustee Program?

**RESPONSE:** Yes.

2. Will you support and encourage greater enforcement actions by the U.S. Trustee Program to prevent abusive or fraudulent bankruptcy filings, including vigorous review of attorney fee applications in large Chapter 11 bankruptcy cases?

**RESPONSE:** Yes, I will support the U.S. Trustee Program's efforts to prevent abusive or fraudulent bankruptcy filings. This program could indeed be an important factor in eliminating bankruptcy fraud. I would also consider pursuing more prosecutions of fraud.

3. Will you assist in efforts to fight attempts to undermine the bankruptcy reform law?

**RESPONSE:** Yes.

**Juvenile Justice System**

1. A significant number of girls in the juvenile justice system are actually victims of human trafficking. What efforts will the Attorney General make to promote the identification of these victims and help ensure their needs are better met?

**RESPONSE:** As a United States Senator, I was a cosponsor and strong supporter of the Adam Walsh Act of 2006, which imposed tough, mandatory penalties for sex trafficking of minors,

child pornography, and federal sexual assault offenses. I also have supported reauthorizations of the Violence Against Women Act, and have supported other legislation that has done much to prevent sexual assault and other violence, including trafficking. Additionally, I worked to add an amendment to the 2005 Violence Against Women Act that expanded DNA sampling and has prevented many of these types of crimes over the past decade. If I am fortunate enough to be confirmed as Attorney General, I will continue to pursue and support solutions to the problem of human trafficking, including vigorous prosecution of human traffickers and improved forensic science efforts to identify victims and serve justice.

2. The programs authorized under the 1974 Juvenile Justice & Delinquency Prevention Act are long overdue for reauthorization. There was broad bipartisan support for these programs' reauthorization in the 114th Congress (as evidenced by the Senate Judiciary Committee's unanimous approval of a reauthorization bill in 2015 and the House of Representatives' 2016 passage of a companion bill by a vote of 382-29). JJDPA reauthorization remains a top priority for this Committee in the 115th Congress.

   Alabama in recent years has embraced the importance of juvenile justice reforms. (Research indicates that such reforms not only conserve taxpayer resources but also promote better outcomes for the nation's at-risk youth.) Given Alabama's recent success in juvenile justice reform and the federal taxpayers' 40-year investment in JJDPA implementation, will you encourage the rest of the nation to adopt similar reforms and engage in a robust implementation of the JJDPA?

**RESPONSE:** If I am fortunate enough to be confirmed as Attorney General, I will encourage jurisdictions to continue to study and implement reforms of their juvenile justice systems, including utilizing best practices from around the country while also finding what works best in their particular jurisdiction.

**Scope of Executive Privilege**

For the past five years, the U.S. House of Representatives Committee on Oversight and Government Reform (HOGR) has sought subpoenaed documents from the Department of Justice related to Operation Fast and Furious.[1] Originally, the Department failed to produce any documents responsive to the October 2011 subpoena despite failing to formally assert a legally recognized privilege. In fact, only a feeble attempt to rely on "confidentiality interests" and "separation of powers" was proffered.[2] Eventually the Department asserted executive privilege over the majority of relevant documents, and shortly thereafter, the Committee voted to hold Attorney General Eric Holder in contempt of Congress.

In August 2012, HOGR filed a civil lawsuit in the U.S. District Court for the District of Columbia seeking to enforce its subpoena of documents, including those created after a February 4, 2011

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[1] Stephen Dinan, *Election eve surprise: DOJ belatedly releases Fast & Furious documents*, WASH. TIMES, Nov. 4, 2014, *available at* http://www.washingtontimes.com/news/2014/nov/4/justice-dept-submits-64k-pages-fast-furious-docs/?page=all.
[2] Brief of Petitioner-Appellant at 21, *Committee on Oversight and Government Reform of the United States House of Representatives v. Loretta Lynch*, No. 16-5078 (D.C. Cir. Oct. 6, 2016) ["HOGR Brief"].

