From: Gauhar, Tashina (ODAG)
Subject: FW: FISC - Misc 13-08 - For Service on all parties
To: Crowell, James (ODAG)
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Attached: Misc 13-08 Opinion and Order.pdf

FYI only – Good news on a public case before the Foreign Intelligence Surveillance Court ("FISC"). Public cases in the FISC are few and far between and this one has been pending since 2014.

Summary: The FISC issued an unclassified opinion holding that there is no First Amendment right of access to FISC opinions. The court ruled that those seeking FISC opinions must ask the Executive Branch under FOIA and pursue any judicial review through that mechanism. This case was filed after the unauthorized disclosures of 2013. We expect the FISC to post this opinion on its website. OPA and OLA are aware.

Happy to discuss or provide additional information as needed.

Thanks,
Tash

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE OPINIONS & ORDERS OF THIS COURT ADDRESSING BULK COLLECTION OF DATA UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT.	Docket No. Misc. 13-08

OPINION

Pending before the Court is the MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AND THE MEDIA FREEDOM AND INFORMATION ACCESS CLINIC FOR THE RELEASE OF COURT RECORDS,[1] which, as is evident from the motion's title, was filed jointly by the American Civil Liberties Union ("ACLU"), the American Civil Liberties Union of the Nation's Capital ("ACLU-NC"), and the Media Freedom and Information Access Clinic ("MFIAC") (collectively "the Movants"). The Movants ask the Court to "unseal its opinions addressing the legal basis for the 'bulk collection' of data" on the asserted ground that "these opinions are subject to the public's First Amendment right of access, and no proper basis exists to keep the legal discussion in these opinions secret." Mot. for Release of Ct. Records 1. As will be explained, however, the four opinions the Movants seek were never under seal and were declassified by the Executive Branch and made public with redactions in 2014. Consequently, although characterized as a request for the release of certain

[1] Hereinafter, this motion will be referred to as the "Motion for the Release of Court Records" and cited as "Mot. for Release of Ct. Records." Documents submitted by the parties are available on the Court's public website at http://www.fisc.uscourts.gov/public-filings.

of this Court's judicial opinions, what the Movants actually seek is access to the redacted material that remains classified pursuant to the Executive Branch's independent classification authority.

As explained in Parts I and II of the following Discussion, this Court has jurisdiction over the Motion for Release of Court Records only if it presents a case or controversy under Article III of the Constitution, which in turn requires among other things that the Movants assert an injury to a legally protected interest. The Movants claim that withholding the opinions in question contravenes a qualified right of access to those opinions under the First Amendment. If, contrary to the Movants' interpretation of the law, the First Amendment does not afford a qualified right of access to those opinions, they have failed to claim an injury to a legally protected interest. For reasons explained in Part III of the Discussion, the First Amendment does not apply pursuant to controlling Supreme Court precedent so there is no qualified right of access to those opinions. Accordingly, the Court holds that the Movants lack standing under Article III and the Court therefore must dismiss the Motion for Release of Court Records for lack of jurisdiction.

By no means does this result mean that the opinions at issue, or others like them, will never see the light of day. First, the opinions at issue have already been publicly released, subject to Executive Branch declassification review and redactions that withhold portions of those opinions found to contain information that remains classified. Members of the public seeking release of other opinions (or further release of redacted text in the opinions at issue in this matter) may submit requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and seek review of the Executive Branch's responses to those requests in a federal district court. Finally, as noted *infra* Part V, Congress has charged Executive Branch officials—not this

Court—with releasing certain significant Court opinions to the public, subject to declassification review. Those statutory mechanisms for public release are unaffected by the determination that the Court lacks jurisdiction over the instant motion.

BACKGROUND AND PROCEDURAL POSTURE

The Movants filed the pending motion in the wake of unauthorized but widely-publicized disclosures about National Security Agency ("NSA") programs involving the bulk collection of data under the Foreign Intelligence Surveillance Act of 1978, codified as amended at 50 U.S.C. §§ 1801-1885c (West 2015) ("FISA"). The motion urges the Court to unseal its judicial opinions addressing the legality of bulk data collection on the ground that the First Amendment to the United States Constitution guarantees that the public shall have a qualified right of access to judicial opinions. Mot. for Release of Ct. Records 1, 2, 12-21. The Movants contend that this right of access applies even when national security interests are at stake. *Id.* at 17. According to the Movants, the right of access can be overcome only if the United States of America (the "Government") satisfies a "strict" test requiring evidence of a substantial probability of harm to a compelling interest and no alternative means to protect that interest. *Id.* at 3, 21-24, 25, 28. Even if the Government demonstrates a substantial probability of harm to a compelling interest, the Movants maintain that "[a]ny limits on the public's right of access must . . . be narrowly tailored and demonstrably effective in avoiding that harm." *Id.* at 3. The Movants therefore insist that the First Amendment obligates the Court to review independently any portions of the Court's judicial opinions that are being withheld from public disclosure via redaction and assess whether the redaction is sufficiently narrowly tailored to protect only a compelling interest and nothing more. *Id.* at 23.

To conduct this independent review, the Movants suggest that the Court should first invoke Rule 62 of the United States Foreign Intelligence Surveillance Court ("FISC") Rules of Procedure and order the Government to perform a classification review of all judicial opinions addressing the legality of bulk data collection.[2] *Id.* at 24. If the ordered classification review results in the Government withholding any contents of the Court's opinions by redaction, the Movants assert that the Court should schedule the filing of legal briefs to allow the Government to set forth the rationale for "its sealing request" and to accommodate the Movants' presentation of countervailing arguments regarding "any sealing they believe to be unjustified," *id.*, after which the Court should "test any sealing proposed by the government against the standard required by the First Amendment," *id.* at 27. *See also* Movants' Reply in Supp. of Their Mot. for Release of Ct. Records 2, 4. The Movants further request that the Court exercise its discretion to order a classification review pursuant to FISC Rule 62 even if the Court ultimately concludes that a First Amendment right of access does not apply in this matter. *Id.* at 27.

The Government opposes the Movants' motion principally because the four opinions that address the legal bases for bulk collection were made public in 2014 after classification reviews conducted by the Executive Branch. Gov't's Opp'n Br. 1-2. Two opinions were published by the Court:

- Memorandum, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [Redacted]*, Docket No. BR 13-158 (Oct. 11, 2013) (McLaughlin, J.), *available at* http://www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Memorandum-1.pdf; and

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[2] Rule 62 provides in relevant part that, after consultation with other judges of the court, the Presiding Judge of the FISC may direct that an opinion be published and may order the Executive Branch to review such opinion and "redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor)." FISC Rule 62(a).

- Amended Memorandum Opinion, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [Redacted]*, Docket No. BR 13-109 (Aug. 29, 2013) (Eagan, J.), *available at* http://www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-1.pdf.

Gov't's Opp'n Br. 2. The other two opinions were released by the Executive Branch:

- Opinion and Order, [Redacted], Docket No. PR/TT [Redacted] (Kollar-Kotelly, J.), *available at* https://www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf; and

- Memorandum Opinion, [Redacted], Docket No. PR/TT [Redacted] (Bates, J.), *available at* https://www.dni.gov/files/documents/1118/CLEANEDPRTT%202.pdf.

Id. The Government submits that, because the Executive Branch already conducted thorough classification reviews of all four opinions before their publication and release, there is no reason for the Court to order the Government to repeat that process.[3] *Id.* The Government further argues that the motion should be dismissed for lack of the Movants' standing to advance FISC Rule 62 as a vehicle for publication because that rule permits only a "party" to move for publication of the Court's opinions. *Id.* at 3. In support, the Government cites the Court's decision in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, No. Misc. 13-02, 2013 WL 5460064 (FISA Ct. Sept. 13, 2013), for the proposition that the term "party" in Rule 62 refers to a "party" to the proceeding that resulted in the opinion. Gov't's Opp'n Br. 3. The Government points out that the Movants were not such "parties" to any of the proceedings that begot the four opinions discussing the legality of bulk collection. *Id.* Finally, the Government contends that the Court should decline to exercise its own discretion to require the Executive Branch to conduct another classification review of the relevant opinions under Rule 62—or to permit the Movants to challenge the redaction of classified material—because FOIA

[3] The Movants argue that the Executive Branch's classification reviews were insufficient and resulted in the four declassified opinions being "redacted to shreds." Movants' Reply In Supp. of Their Mot. for Release of Ct. Records 8.

supplies the proper legal mechanism to seek access to classified material withheld by the Executive Branch. *Id.* at 3-4. According to the Government, the FISC is not empowered to review independently and/or override Executive Branch classification decisions, *id.* at 4-6, nor should the FISC serve as an alternate forum to duplicate the judicial review afforded by FOIA, *id.* at 3-4.

DISCUSSION

Before proceeding to consider the merits of the pending motion the Court must first establish with certainty that it has jurisdiction. Because the FISC is an Article III court,[4] it cannot exercise the judicial power to resolve the Movants' motion unless there is an actual "case or controversy" in which the Movants have standing. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (May 16, 2016) (discussing the constitutional limits on the exercise of judicial power). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies" as set forth in Article III of the Constitution. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). By framing the exercise of judicial power in terms of "cases or controversies," Article III recognizes:

> [T]wo complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.

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[4] *See In re Sealed Case*, 310 F.3d 717, 731 (FISA Ct. Rev. 2002) (per curiam) (indicating that "the constitutional bounds that restrict an Article III court" apply to the FISC); *In re Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985) (rejecting the assertion that the FISC "is not a proper Article III court"), *aff'd*, 788 F.2d 566 (9th Cir. 1986).

Flast v. Cohen, 392 U.S. 83, 95 (1968). As will be discussed, the separation-of-powers concern poses particular unease in this case.

"From Article III's limitation of the judicial power to resolving 'Cases' and 'Controversies,' and the separation-of-powers principles underlying that limitation, [the Supreme Court has] deduced a set of requirements that together make up the 'irreducible constitutional minimum of standing.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). This doctrine of standing is an "essential and unchanging part of the case-or-controversy requirement of Article III . . . ." *Lujan*, 504 U.S. at 560. "In fact, standing is perhaps the most important jurisdictional doctrine, and, as with any jurisdictional requisite, we are powerless to hear a case when it is lacking." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005) (internal citations and quotation marks omitted). As the Supreme Court has observed:

> In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society.
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> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit.

Warth v. Seldin, 422 U.S. 490, 498 (1975) (internal quotation marks and citations omitted).

I.

Accordingly, at the outset, the Court is obligated to ensure that it can properly entertain the Movants' motion because they have met their burden of establishing standing sufficient to satisfy the Article III requirement of a case or controversy. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). To do so, the Movants "must clearly and specifically set forth facts sufficient to satisfy . . . Art. III standing requirements. A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990). Moreover, because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), the Movants "must demonstrate standing for each claim [they] seek[] to press" as well as "'for each form of relief sought,'" *DaimlerChrysler*, 547 U.S. at 352 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)). Ultimately, "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler*, 547 U.S. at 341. Absent standing, the Court's exercise of judicial power "would be gratuitous and thus inconsistent with the Art. III limitation." *Simon*, 426 U.S. at 38.

Anticipating that standing might be an issue, the Movants commenced their legal arguments by first claiming that they established standing by virtue of the fact that they were denied access to judicial opinions. Mot. for Release of Ct. Records 10. The Movants assert that "[d]enial of access to court opinions alone constitutes an injury sufficient to satisfy Article III." *Id.* By footnote, the Movants also question in part the decision in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, 2013 WL 5460064, to the extent that it held that a party claiming the denial of public access to judicial opinions must further show either (1) that the lack of public access impeded the party's own activities in a concrete and particular way or

(2) that access would afford concrete and particular assistance to the party in the conduct of its own activities, although the Movants alternatively argue that "even if those showings are necessary to establish standing, [they] satisfy the additional requirements." *Id.* at 11 n.27.

It appears that *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act* was the first and only occasion on which a FISC Judge expressly addressed the question of a third party's standing for the purpose of asserting a First Amendment right to access this Court's judicial opinions.[5] That was a case championed by these same Movants on the same ground that the First Amendment guarantees a qualified right of public access to judicial opinions, although in that case the Movants sought access to opinions analyzing Section 215 of the USA PATRIOT Act (as codified at 50 U.S.C. § 1861). *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, 2013 WL 5460064, at *1. There, the parties neglected to address standing so the Court was obliged to consider it sua sponte based on the existing record, *id.*, after impliedly taking judicial notice of public matters, *id.* at *4 (stating that "[t]he Court ordinarily would not look beyond information presented by the parties to find that a claimant has Article III standing" but "[i]n this case . . . the ACLU's active participation in the legislative and public debates about the proper scope of Section 215 and the advisability of amending that provision is obvious from the public record and not reasonably in dispute"). The Court found that the ACLU and the ACLU-NC had standing but MFIAC did not, *id.* at *4, albeit the Court later reinstated MFIAC as a party upon granting MFIAC's motion seeking reconsideration of its standing on the strength of

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[5] *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007), also involved a motion filed by the ACLU seeking the release of court documents. In that case, part of which is discussed at length *infra* Part IV, the ACLU's standing was not addressed and the cited basis for the exercise of jurisdiction was the Court's inherent supervisory power over its own records and files. *Id.* at 486-87 (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)).

additional information regarding MFIAC's activities, Opinion & Order Granting Mot. for Recons., *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, No. Misc. 13-02 (Aug. 7, 2014), *available at* http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-6_0.pdf. The Court never reached the question of whether the First Amendment applied, however, and, instead, dismissed for comity the Movants' motion to the extent it sought opinions that were the subject of ongoing FOIA litigation in another federal jurisdiction. *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, 2013 WL 5460064, at *6-7. The Court then exercised its own discretion to initiate declassification review proceedings for a single opinion pursuant to Rule 62. *Id.* at *8.

Recognizing that the decision in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act* involved the same Movants asserting, in essence, the same type of legal claim, the question of standing nevertheless must be independently examined in this case because "[t]his court, as a matter of constitutional duty, must assure itself of its jurisdiction to act in every case." *CTS Corp. v. EPA*, 759 F.3d 52, 57 (D.C. Cir. 2014). Significantly, the decision in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act* is distinguishable because it did not reach the question of whether the First Amendment applied and, if not, whether the Movants could establish standing in the absence of an interest protected by the First Amendment. This case also is in a unique posture because the Movants seek access to judicial documents that already have been made public and declassified by the Executive Branch, unlike the documents sought in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act.* An independent assessment of standing also is warranted in light of Article III's necessary function to circumscribe the Federal Judiciary's exercise of power, *Spokeo*, 136 S. Ct. at 1547, and given

the "highly case-specific" nature of jurisdictional standing inquiries, *Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003).

Embarking on an analysis of standing in this matter, the Court is mindful that, because "[s]tanding is an aspect of justiciability," "the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability." *Flast*, 392 U.S. at 98. Indeed, "[s]tanding has been called one of 'the most amorphous (concepts) in the entire domain of public law.'" *Id.* at 99 (quoting *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the S. Judiciary Comm.*, 89th Cong. 498 (2d Sess. 1966) (statement of Prof. Paul A. Freund)). The United States Court of Appeals for the Second Circuit has referred to standing as a "labyrinthine doctrine," *Fin. Insts. Ret. Fund v. Office of Thrift Supervision*, 964 F.2d 142, 146 (2d Cir. 1992), and even the Supreme Court has admitted that "'the concept of Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it," *Whitmore*, 495 U.S. at 155 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982)).

Despite its nebulousness, there are several fundamental guideposts that offer direction and a general framework to evaluate standing in any given case. To begin with, while it has long been the rule that standing "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal," it nonetheless "often turns on the nature and source of the claim asserted." *Warth*, 422 U.S. at 500. Supreme Court precedent "makes clear that Art. III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue[.]" *Diamond v. Charles*, 476 U.S. 54, 70 (1986) (citing *Valley Forge Christian Coll.*, 454 U.S. at 472). Thus, "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72,

77 (1991). "In essence, the standing question is determined by 'whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.'" *E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 450 (2d Cir. 2014) (quoting *Warth*, 422 U.S. at 500). "[A]lthough standing is an anterior question of jurisdiction, the grist and elements of [the Court's] jurisdictional analysis require a peek at the substance of [the Movants'] arguments." *Transp. Workers Union of Am., AFL-CIO v. Transp. Sec. Admin.*, 492 F.3d 471, 474-75 (D.C. Cir. 2007).

It also is well established that the doctrine of standing consists of three elements, the first of which requires the Movants to show that they suffered an "injury in fact." *Lujan*, 504 U.S. at 560. The second element requires that the injury in fact be "fairly traceable" to the defending party's challenged conduct and the third element requires that there be a likelihood (versus mere speculation) that the injury will be redressed by a favorable judicial decision. *Id.*

II.

Recently, the Supreme Court emphasized that "injury in fact" is the "'[f]irst and foremost' of standing's three elements." *Spokeo*, 136 S. Ct. at 1547 (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998)). Importantly for the purpose of resolving the pending motion, the Supreme Court has "stressed that the alleged injury must be legally and judicially cognizable." *Raines v. Byrd*, 521 U.S. 811, 819 (1997). "This requires, among other things, that the plaintiff have suffered an invasion of a *legally protected interest* which is . . . concrete and particularized, and that the dispute is traditionally thought to be capable of resolution through the judicial process[.]" *Id.* (internal quotation marks and citations omitted, emphasis added). "[A]n injury refers to the invasion of some 'legally protected interest' arising

from constitutional, statutory, or common law." *Pender v. Bank of Am. Corp.*, 788 F.3d 354, 366 (4th Cir. 2015) (quoting *Lujan*, 504 U.S. at 578).