letter to me which falsely claimed the Department had not been walking guns, to understand how the Department came to know the letter was false.[3] In August 2014, after years of litigation, the court ordered the Department to produce a privilege log. However, the court also held that the deliberative process privilege "could be invoked in response to a congressional subpoena."[4]

In response to the order, the Department produced an incomplete "list" of a subset of documents, along with about two thirds of those documents which it had previously unlawfully withheld, given that it had a legal obligation to comply with the subpoena and given that even the Department did not take the position that those documents were privileged. The remaining documents on the Department's "list" were categorically withheld on deliberative process grounds as well as five other claims of "privilege" never previously asserted.

HOGR then filed a motion to compel production of *all* documents, without redactions, created following the Department's false and misleading February 2011 letter to Congress.[5] On January 19, 2016, the district court granted the Committee's motion in part and denied it in part. The court ordered the Department to produce all documents from its 2014 "set" that it had withheld on deliberative process grounds, but denied the Committee's motion to compel remaining responsive documents.[6]

HOGR appealed on October 2016 to seek production of all other documents responsive to the subpoena.[7] Among other things, the appeal also generally challenges the district's court's holding that the common law "deliberative process" privilege can form a valid basis for denying access to information regarding Executive Branch misconduct sought by a congressional subpoena. The appeal is currently pending.

The most problematic aspect of the long negotiation and litigation over the Fast and Furious documents is the Department's continued insistence, and the district court's assent to the Department's position, that the constitutionally based Executive Privilege extends far below the President to shield the "deliberative process" of lower-level, unelected bureaucrats. The deliberative process privilege is a common law doctrine and a basis for a Freedom of Information Act exemption. It is not a Constitutional privilege of equal standing with the inherent power of Congress to conduct oversight inquiries. Deliberative process also traditionally applies only to content that is deliberative and pre-decisional.[8] It does not shield material created after a decision is made, or that is purely factual.

Worse, the Department has even used this exceedingly broad view of Executive Privilege to shield production of documents the former Attorney General himself admitted *were not actually privileged at all*.[9] The Department's Office of Legal Counsel opinion on the President's assertion

[3] Complaint available at http://legaltimes.typepad.com/files/complaint-13.pdf.
[4] HOGR brief at 9.
[5] Available at http://oversight.house.gov/wp-content/uploads/2014/11/Cover-Letter.pdf.
[6] HOGR brief at 25.
[7] *Id.*
[8] *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997).
[9] 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).

of Executive Privilege further suggests inexplicably that the privilege applies to a document, "regardless of whether a given document contains deliberative material."[10]

Moreover, in a very troubling trend, the Department and other Executive Branch agencies also have relied on the district court's opinion in their refusal to produce a vast array of information to Congress in response to subpoenas, claiming broadly not only a dubious "deliberative process" privilege but also general, unarticulated "confidentiality" interests and other vague concepts.

Many of those examples are featured in an amicus brief that I and several other congressional committee chairmen in the House and the Senate filed in the HOGR appeal.[11] The brief challenges the attempts by the Obama administration to stretch the Executive Privilege beyond its constitutional boundaries to shield from congressional review documents it claims are "deliberative" or even merely "confidential." The brief asserts that the administration's overbroad privilege claims, including in response to congressional subpoenas, serve only to thwart legitimate congressional oversight.[12]

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

**RESPONSE:** The practice of the political branches and the courts have recognized that the following types of information may be protected by executive privilege: state secrets relating to foreign relations and military affairs; certain sensitive information relating to law enforcement investigations; presidential communications—including not only communications to and from the President but also, in some cases, communications made or solicited and received by White House staff in the course of preparing advice for the President; and information that reflects the internal, pre-decisional deliberations of the Executive Branch. *See, e.g.*, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975); *United States v. Nixon*, 418 U.S. 683, 705 (1974); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc).