The meaning of the phrase "legally protected interest" has been a source of perplexity in the case law as a result, at least in part, of the Supreme Court's pronouncement that a party can have standing even if he loses on the merits. *See Warth*, 422 U.S. at 500 (stating that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal"); *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1172 (10th Cir. 2006) ("The term *legally protected interest* has generated some confusion because the Court has made clear that a plaintiff can have standing despite losing on the merits . . . ." (emphasis in original)); *Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359, 363 (D.C. Cir. 2005) (Williams, J., concurring) (expressing "puzzlement" over the Supreme Court's use of the phrase "legally protected" as a "modifier" and examining the discordant state of the case law's treatment of the phrase); *United States v. Richardson*, 418 U.S. 166, 180-81 (1974) (Powell, J., concurring) (questioning the Supreme Court's approach in *Flast*, 392 U.S. at 99-101, on the ground that "[t]he opinion purports to separate the question of standing from the merits . . . yet it abruptly returns to the substantive issues raised by a plaintiff for the purpose of determining whether there is a logical nexus between the status asserted and the claim sought to be adjudicated" (internal quotation marks omitted)); *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 951 n.23 (9th Cir. 2013) ("The exact requirements for a 'legally protected interest' are far from clear."). The confusion is compounded by the fact that the Supreme Court has occasionally resorted to using the phrase "judicially cognizable interest" rather than, or interchangeably with, the phrase "legally protected interest." *Judicial Watch*, 432 F.3d at 364 (Williams, J., concurring) ("[T]he [Supreme] Court appears to use the 'legally protected' and 'judicially cognizable' language

interchangeably."); *ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 959 (8th Cir. 2011) (citing *Lujan* for the proposition that "[a] 'legally protected interest' requires only a 'judicially cognizable interest'"); *Lujan*, 504 U.S. at 561-63, 575, 578 (initially stating that a plaintiff must have suffered "an invasion of a legally protected interest" to satisfy Article III but then reverting to use of the term "cognizable" to characterize the viability of that interest to establish standing); *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (stating that "standing requires: (1) that the plaintiff have suffered an 'injury in fact'—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"); *Warth*, 422 U.S. at 514 (referring to a "judicially cognizable injury" in the context of discussing the legality of Congress expanding by statute the interests that may establish standing). Adding to the uncertainty, in some cases the Supreme Court makes no mention whatsoever of the requirement that an injury entail the invasion of either a "legally protected" or "judicially cognizable" interest. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) ("To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)); *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) ("To ensure the proper adversarial presentation, *Lujan* holds that a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury.").

Deciphering the meaning of the phrase "legally protected interest" also is muddled by the varying approaches courts use to identify the relevant "interest" at stake. In at least one case the United States Court of Appeals for the Fourth Circuit suggested that the interest at issue could be

considered subjectively from the perspective of the party asserting standing. *Doe v. Pub. Citizen*, 749 F.3d 246, 262 (4th Cir. 2014) (intimating that litigants need only assert an interest that "in their view" was protected by the common law or the Constitution). Other courts focus objectively on whether the Constitution, a statute or the common law actually recognizes the asserted interest. *See, e.g., Sargeant v. Dixon*, 130 F.3d 1067, 1069 (D.C. Cir. 1997) (stating that "[a] legally cognizable interest means an interest recognized at common law or specifically recognized as such by the Congress").

Still other courts have examined whether the type or form of the injury is traditionally deemed to be a legal harm, such as an economic injury or an invasion of property rights, although such an inquiry can blend into the question of whether the injury is concrete and particularized. *See, e.g., Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005) (stating that "[m]onetary harm is a classic form of injury-in-fact" that "is often assumed without discussion" and an invasion of property rights, "whether it sounds in tort . . . or contract . . . undoubtedly 'affect[s] the plaintiff in a personal and individual way'" (quoting *Lujan*, 504 U.S. at 560 n.1)). At least one court has found standing by analogizing to interests that were never advanced by the party asserting standing.[6] *See In re Special Grand Jury 89-2*, 450 F.3d at

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[6] It is unclear how this approach can be reconciled with the Supreme Court's admonitions that standing "is gauged by the specific common-law, statutory or constitutional claims *that a party presents*," *Int'l Primate Prot. League*, 500 U.S. at 77 (emphasis added), and a "federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing," *Whitmore*, 495 U.S. at 155-56. The Tenth Circuit opined that the Supreme Court's decision in *Bennett*, 520 U.S. at 167, presented a "new locution" according to which the substitution of the phrase "judicially cognizable interest" for "legally protected interest" signaled that the Supreme Court had abandoned *Lujan's* requirement of a "legally protected interest" in favor of a formulation that provides that "an interest can support standing even if it is not protected by law (at least, not protected in the particular case at issue) so long as it is the sort of interest that courts think to be of sufficient moment to justify judicial intervention." *In re Special Grand Jury 89-2*, 450 F.3d at 1172. The question of whether the Supreme Court intended to abandon the requirement for a "legally protected interest" seems to have been

1172-1173 (characterizing former grand jurors' requests to lift the secrecy obligation imposed by Rule 6(e) of the Federal Rules of Criminal Procedure as an interest in "stating what they know" that mirrors the First Amendment claims of litigants challenging speech restrictions and commenting that "there is no requirement that the legal basis for the interest of a plaintiff that is 'injured in fact' be the same as, or even related to, the legal basis for the plaintiff's claim, at least outside the taxpayer-standing context").

Although no universal definition of the phrase "legally protected interest" has been developed by the case law,[7] the Supreme Court and a majority of federal jurisdictions have concluded that an interest is not "legally protected" or cognizable for the purpose of establishing standing when its asserted legal source—whether constitutional, statutory, common law or

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resolved in the negative by the Supreme Court's decision in *Raines*, which was decided shortly after *Bennett* and was joined by Justice Antonin Scalia, the author of the Court's unanimous decision in *Bennett*. In *Raines*, as stated *supra*, the Supreme Court "stressed that the alleged injury must be legally and judicially cognizable" and went on to state that "[t]his requires, among other things, that the plaintiff have suffered 'an invasion of a legally protected interest which is . . . concrete and particularized.'" 521 U.S. at 819 (quoting *Lujan*, 504 U.S. at 560). The Supreme Court's recent decision in *Spokeo* also employs the locution requiring that, "[t]o establish injury in fact, a plaintiff must show that he or she suffered '*an invasion of a legally protected interest*' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560) (emphasis added).

[7] The bewildering state of the law might explain in part why one commentator has referred to the "injury in fact" requirement as "a singularly unhelpful, even incoherent, addition to the law of standing," William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 231 (1988), and another has taken what the United States Court of Appeals for the Tenth Circuit described as the "somewhat cynical view" that "'[t]he only conclusion [regarding what injuries are sufficient for standing] is that in addition to injuries to common law, constitutional, and statutory rights, a plaintiff has standing if he or she asserts an injury that the Court deems sufficient for standing purposes.'" *In re Special Grand Jury 89-2*, 450 F.3d at 1172 (second alteration in original) (quoting Erwin Chemerinsky, *Federal Jurisdiction* § 2.3.2 at 74 (4th ed.2003)).

otherwise—does not apply or does not exist. The United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit")[8] has offered the following explanation:

> Whether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits. Otherwise, every unsuccessful plaintiff will have lacked standing in the first place. Thus, for example, one can have a legal interest in receiving government benefits and consequently standing to sue because of a refusal to grant them even though the court eventually rejects the claim. *See generally Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 109 S. Ct. 2558, 105 L.Ed.2d 377 (1989) (plaintiffs had standing to bring suit under [Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. §§ 1-15] although claim failed). Indeed, in *Lujan* the Court characterized the "legally protected interest" element of an injury in fact simply as a "cognizable interest" and, without addressing whether the claimants had a statutory right to use or observe an animal species, concluded that the desire to do so "undeniably" was a cognizable interest. *Lujan*, 504 U.S. at 562–63, 112 S. Ct. at 2137–38.
>
> On the other hand, if the plaintiff's claim has no foundation in law, he has no legally protected interest and thus no standing to sue. *See, e.g., Arjay Assocs. v. Bush*, 891 F.2d 894, 898 (Fed. Cir. 1989) ("We hold that appellants lack standing because the injury they assert is to a nonexistent right . . . ."); *ACLU v. FCC*, 523 F.2d 1344, 1348 (9th Cir. 1975) ("If ACLU's claim is meritorious, standing exists; if not, standing not only fails but also ceases to be relevant."); *United Jewish Org. of Williamsburgh v. Wilson*, 510 F.2d 512, 521 (2d Cir. 1975) ("Whether our decision on this point is cast on the merits or as a matter of standing is probably immaterial."), *aff'd*, 430 U.S. 144, 97 S. Ct. 996, 51 L.Ed.2d 229 (1977).

Claybrook v. Slater, 111 F.3d 904, 907 (D.C. Cir. 1997). Furthermore, although the question of whether a litigant's interest is "legally protected" does not depend on the merits of the claim, it nevertheless is the case that "there are instances in which courts have examined the merits of the underlying claim and concluded that the plaintiffs lacked a legally protected interest and therefore lacked standing." *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1236 (10th Cir. 2004) (citing *Skull Valley Band of Goshute Indians v. Leavitt*, 215 F. Supp. 2d 1232, 1240–41 (D. Utah 2002) (discussing cases), *Claybrook*, 111 F.3d at 907, and *Arjay Assocs.*

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[8] For brevity and convenience, this opinion hereinafter will omit the phrase "United States Court of Appeals for the" from the identification of federal circuit courts of appeal.

Inc. v. Bush, 891 F.2d 894, 898 (Fed. Cir. 1989)). *Accord Martin v. S.E.C.*, 734 F.3d 169, 173 (2d Cir. 2013) (per curiam) (declining to reach the merits of a litigant's claims when standing was lacking "except to the extent that the merits overlap with the jurisdictional question").