Courts have recognized the deliberative process privilege to apply to deliberative agency documents that do not relate to presidential decisions, and the contours and limits of that privilege have been described in case law. *See, e.g., In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). If I am fortunate enough to be confirmed as Attorney General, I would, of course, follow the applicable case law and seek the legal guidance of attorneys within the Department of Justice regarding the applicability of any privilege claim.

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

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[10] 36 Op. O.L.C. 1, 3 (June 19, 2012).
[11] Brief of Amici Curiae Chairmen of Certain House and Senate Oversight Committees in Support of Appellant, *Committee on Oversight and Government Reform of the United States House of Representatives v. Loretta Lynch*, No. 16-5078 (D.C. Cir. Oct. 13, 2016).
[12] "[T]he power of inquiry—with the process to enforce it—is an essential and appropriate auxiliary to the legislative function." *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

**RESPONSE:** Each claim of executive privilege must be carefully evaluated and determined individually based upon the specific nature and contents of the documents or communications at issue. Although I am aware that past administrations have asserted executive privilege over, for example, pre-decisional deliberative materials in response to congressional inquiries, I have not studied the specific legal bases for those claims.

As noted above, the contours and limits of the deliberative process privilege has been discussed in case law. Additionally, case law indicates that, where practicable, the Executive Branch and Congress should try in good faith to resolve inter-branch disputes regarding executive privilege through negotiation and accommodation.

3. Will you commit that, if confirmed, you will personally review and examine the expansive claims of Executive Privilege asserted by the Department in this long running litigation with Congress under its previous leadership and decide whether it is proper and consistent with the law to continue litigating them?

**RESPONSE:** If I am fortunate enough to be confirmed as Attorney General, I will review these matters.

**Whistleblowers**

On December 16, 2016, President Obama signed into law the Grassley-Leahy FBI Whistleblower Protection Enhancement Act. The Act clarifies, once and for all, that FBI employees are protected for making disclosures of waste, fraud, and abuse within their chains of command—just like every other federal government employee. The Department of Justice should work swiftly to update its current regulations in accordance with the new statute[13] and ensure FBI employees are fully apprised of their protections.

Unfortunately, the version of the FBI WPEA—which unanimously passed the Judiciary Committee early in 2016—did not become law. This version sought to improve the investigative and adjudicative procedures for FBI reprisal claims to address significant deficiencies noted by the Government Accountability Office and the Department of Justice in their respective reports on the FBI whistleblower program.

For example, that version of the bill would have addressed lengthy delays in the investigations and adjudications procedures for FBI whistleblower claims. Among other things, the bill provided for the ability of the Department to utilize more experienced administrative law judges to evaluate cases and allowed for interim relief for whistleblowers where the Office of the Inspector General finds a reasonable basis to believe reprisal occurred. The bill also would have required the Department to meet its obligations under FOIA and follow the example of the Merit Systems Protection Board in publicizing its opinions. The Department has promised to consider doing so,

[13] 28 C.F.R. Part 27. The current regulations limit the individuals to whom FBI employees may make protected disclosures to nine specifically designated entities or individuals. In establishing such a limited group, the Department ignored the central purpose of whistleblower protection laws, which is to encourage disclosures and protect employees from the individuals or entities most likely to reprise against them.

but in nearly two years has failed to publicize a single FBI whistleblower case. The result is that the FBI has access to case precedent, but potential whistleblowers do not.

Notably, the Judiciary Committee unanimously approved these key reforms in early 2016.

However, the Department of Justice and the FBI objected to these improvements—behind the scenes—without ever providing any official written comment on the bill.

1. If confirmed, how will you ensure that FBI employees are fully apprised of their new protections from reprisal committed by their supervisors?

**RESPONSE:** Strong protections for whistleblowers are important to ensure that governmental misconduct is investigated and appropriately addressed. If I am fortunate enough to be confirmed as Attorney General, I will endeavor to make certain that employees of the Department of Justice and its components are informed of their rights and protections from reprisal when they help appropriate individuals identify and prevent misconduct, including through regular review of, and if necessary, updates to the policies and procedures of the Department.