In *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part on other grounds, Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court concluded that a group of litigants lacked Article III standing because their claims could not be deemed "legally cognizable" when the Court had never previously recognized the broadly-asserted interest and that interest was premised on a mistaken interpretation of inapplicable legal precedent. The litigants in *McConnell* consisted in part of a group of voters, organizations representing voters, and candidates who collectively challenged, among other things, the constitutionality of a particular section of the Bipartisan Campaign Reform Act of 2002 ("BCRA") that amended the Federal Election Campaign Act of 1971 ("FECA") by "increas[ing] and index[ing] for inflation certain FECA contribution limits." 540 U.S. at 226. As relevant here, the litigant group argued that, as a result of the amendments, they suffered an injury they identified as the deprivation of an "equal ability to participate in the election process based on their economic status." *Id.* at 227. The group asserted that this injury was legally cognizable according to voting-rights case law that they viewed as prohibiting "electoral discrimination based on economic status . . . and upholding the right to an equally meaningful vote." *Id.* (internal quotation marks omitted). The Supreme Court, however, disclaimed the notion that it had ever "recognized a legal right comparable to the broad and diffuse injury asserted by the . . . plaintiffs." *Id.* In addition, the group's "reliance on this Court's voting rights cases [was] misplaced" because those cases required only "nondiscriminatory access to the ballot and a single, equal vote for each voter" whereas the group had not claimed that they were denied such equal access or the right to vote. *Id.* The

Court further stated that it had previously "noted that '[p]olitical 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources,'" so the group's "claim of injury . . . is, therefore, not to a legally cognizable right." *Id.* (quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)).

In *Bond v. Utreras*, 585 F.3d 1061, 1065-66 (7th Cir. 2009), the Seventh Circuit reviewed a district court order lifting a protective order and permitting a journalist to intervene in a civil rights case involving allegations that Chicago police officers mentally and physically abused a plaintiff while performing their official duties. The journalist sought to "unseal" police department records relating to citizen complaints against Chicago police officers that the city had produced during pretrial discovery but never filed with the court. *Id.* at 1066. The journalist claimed that no good cause existed to continue the protective order under Rule 26(c) of the Federal Rules of Civil Procedure. *Id.* at 1065. Several months after dismissing the underlying lawsuit, which had settled, *id.*, the district court "reevaluated whether 'good cause' existed to keep the documents confidential, and in so doing applied a 'presumption' of public access to discovery materials," *id.* at 1067. On balance, the district court concluded that the city's interest in keeping the records confidential was outweighed by the public's interest in information about police misconduct; as a result, the court granted the journalist's request to intervene and lifted the protective order. *Id.* On appeal by the city, the Seventh Circuit characterized as a "mistake" the district court's failure to consider whether the journalist had standing in view of the fact that the underlying lawsuit had been dismissed. *Id.* at 1068. The Seventh Circuit held that a third party seeking permissive intervention to challenge a protective order after a case has been dismissed "must meet the standing requirements of Article III in addition to Rule 24(b)'s requirements for permissive intervention." *Id.* at 1072. Discussing Article III's standing requirements, *id.* at

1072-73, the Seventh Circuit noted that, "while a litigant need not definitely 'establish that a right of his has been infringed,' he 'must have a colorable *claim* to such a right' to satisfy Article III," *id.* at 1073 (emphasis in original) (quoting *Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1024 (7th Cir. 2006)). Because the district court's decision to lift the protective order was premised on a presumptive right of access to discovery materials, *id.* at 1067, the Seventh Circuit analyzed the legal basis of such a presumptive right and concluded that, while "most documents filed in court are presumptively open to the public," *id.* at 1073, it nevertheless is the case that "[g]enerally speaking, the public has no constitutional, statutory (rule-based), or common-law right of access to *unfiled* discovery," *id.* at 1073 (emphasis in original). The Seventh Circuit also found no support for the notion that Rule 26(c) "creates a freestanding public right of access to unfiled discovery." *Id.* at 1076. It then proceeded to consider and reject whether, alternatively, the First Amendment supplied such a right. *Id.* at 1077-78. Lacking any legal basis to assert a right to unfiled discovery, the Seventh Circuit held that the journalist "has no injury to a legally protected interest and therefore no standing to support intervention." *Id.* at 1078.

Griswold v. Driscoll, 616 F.3d 53 (1st Cir. 2010), is another instructive case. The First Circuit held that litigants lacked a legally protected interest because the source of the interest, the First Amendment, did not apply. In *Griswold*, students, parents, teachers, and the Assembly of Turkish American Associations ("ATAA") collectively challenged a decision by the Commissioner of Elementary and Secondary Education of Massachusetts to revise a statutorily-mandated advisory curriculum guide. 616 F.3d at 54-56. The Commissioner's initial revisions were motivated by political pressure to assuage a Turkish cultural organization that objected to the curriculum guide's references to the Armenian genocide as biased for failing to acknowledge an opposing contra-genocide perspective. *Id.* at 54-55. After the revised curriculum guide was

submitted to legislative officials, the Commissioner again modified it – at the request of Armenian descendants – by removing references to all pro-Turkish websites (including websites that presented the contra-genocide perspective) except the Turkish Embassy's website. *Id.* at 55. The plaintiffs sued claiming that the revisions to the curriculum guide were made in violation of their rights under the First Amendment to "inquire, teach and learn free from viewpoint discrimination . . . and to speak." *Id.* at 56. In an opinion notable for its authorship by U.S. Supreme Court Associate Justice David Souter (Ret.), sitting by designation, the First Circuit affirmed the dismissal of the ATAA's First Amendment claim as time barred and then considered whether the remaining plaintiffs had standing to assert a First Amendment right. *Id.* Remarking that "we see this as a case in which the dispositive questions of standing and statement of cognizable claim are difficult to disentangle," the First Circuit found it "prudent to dispose of both standing and merits issues together." *Id.* The First Circuit then evaluated whether the challenged advisory curriculum guide was analogous to a virtual school library—in which case the revisions to the guide would be subject to First Amendment review pursuant to the plurality decision in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982)—or whether the guide was more properly characterized as an element of curriculum over which the State Board of Education may exercise discretion. *Id.* at 56-60. The First Circuit ultimately regarded the complaint as pleading "a curriculum guide claim that should be treated like one about a library, in which case pleading cognizable injury and stating a cognizable claim resist distinction." *Id.* at 56. Declining to extend "the *Pico* plurality's notion of non-interference with school libraries as a constitutional basis for limiting the discretion of state authorities to set curriculum," the First Circuit found that the guide was an element of curriculum, *id.* at 59, so that "revisions to the Guide after its submission to legislative officials,

even if made in response to political pressure, did not implicate the First Amendment," *id.* at 60. The First Circuit therefore affirmed the lower court's judgment that the First Amendment did not apply to the challenged curriculum guide and, as a result, the plaintiffs had failed to establish either a cognizable injury or a cognizable claim. *Id.* at 56, 60.

The D.C. Circuit's decision in *Claybrook*, cited *supra*, also lends authority to the proposition that a party lacks standing when the statutory, constitutional, common law or other source of the asserted legal interest does not apply or does not exist. *Claybrook* involved a lawsuit filed by Joan Claybrook, a co-chair of Citizens for Reliable and Safe Highways ("CRASH"), who sued the Administrator of the Federal Highway Administration ("FHWA") for failing to prevent an agency advisory committee from passing a resolution that criticized CRASH's fund-raising literature. 111 F.3d at 905, 906. Claybrook claimed that the Administrator violated the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. §§ 1-15, by permitting the advisory committee to vote on and pass the challenged resolution, which Claybrook claimed was not on the committee's agenda and not within the committee's authority. *Id.* at 906. The Administrator countered by arguing that Claybrook lacked standing "because the legal duty she claims he violated does not exist." *Id.* at 907. Upon analysis of the relevant provisions of FACA, 5 U.S.C. App. §§ 9(c)(B), 10(a)(1), 10(a)(2), 10(e), 10(f), the D.C. Circuit agreed that the Act did not impose the asserted legal duty that served as a basis for Claybrook's claimed injury, the agency otherwise complied with the Act, and the decision to adjourn the advisory committee meeting was committed to the agency's discretion pursuant to 5 U.S.C. § 701(a)(2). *Id.* at 907-909. Because FACA offered no recourse to Claybrook, the D.C. Circuit held that "[i]n sum, we are left with no law to apply to Claybrook's claim and consequently Claybrook lacks standing." *Id.* at 909.

The Ninth Circuit reached a similar result in *Fleck & Assocs., Inc. v. Phoenix, an Arizona Mun. Corp.*, 471 F.3d 1100 (9th Cir. 2006). The appellant in *Fleck & Assocs.* was a "for-profit corporation that operate[d] . . . a gay men's social club in Phoenix, Arizona" where "[s]exual activities [took] place in the dressing rooms and in other areas of the club." 471 F.3d at 1102. Pursuant to a Phoenix ordinance banning the operation of live sex act businesses, a social club operated by the appellant was subjected to a police search during which two employees were questioned and detained. *Id.* at 1102-1103. The appellant was also "threatened with similar actions." *Id.* at 1103. The appellant sued the city seeking both injunctive and declaratory relief on the ground that the ordinance violated its constitutional privacy rights. *Id.* at 1102. The district court interpreted the appellant's complaint to raise one claim based on the invasion of its customers' privacy rights and a second claim based on the invasion of the appellant's rights as a corporation. *Id.* at 1103. With respect to the claim based on the customers' privacy rights, the district court found that the appellant lacked standing to pursue that claim and, alternatively, the appellants' customers had no privacy rights in the social club so dismissal was further warranted for failure to state a claim for relief. *Id.* The district court held, however, that the appellant had standing to assert its own privacy rights as a corporation, albeit "[t]he court did not . . . identify what those corporate rights might have been" and "immediately proceeded to hold that [the appellant] lacked any cognizable privacy rights and dismissed for failure to state a claim." *Id.* On appeal, the Ninth Circuit agreed with the district court that the appellant lacked associational standing[9] to assert its customers' rights but held that the district court erred by addressing the merits of the customers' privacy rights in the social club when the court lacked subject matter

[9] "Under the doctrine of 'associational' or 'representational' standing an organization may bring suit on behalf of its members whether or not the organization itself has suffered an injury from the challenged action." *Id.* at 1105.

jurisdiction. *Id.* at 1103, 1105, 1106. Discussing the appellant's claim of "traditional" Article III standing based on its asserted privacy rights as a corporation, the Ninth Circuit noted that the appellant "squarely identifie[d] the source of its supposed right as the liberty guarantee described in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)." *Id.* at 1104. The Ninth Circuit determined, however, that no corporate right to privacy emanated from that case, *id.* at 1105, 1106, and, as a result, "[b]ecause the right to privacy described in *Lawrence* is purely personal and unavailable to a corporation, [the appellant corporation] failed to allege an injury in fact sufficient to make out a case or controversy under Article III," *id.* at 1105.

In *Muntaqim v. Coombe*, 449 F.3d 371 (2d Cir. 2006) (en banc) (per curiam), the Second Circuit considered a prisoner's complaint challenging New York Election Law section 5–106 on the ground that it denied felons the right to vote in violation of section 2 of the Voting Rights Act "because it 'result[ed] in a denial or abridgement of the right . . . to vote on account of race.'" 449 F.3d at 374 (quoting 42 U.S.C. § 1973(a), transferred to 52 U.S.C. § 10301). Because the prisoner was a resident of California before he was incarcerated, *id.* at 374, and the Second Circuit concluded that "under New York law, [his] involuntary presence in a New York prison [did] not confer residency for purposes of registration and voting," *id.* at 376, the court found that "his inability to vote in New York arises from the fact that he was a resident of California, not because he was a convicted felon subject to the application of New York Election Law section 5–106," *id.* As a result, the Second Circuit held that that the prisoner "suffered no 'invasion of a legally protected interest.'" *Id.* (quoting *Lujan*, 504 U.S. at 560).

Other federal circuits similarly have concluded that, when the source of the legal interest asserted by a litigant does not apply or does not exist, the litigant has not established a colorable claim to a right that is "legally protected" or "cognizable" for the purpose of establishing an

injury in fact that satisfies Article III's standing requirement. *See, e.g.*, *24th Senatorial Dist. Republican Comm. v. Alcorn*, 820 F.3d 624, 633 (4th Cir. 2016) (finding that "[b]ecause neither Virginia law nor the Plan [of Organization that governs the Republican Party of Virginia] gives [the litigant] 'a legally protected interest' in determining the nomination method in the first place, he fails to make out 'an *invasion* of a legally protected interest,' i.e. actual injury, in this case" (quoting *Lujan*, 504 U.S. at 560) (emphasis in original)); *Spirit Lake Tribe of Indians ex rel. Comm. of Understanding and Respect v. Nat'l Collegiate Athletic Ass'n*, 715 F.3d 1089, 1092 (8th Cir. 2013) (noting that injury resulting from a college ceasing to use a Native American name, "even if . . . sufficiently concrete and particularized . . . does not result from the invasion of a legally protected interest"); *White v. United States*, 601 F.3d 545, 555 (6th Cir. 2010) (stating that the plaintiffs "must demonstrate an injury-in-fact to a legally protected interest" but failed to do so because "none of the purported 'constitutional' injuries actually implicates the Constitution"); *Pichler v. UNITE*, 542 F.3d 380, 390-92 (3d Cir. 2008) (affirming dismissal on the ground that litigants failed to establish an injury to a "legally protected interest" because the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721–2725, was interpreted to apply only to an individual whose personal information was contained in a motor vehicle record and not to spouses who might share that same personal information but were not the subject of the motor vehicle record); *Bochese*, 405 F.3d at 984 (litigant was not an intended beneficiary of a contract amendment so he "had no 'legally cognizable interest' in that agreement and therefore lack[ed] standing to challenge its rescission"); *Aiken v. Hackett*, 281 F.3d 516, 519-20 (6th Cir. 2002) (appellants who claimed they were denied a benefit in violation of the Equal Protection Clause but did not allege that they would have received the benefit under a race-neutral policy lacked standing because they "failed to allege the invasion of a right that the law

protects"); *Arjay Assocs.*, 891 F.2d at 898 (stating that "[b]ecause appellants have no right to conduct foreign commerce in products excluded by Congress, they have in this case no right capable of judicial enforcement and have thus suffered no injury capable of judicial redress").

III.

Several considerations favor the above-described understanding of the injury in fact requirement, the first of which is its inherent logic. For an interest to be deemed "legally" protected or cognizable it must have some foundation in the law. *Claybrook*, 111 F.3d at 907 (stating, as quoted above, that "if the plaintiff's claim has no foundation in the law, he has no legally protected interest"). Thus, if the interest underlying a litigant's claimed injury is premised on a law that does not apply or does not exist, it directly follows that the litigant does not possess an interest that is "legally protected." *Cf. Pender*, 788 F.3d at 366 (indicating that a legally protected interest "aris[es] from constitutional, statutory, or common law" (citing *Lujan*, 504 U.S. at 578)).

Another consideration is the degree to which the approach taken by the majority of jurisdictions remains faithful to the proper role of standing as an element of Article III's constitutional limit on the exercise of judicial power. As the Supreme Court has said, "the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies'" and the Court "ha[s] always taken this to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 102. "Such a meaning is fairly implied by the text, since otherwise the purported restriction upon the judicial power would scarcely be a restriction at all." *Id.* Declining to exercise jurisdiction to entertain a litigant's claim for which no law can be properly invoked and, as a result, no legally protected interest can be said to have been wrongfully invaded, comports with standing's role as a limitation on judicial power. A contrary approach to standing would effect an expansion of

judicial power without due regard for the autonomy of co-equal branches of government or the way in which the exercise of judicial power "can so profoundly affect the lives, liberty, and property of those to whom it extends," *Valley Forge Christian Coll.*, 454 U.S at 473.[10]

Most importantly, this matter poses separation-of-powers concerns. The Supreme Court has observed that the "standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines*, 521 U.S. at 819-20. The Movants bring a constitutional claim that implicates the authorities of co-equal branches of the government. First, the decisions the Movants seek have been classified by the Executive Branch in accordance with its constitutional authorities and the portions of the opinions that the Executive Branch has declassified have already been released. The Supreme Court has stressed that "[t]he President, after all, is the 'Commander in Chief of the Army and Navy of the United States'" and "[h]is authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). Accordingly, "[f]or 'reasons . . . too obvious to call for enlarged discussion,' *CIA v. Sims*, 471 U.S. 159, 170, 105 S.Ct. 1881, 1888, 85 L.Ed.2d 173 (1985), the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." *Egan*, 484 U.S. at 529.

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[10] Some might object that litigants should have an opportunity to develop the facts before a court assesses the scope or applicability of an asserted right. *E.g.*, *Judicial Watch*, 432 F.3d at 363 (Williams, J., concurring) (stating that "the use of the phrase 'legally protected' to require showing of a substantive right would thwart a major function of standing doctrine—to avoid premature judicial involvement in resolution of issues on the merits"). This case does not implicate those concerns. No amount of factual development would alter the outcome of the question of whether the First Amendment applies and affords a qualified right of access to classified, ex parte FISA proceedings.

"[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* In this case, the Movants seek access to information contained in this Court's opinions that the Executive Branch has determined is classified national security information.

Second, in the exercise of its constitutional authorities to make laws, *see United States v. Kebodeaux*, 133 S. Ct. 2496, 2502 (2013) (discussing Congress's broad authority to make laws pursuant to the Constitution's Necessary and Proper Clause), Congress has directed by statute that "[t]he record of proceedings under [FISA], including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence," 50 U.S.C. § 1803(c). While Congress has also established means by which certain opinions of this Court are to be subject to a declassification review and made public, it has made Executive Branch officials acting independently of the Court responsible for these actions. *See infra* Part V.

To be clear, the classified material the Movants' seek is not subject to sealing orders entered by this Court. *See* Movants' Reply In Supp. of Their Mot. for Release of Ct. Records 16 (requesting that the Court "unseal" the judicial opinions and release them "with only those redactions essential to protect information that the Court determines, after independent review, to warrant continued sealing"). No such orders were imposed in the cases in which the sought-after judicial opinions were issued; consequently, no question about the propriety of a sealing order is at play in this matter. The entirety of the information sought by the Movants is classified information redacted from public FISC opinions that is being withheld by the Executive Branch pursuant to its independent classification authorities and remains subject to the statutory mandate that the FISC maintain its records under the aforementioned security procedures. Adjudication

of the Movants' motion could therefore require the Court to delve into questions about the constitutionality, pursuant to the First Amendment, of the Executive Branch's national security classification decisions or the scope and constitutional validity of the statute's mandate that this Court maintain material under the required security procedures.

Together, these considerations commend the path paved by the majority of jurisdictions, which have held that an interest is not "legally protected" for the purpose of establishing standing when the constitutional, statutory or common-law source of the interest does not apply or does not exist. It bears emphasizing that the only interest the Movants identify to establish standing in this case is a qualified right to access judicial opinions. Mot. for Release of Ct. Records 1, 2, 10. The Movants claim that this interest is legally protected by the First Amendment. *Id.* at 10. The Movants further assert that this legally protected interest—that is, the qualified right to access judicial documents as protected by the First Amendment—was invaded when they were denied access to this Court's judicial opinions addressing the legality of bulk data collection, thereby causing injury. *Id.* Accordingly, the question for the Court is whether the First Amendment applies.

IV.