2. If confirmed, how will you ensure that the Department and the FBI work with this Committee to continue to improve protections for whistleblowers at the FBI?

**RESPONSE:** Strong protections for whistleblowers are important to ensure that governmental misconduct is investigated and appropriately addressed. If I am fortunate enough to be confirmed as Attorney General, I will direct the Department to conduct regular review of its policies and procedures related to whistleblower protections, and will work with Congress and with this Committee whenever new authorities or changes to the law are necessary to protect whistleblowers and prevent governmental misconduct.

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

**RESPONSE:** Yes.

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

**RESPONSE:** Yes.

**Improper Handling Restrictions on Committee Documents**

During the course of the Clinton investigation, the FBI provided a document production that was largely unclassified but contained some classified material. The production included "handling restrictions" on all the unclassified material which prevented necessary staff without a clearance from reviewing the unclassified material. These restrictions were never negotiated for, rather the FBI unilaterally used them.

The FBI's action is entirely contrary to the executive order and regulations governing the handling of classified information. Under the law, the unclassified material should have been produced directly to the Committee, with only a classified addendum submitted to the Office of Senate Security. Executive Order 13526 states:

> The classification authority shall, whenever practicable, use a classified addendum **whenever classified information constitutes a small portion of an otherwise unclassified document** or prepare a product to allow for dissemination **at the lowest level of classification possible or in unclassified form.**

Moreover, Section 1.7(a) of Executive order 13526 specifically states:

> **In no case shall information** be classified, continue to **be maintained as classified**, or fail to be declassified **in order to**:
> (1) conceal violations of law, inefficiency, or administrative error;
> (2) prevent embarrassment to a person, organization, or agency;
> …
> **(3) prevent or delay the release of information that does not require protection in the interest of national security.**

Importantly, by definition, unclassified information does not require protection in the interest of the national security. And Executive Order 13526 mandates that "in no case" shall it "be maintained as classified," which accordingly prohibits FBI's attempt to require the unclassified materials to be treated as classified and stored in a SCIF.

The FBI's actions raise serious Constitutional separation of powers issues when the imposition of such document controls interferes with the independent oversight function of the Judiciary Committee.

1. Do you agree that the Legislative Branch has independent and constitutionally based oversight powers that provide it the authority to oversee the Executive Branch?

**RESPONSE:** Yes. Your continued work to hold the executive branch accountable for its actions regardless of party is very important. If I am confirmed, I can assure you that the Department will respect your constitutional oversight role and the separation of powers between the Executive and Legislative branches.

2. Do you agree that unilateral document controls by the Executive Branch undermine the independent and constitutionally based oversight powers of the Legislative Branch? If not, why not? Please explain.

**RESPONSE:** As a Senator, I understand the important role that congressional oversight plays in our system of government. At the same time, the President and his senior officers have a vital

need to receive candid and confidential advice from those within the Executive Branch, as well as to protect other confidential information such as national security and law enforcement information from public disclosure. For this reason, both the courts and the political branches have recognized that some Executive Branch documents may be privileged from disclosure to Congress. Each claim of executive privilege must be carefully evaluated and determined individually based upon the specific nature and contents of the documents or communications at issue. Although I am aware that past administrations have asserted executive privilege over, for example, pre-decisional deliberative materials in response to congressional inquiries, I have not studied the specific legal bases for those claims. Where practicable, and as they have many times in the past, the Executive Branch and Congress should try in good faith to resolve inter-branch disputes regarding executive privilege through negotiation and accommodation.

3. If confirmed, will you instruct Justice Department employees and its components to negotiate in good faith any handling restrictions with the Committee before production? If not, why not?

**RESPONSE:** Yes, I agree that the Executive Branch and Congress should try in good faith to resolve inter-branch disputes regarding handling restrictions through negotiation and accommodation, and I would act accordingly.