Access to judicial records is not expressly contemplated by the First Amendment, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I. The Supreme Court, however, has inferred that, in conjunction with the Fourteenth Amendment, "[t]hese expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality opinion). The Supreme Court has further explained that "[i]n guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to these explicit guarantees" and "[w]hat this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." *Id.*

In *Richmond Newspapers*, the Supreme Court "firmly established for the first time that the press and general public have a constitutional right of access to criminal trials." *Globe Newspaper Co v. Superior Court*, 457 U.S. 596, 603 (1982). The Supreme Court has advised, however, that, "[a]lthough the right of access to criminal trials is of constitutional stature, it is not absolute," *id.* at 607, but "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest," *Press-Enter. Co. v. Superior Court,* 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"). The Supreme Court has extended this qualified First Amendment right of public access only to

criminal trials, *Richmond Newspapers*, 448 U.S. at 580, the voir dire examination of jurors in a criminal trial, *Press-Enterprise I*, 464 U.S. at 508-13, and criminal preliminary hearings "as they are conducted in California," *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13 (1986) ("*Press-Enterprise II*"). Most circuit courts, though, "have recognized that the First Amendment right of access extends to civil trials and some civil filings." *ACLU v. Holder*, 673 F.3d 245, 252 (4th Cir. 2011). To date, however, the Supreme Court has never "applied the *Richmond Newspapers* test outside the context of criminal judicial proceedings or the transcripts of such proceedings." *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003). Nor has "the Supreme Court . . . ever *indicated* that it would apply the *Richmond Newspapers* test to anything other than criminal judicial proceedings." *Id.* (emphasis in original).

"In *Press–Enterprise II*, the Supreme Court first articulated what has come to be known as the *Richmond Newspapers* 'experience and logic' test, by which the Court determines whether the public has a right of access to 'criminal proceedings.'"[11] *Id.* at 934. The "experience" test questions "whether the place and process have historically been open to the press and general public." *Press-Enterprise II*, 478 U.S. at 8. The "logic" test asks "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

This is not the first occasion on which the Court has confronted the question of whether a qualified First Amendment right of access applies to this Court's judicial records. Nearly a decade ago, the ACLU sought by motion the release of this Court's "orders and government

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[11] In addition to the *Richmond Newspapers* "experience and logic" tests, the Second Circuit has also "endorsed" a "second approach" that holds that "the First Amendment protects access to judicial records that are 'derived from or a necessary corollary of the capacity to attend the relevant proceedings.'" *In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 409 (2d Cir. 2009) (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004)).

pleadings regarding a program of surveillance of suspected international terrorists by the National Security Agency (NSA) that had previously been conducted without court authorization." *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 485. Assuming, for the sake of argument, that a qualified First Amendment right of access might extend to judicial proceedings other than criminal proceedings, the Court applied the requisite "experience" and "logic" tests acknowledged by the Supreme Court in *Press-Enterprise II* to determine whether such a right attached to the FISA electronic surveillance proceedings in which the sought-after orders and pleadings were filed. *Id.* at 491-97.

Considering the "experience" test first, the Court in *In re Motion for Release of Court Records* noted that "[t]he FISC ha[d] no . . . tradition of openness"; it "ha[d] never held a public hearing in its history"; a "total of two opinions ha[d] been released to the public in nearly three decades of operation"; the Court "ha[d] issued literally thousands of classified orders to which the public has had no access"; there was "no tradition of public access to government briefing materials filed with the FISC" or FISC orders; and the publication of two opinions of broad legal significance failed to establish a tradition of public access given the fact that "the FISC ha[d] . . . issued other legally significant decisions that remain classified and ha[d] not been released to the public . . . ." 526 F. Supp. 2d at 492-93. Accordingly, the Court determined that "the FISC is not a court whose place or process has historically been open to the public" and the "experience" test was not satisfied. *Id.* at 493.

As far as the "logic" test was concerned, although the Court in *In re Motion for Release of Court Records* agreed that public access might result in a more informed understanding of the Court's decision-making process, provide a check against "mistakes, overreaching or abuse," and benefit public debate, *id.* at 494, it found that "the detrimental consequences of broad public

access to FISC proceedings or records would greatly outweigh any such benefits" and would actually imperil the functioning of the proceedings:

> The identification of targets and methods of surveillance would permit adversaries to evade surveillance, conceal their activities, and possibly mislead investigators through false information. Public identification of targets, and those in communication with them, would also likely result in harassment of, or more grievous injury to, persons who might be exonerated after full investigation. Disclosures about confidential sources of information would chill current and potential sources from providing information, and might put some in personal jeopardy. Disclosure of some forms of intelligence gathering could harm national security in other ways, such as damaging relations with foreign governments.

Id. The Court cautioned that "[a]ll these possible harms are real and significant, and, quite frankly, beyond debate," *id.*, and "the national security context applicable here makes these detrimental consequences even more weighty," *id.* at 495. In addition, after rejecting the ACLU's argument that the Court should conduct an independent review of the Executive Branch's classification decisions under a non-deferential standard, the Court identified numerous ways that "the proper functioning of the FISA process would be adversely affected if submitting sensitive information to the FISC could subject the Executive Branch's classification [decisions] to a heightened form of judicial review":

> The greater risk of declassification and disclosure over Executive Branch objections would chill the government's interactions with the Court. That chilling effect could damage national security interests, if, for example, the government opted to forgo surveillance or search of legitimate targets in order to retain control of sensitive information that a FISA application would contain. Moreover, government officials might choose to conduct a search or surveillance without FISC approval where the need for such approval is unclear; creating such an incentive for government officials to avoid judicial review is not preferable. *See Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (noting strong Fourth Amendment preference for searches conducted pursuant to a warrant and adopting a standard of review that would provide an incentive for law enforcement to seek warrants). Finally, in cases that are submitted, the free flow of information to the FISC that is needed for an ex parte proceeding to result in sound decision[-]making and effective oversight could also be threatened.

Id. at 496. Finding that the weight of all these harms counseled against public access, the Court adopted the reasoning of other courts that "have found that there is no First Amendment right of access where disclosure would result in a diminished flow of information, to the detriment of the process in question," *id.*, and remarked that this reasoning "compels the conclusion that the 'logic test' . . . is not satisfied here," *id.* at 497.

Because both the "experience" and "logic" tests were "unsatisfied," the Court concluded that "there [was] no First Amendment right of access to the requested materials." *Id.* The Court also declined to exercise its own discretion to "undertake the searching review of the Executive Branch's classification decisions requested by the ACLU, because of the serious negative consequences that might ensue . . . ." *Id.* The Court noted, however, that "[o]f course, nothing in this decision forecloses the ACLU from pursuing whatever remedies may be available to it in a district court through a FOIA request addressed to the Executive Branch." *Id.*

In the motion that is now pending, the Movants acknowledge the decision in *In re Motion for Release of Court Records* but argue that the decision erred by (1) "limiting its analysis to whether two previously published opinions of this Court 'establish a tradition of public access'" and (2) "concluding that public access would 'result in a diminished flow of information, to the detriment of the process in question.'" Mot. for Release of Ct. Records 21 (quoting *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 493, 496). Taking these two arguments in order, the first argument is premised on a misreading of the Court's analysis and an overly broad framing of the legal question. While examining the experience prong of *Richmond Newspapers*, the Court did not "limit" its analysis to two previously-published opinions; to the contrary, the Court made clear that its rationale for holding that there was no tradition of public access to FISC electronic surveillance proceedings was demonstrated by, as stated above, the lack of any

public hearing in the (at that point) approximately 30 years in which the FISC had been operating and the fact that, with *the exception of* only two published opinions, the entirety of the court's proceedings, which consisted of the issuance of thousands of judicial orders, was classified and unavailable to the public. *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 492. In other words, at that time, a minimum of 99.98% of FISC proceedings was classified and nonpublic. It would be an understatement to say that such a percentage reflected a tradition of no public access. Indeed, the Court found that "the ACLU's First Amendment claim runs counter to a long-established and virtually unbroken practice of excluding the public from FISA applications and orders . . . ." *Id.* at 493.

The Movants gain no traction challenging *In re Motion for Release of Court Records* by suggesting that the framing of the "experience" test should be enlarged to posit whether public access historically has been available to any "judicial opinions interpreting the meaning and constitutionality of public statutes," Mot. for Release of Ct. Records 14, rather than focusing on whether *FISC proceedings* historically have been accessible to the public. Such an expansive framing of the type or kind of document or proceeding at issue plainly would sweep too broadly because it would encompass grand jury opinions, which often interpret the meaning and constitutionality of public statutes but arise from grand jury proceedings, which are a "paradigmatic example" of proceedings to which no right of public access applies, *In re Boston Herald, Inc.*, 321 F.3d 174, 183 (1st Cir. 2003) (quoting *Press-Enterprise II*, 478 U.S. at 9), and a "classic example" of a judicial process that depends on secrecy to function properly, *Press-Enter. II*, 478 U.S. at 9. As demonstrated by the decision in *Press-Enterprise II*, the Supreme Court certainly contemplated the consideration of narrower subsets of legal documents and proceedings in light of the fact that it entertained the question of whether the First Amendment

right of access applied to a subset of judicial hearing transcripts—i.e., "the transcript of a preliminary hearing growing out of a criminal prosecution," 478 U.S. at 3—and never intimated that its analysis should (or could) extend to transcripts of *all* judicial hearings growing out of a criminal prosecution. Furthermore, to the extent the Movants take issue with the Court's formulation of the "experience" test on the ground that it focused too narrowly on FISC practices, Mot. for Release of Ct. Records 21 (arguing that the experience test "does not look to the particular practice of any one jurisdiction"), the fact of the matter is that FISA mandates that the FISC "shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States," 50 U.S.C. § 1803(a)(1), so the FISC's virtually-exclusive[12] jurisdiction over such proceedings is a construct of Congress and, thereby, the American people.[13] The Movants offer no authority to support a suggestion that the concentration of FISC proceedings in one judicial forum detracts from the legitimacy or correctness of applying the "experience" test to FISC proceedings rather than a broader range of proceedings. Accordingly, *In re Motion for Release of Court Records* properly framed the "experience" test to examine whether FISC proceedings—proceedings that relate to applications made by the Executive Branch for the issuance of court orders approving authorities covered exclusively by FISA—have historically been open to the press and general public.

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[12] *See* 50 U.S.C. §§ 1803(a), 1823(a), 1842(b)(1), 1861(b)(1)(A), 1881b(a), 1881c(a)(1). Although applications seeking pen registers, trap-and-trace devices, or certain business records for foreign intelligence purposes may be submitted by the government to a United States Magistrate Judge who has been publicly designated by the Chief Justice of the United States to have the power to hear such applications, FISA makes clear that the United States Magistrate Judge will be acting "on behalf of" a judge of the FISC. 50 U.S.C. §§ 1842(b)(2), 1861(b)(1)(B). In practice, no United States Magistrate Judge has been designated to entertain such applications.

[13] Although FISC proceedings occur in a single judicial forum, the district court judges designated to comprise the FISC are from at least seven of the United States judicial circuits across the country. 50 U.S.C. § 1803(a)(1).

Attending to the "logic" prong of the constitutional analysis, the Movants argue that the Court "erred in concluding that public access would 'result in a diminished flow of information, to the detriment of the process in question.'" Mot. for Release of Ct. Records 21 (quoting *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 496). The Movants neglect, however, to explain why they believe this conclusion was flawed; nor do they otherwise refute the Court's identification of the detrimental effects that could cause a diminished flow of information as a result of public access, *see In re Motion for Release of Court Records*, 526 F. Supp. 2d at 494-96. Instead, the Movants offer the conclusory statement that "disclosure of the requested opinions would serve weighty democratic interests by informing the governed about the meaning of public laws enacted on their behalf." Mot. for Release of Ct. Records 21. While it undoubtedly is the case that access to judicial proceedings and opinions plays an important, if not imperative, role in furthering the public's understanding about the meaning of public laws, the Movants cannot ignore the Supreme Court's instruction that, "[a]lthough many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly." *Press-Enter. II*, 478 U.S. at 8-9. *In re Motion for Release of Court Records* identified detrimental consequences that could be anticipated if the public had access to open FISC proceedings, some of which the Court noted were "comparable to those relied on by courts in finding that the 'logic' requirement for a First Amendment right of access was not satisfied regarding various types of proceedings and records" and the others were described as "distinctive to FISA's national security context." 526 F. Supp. 2d at 494. These detrimental consequences, which are quoted above, were deemed to outweigh any benefits public access would add to the functioning of such proceedings, *id.*, and the Court emphasized that "the national security

context applicable here makes these detrimental consequences even more weighty," *id.* at 495. Because the Movants made no attempt to dispute or discredit these detrimental effects, the resulting diminished flow of information that public access would have on the functioning of FISC proceedings, or the weight the Court gave to the detrimental effects, this Court is left to view their argument as simply a generalized assertion that they disagree with *In re Motion for Release of Court Records.*[14] That disagreement being duly noted, the Movants have not made a persuasive case that the result was wrong. Consequently, this Court has no basis to disclaim the conclusion in *In re Motion for Release of Court Records* that the 'logic' test was "not satisfied[,]" *id.* at 497, and, indeed, agrees with it.

Although the records to which the ACLU sought access in *In re Motion for Release of Court Records* implicated only electronic surveillance proceedings pursuant to 50 U.S.C. §§ 1804-1805, *id.* at 486, the analysis applying *Richmond Newspapers'* "experience" and "logic" tests involved reasoning that more broadly concerned all classified, ex parte FISC proceedings regardless of statutory section. *Id.* 491-97. Notwithstanding the passage of time, that analysis retains its force and relevance.[15] The Court also sees no meaningful difference between the

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[14] The Movants specify four ways public access to FISC judicial opinions is "important to the functioning of the FISA system," Mot. for Release of Ct. Records 17-20; however, the Movants never discuss these benefits vis-à-vis the detrimental effects identified by *In re Motion for Release of Court Records.*

[15] Although there have been several public proceedings since *In re Motion for Release of Court Records* was decided, *see, e.g.*, Misc. Nos. 13-01 through 13-09, *available at* http://www.fisc.uscourts.gov/public-filings, the statistical significance of those public proceedings makes no material difference to the question of whether FISA proceedings historically have been open to the public, especially when considered in light of the many thousands more classified and ex parte proceedings that have occurred since that case was concluded. Furthermore, by and large, those public proceedings have been in the nature of this one whereby, in the wake of the unauthorized disclosures about NSA programs, private parties moved the Court for access to judicial records or for greater transparency about the number of orders issued by the FISC to providers. They are therefore distinguishable from the type of

application of the "experience" and "logic" tests to FISC proceedings versus the application of these tests to sealed wiretap applications pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20. Like FISC proceedings, Title III wiretap applications are "subject to a statutory presumption *against* disclosure,"[16] "have not historically been open to the press and general public," and are not subject to a qualified First Amendment right of access, *In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 409 (2d Cir. 2009) (emphasis in original). Accordingly, persuaded by *In re Motion for Release of Court Records*, this Court adopts its analysis and, for the reasons stated therein, as well as those discussed above, holds that a First Amendment qualified right of access does not apply to the FISC proceedings that resulted in the issuance of the judicial opinions the Movants now seek, which consist of proceedings pursuant to 50 U.S.C. § 1842 (pen registers and trap and trace devices for foreign intelligence and international terrorism investigations) and 50 U.S.C. § 1861 (access to certain business records for foreign intelligence and international terrorism investigations).

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proceedings relevant to the instant motion and to *In re Motion for Release of Court Records*, namely ex parte proceedings involving classified government requests for authority to conduct electronic surveillance or other forms of intelligence collection.

[16] Title III mandates that wiretap "[a]pplications made and orders granted under this chapter shall be sealed by the judge." 18 U.S.C. § 2518(8)(b). As discussed *supra*, FISA mandates that "[t]he record of proceedings under this chapter, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence." 50 U.S.C. § 1803(c).

V.

As already noted, the only law the Movants cite as the source for their claimed right of public access to FISC judicial opinions is the First Amendment. If any other legal bases existed to secure constitutional standing for these Movants, they were obligated to present them. Because the First Amendment qualified right of access does not apply to the FISC proceedings at issue in this matter, the Movants have no legally protected interest and cannot show that they suffered an injury in fact for the purpose of meeting their burden to establish standing under Article III.[17]

To be sure, the Court does not reach this result lightly. However, application of the Supreme Court's test to determine whether a First Amendment qualified right of access attaches to the FISC proceedings at issue in this matter leads to the conclusion that it does not. Absent some other legal basis to establish standing, this means the Court has no jurisdiction to consider causes of action such as this one whereby individuals and organizations who are not parties to FISC proceedings seek access to classified judicial records that relate to electronic surveillance, business records or pen register and trap-and-trace device proceedings. Notably, the D.C. Circuit has advised that "[e]ven if holding that [the litigant] lacks standing meant that no one could initiate" the cause of action at issue "it would not follow that [the litigant] (or anyone else) must have standing after all. Rather, in such circumstance we would infer that 'the subject matter is committed to the surveillance of Congress, and ultimately to the political process.'" *Sargeant*,

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[17] The Court's decision involves scrutiny of whether the First Amendment qualified right of access applies, but only as part of the assessment of whether the Movants have standing under Article III. Because they do not, the Court dismisses their Motion for lack of jurisdiction without, strictly speaking, ruling on the merits of their asserted cause of action. Moreover, in the absence of jurisdiction, the Court may not consider any other legal arguments or requests for relief that were advanced in the motion.

130 F.3d at 1070 (quoting *Richardson*, 418 U.S. at 179). Indeed, "[t]he assumption that if [the litigants] have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

Evidence that public access to opinions arising from classified, ex parte FISC proceedings is best committed to the political process is demonstrated by Congress's enactment of the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 ("USA FREEDOM Act of 2015"), Pub. L. 114-23, 129 Stat. 268 (2015), which, after considerable public debate, made substantial amendments to FISA. One such amendment, which is found in § 402 of the USA FREEDOM Act and codified at 50 U.S.C. § 1872(a), added an entirely new provision for the public disclosure of certain FISC judicial opinions. Consequently, FISA now states that "the Director of National Intelligence, in consultation with the Attorney General, shall conduct a declassification review of each decision, order, or opinion issued by the Foreign Intelligence Surveillance Court . . . that includes a significant construction or interpretation of any provision of law, including any novel or significant construction or interpretation of the term 'specific selection term', and, consistent with that review, make publicly available to the greatest extent practicable each such decision, order, or opinion." 50 U.S.C. § 1872(a). Although the Movants characterize the enactment of this provision of the USA FREEDOM Act as evidence that "favors disclosure of FISC opinions" and bolsters their argument that "public access would improve the functioning of the process in question," Notice of Supplemental Authority 2 (Dec. 4, 2015), the Court does not believe that this provision alters the First Amendment analysis. FISC proceedings of the type at issue historically have not been, nor presently will be, open to the press and general public given that no amendment to FISA altered the statutory mandate for such proceedings to occur ex parte and

pursuant to the aforementioned security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence. Furthermore, although Congress had the opportunity to do so, it made no amendment to FISA that established a procedure by which the public could seek or obtain access to FISC records directly from the Court. Rather, after informed debate, Congress deemed public access as contemplated by 50 U.S.C. § 1872(a) to be the means that, all things considered, best served the totality of the American people's interests. Accordingly, the USA FREEDOM Act enhances public access to significant FISC decisions, as provided by § 1872(a), and ensures that the public will have a more informed understanding about how FISA is being construed and implemented, which appears to be at the heart of the Movants' interest. Mot. for Release of Ct. Records 2 (stating that "Movants' current request for access to opinions of this Court evaluating the legality of bulk collection seeks to vindicate the public's overriding interest in understanding how a far-reaching federal statute is being construed and implemented, and how constitutional privacy protections are being enforced").

CONCLUSION

For the foregoing reasons, the Court will dismiss for lack of jurisdiction the pending MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AND THE MEDIA FREEDOM AND INFORMATION ACCESS CLINIC FOR THE RELEASE OF COURT RECORDS. A separate order will accompany this Opinion.

January 25th, 2017

Rosemary M Collyer

ROSEMARY M. COLLYER
Presiding Judge, United States Foreign Intelligence Surveillance Court

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE OPINIONS & ORDERS OF THIS COURT ADDRESSING BULK COLLECTION OF DATA UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT.	Docket No. Misc. 13-08

ORDER

For the reasons set forth in the accompanying Opinion, it hereby is **ORDERED** that the MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AND THE MEDIA FREEDOM AND INFORMATION ACCESS CLINIC FOR THE RELEASE OF COURT RECORDS is **DISMISSED** for lack of jurisdiction.

SO ORDERED.

January 25th, 2017

Rosemary M Collyer

ROSEMARY M. COLLYER
Presiding Judge, United States Foreign
Intelligence Surveillance Court

From: Terwilliger, Zachary (ODAG)
Subject: RE: Questions for the Record
To: Raman, Sujit (ODAG) (JMD); Mizelle, Chad (ODAG); Murray, Michael (ODAG); Sheehan, Matthew (ODAG); Barnett, Gary (ODAG); Hall, William A. (ODAG)
Cc: Tyson, Jill C. (OLA); Ramer, Sam (OLA)
Sent: March 14, 2017 10:11 PM (UTC-04:00)
Attached: AG Sessions Responses to QFRs.pdf, DAG_QFRS.docx

Team,
Here are the QFR assignments (QFR assigned). Please let me know if work will prevent you from being able to answer these questions. If you encounter a question you are totally unfamiliar with, please feel free to reach out to Jill Tyson (cc'd above) and/or me and we can help connect you with the right person. In addition, attached are Attorney General Sessions' QFR responses in case you want to do a search for particular responses or terms.

Further, there are a fair amount of repeat questions. After you have gotten a handle on your questions, please feel free to look through the QFR document and see if there are others with whom you can split the load regarding certain questions. If you would prefer to just crank through your questions independently, please feel free and I can clean up on the back end.

1. Sujit Rahman: **Leahy (Questions 1-11) and Coons (15-23)**
2. Chad Mizelle: **Feinstein (Questions 1-13) and Coons (24-30)**
3. Michael Murray: **Feinstein (Questions 14-28) and Coons (31-36)**
4. Matt Sheehan: **Durbin (Questions 1-18) and Coons (36-38)**
5. Gary Barnett: **Durbin (Questions 19-24), Klobuchar Questions (1 page) and Coons (39-44)**
6. Bill Hall: Whitehouse **(Questions 1-6) and Coons (1-15)**
7. OLA: **Coons (45-50)**

Here is the timeline and guidance that Jill sent out earlier. It basically gives us the next two days. I am on work travel tomorrow morning, but will be back by mid-afternoon. If anyone gets totally bogged down, please let me know. Unfortunately, I have a bunch of meetings and interviews over the next two days, but am happy to stay as late as needed to pitch in and help where folks need assistance on various questions.

Thank you very much for your willingness to help out the DAG nominee. This should be the last push.

Zach

All:

Thanks for your ongoing help with the DAG and Associate AG confirmation process. We have arrived at the next phase: responding to Questions for the Record (QFRs). **The Committee has given us until Monday 3/20 to submit all responses.** I've established a folder on the G: drive for this project, located here: **G:\OLA-ODAG-OASG.** If you are in the to: line of this e-mail you should have full access to this folder. Because the folder was just created today, you may have to log off/on to get access the first time. If you can't get into the folder and sub-folders please let me know asap and cc: Chris Greer/OCIO.

The overall plan is to divvy up drafting responsibilities between OLA, ODAG, and OASG, with component input as necessary. Our new G: drive folder contains DAG/Assoc.AG briefing papers and AG Sessions' confirmation materials; please use as much of that text as possible for consistency of tone and substance. Tonight, following this e-mail, Zach and Rachel will send out documents noting drafting assignments.

QFR PROCESS AND TIMELINE:

1. 3/14: QFRs assigned among OLA, ODAG, and OASG attorneys. For tracking purposes, please submit one list from ODAG and one list from OASG of who will be writing which responses.
2. 3/15-16: Draft responses and put in a separate document from the master document (since we call can't be in the master doc at the same time). Please save your draft responses document with the file name "[Nominee name] QFR drafts – [last name] – [date]". Each response should note who drafted, e.g. (OLA/Tyson) in front of the first paragraph.
3. **3/16: DRAFT RESPONSES DUE BY 5:00PM FOR NOMINEE REVIEW. **
4. 3/17: Nominees review; DOJ to address any comments.
5. 3/17-18: OLA submits QFRs to WH/EOP for expedited review and clearance.
6. 3/19: DOJ to address WH edits/comments as necessary.
7. 3/20: Submit final QFRs to the Committee.

Please let me know if you have any questions.
Thanks very much,
-JCT

From: Terwilliger, Zachary (ODAG)
Sent: Tuesday, March 14, 2017 8:48 PM
To: Raman, Sujit (ODAG) (JMD) <(b) (6) >; Mizelle, Chad (ODAG) <(b) (6) >; Murray, Michael (ODAG) <(b) (6) >; Sheehan, Matthew (ODAG) <(b) (6) >; Barnett, Gary (ODAG) <(b) (6) >; Hall, William A. (ODAG) <(b) (6) >; Bressack, Leah (ODAG) <(b) (6) >
Cc: Tyson, Jill C. (OLA) <(b) (6) >
Subject: Questions for the Record

Team,
OLA just received the U.S. Attorney's Questions-for-the-Record. Jill is going to be sending additional guidance soon, but I wanted to let you know about this project. We have a tight turn-around and it is going to be all hands and I would greatly appreciate your help.

After Jill sends the schedule, I will send around some assignments as far as breaking up the responses.

Thank you very much in advance for your willingness to help with this final step of the confirmation support process.

Zach

Zachary Terwilliger
Associate Deputy Attorney General
Office of the Deputy Attorney General
(b) (6)
(b) (6) (Desk)
(b) (6) (Mobile)

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

[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

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[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.

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

QUESTIONS FROM SENATOR FEINSTEIN

1. News reports have indicated that President-Elect Trump's chosen National Security Advisor, Retired Army Gen. Michael Flynn, engaged in multiple communications with the Russian Ambassador Sergey Kislyak, on the same day that President Obama announced sanctions against Russia.

   a. Have you communicated with President-Elect Trump about these communications to the Russian Ambassador? Have you spoken with anyone else on the transition team (including General Flynn) or President-Elect Trump's staff? If so, please specify who you communicated with, and when.

RESPONSE: No.

   b. If confirmed, you will be interacting frequently with General Flynn in his capacity as National Security Advisor. Will you recuse yourself from any FBI or Justice Department investigation into whether Flynn's communications were permissible under the law, including the Logan Act? If not, why not?

RESPONSE: I am not aware of a basis to recuse myself from such matters. If a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

2. At your hearing, Senator Coons asked whether you would support legislation to strengthen and uphold sanctions against Russia for the cyber-attack it organized that was designed to influence the American elections. You responded that "That is something that is appropriate for Congress and the Chief Executive to consider. In other words, how do you respond to what is believed to be a cyber attack from a major nation? It is difficult just to say, well, we are going to prosecute the head of the KGB or some group that has participated in it—no longer a KGB, of course. So in many ways, the political response, the international foreign policy response, may be the only recourse."

   In fact, the federal criminal code contains numerous criminal statutes levying serious penalties that might be available in a case involving allegations of international hacking. In addition, the Department of Justice has used these to prosecute individuals in the past. In addition, the Department may be required to decide whether to bring criminal charges against any person who committed these hacks, aided and abetted these hacks, or conspired to commit these hacks.

a. The Department has charged similar cases against state-sponsored individuals associated with the Iranian government, as well as members of the Chinese military. Will you commit that the Department will take any and all steps necessary to enforce federal statutes that were violated, and not just rely on political diplomacy?

RESPONSE: If confirmed, I will examine, and where appropriate, enforce, the federal statutes referred to above.

b. Have you reviewed either the classified or unclassified assessments by the Intelligence Community regarding Russian activities and intentions in recent U.S. elections?

RESPONSE: No.

c. Do you agree with the Intelligence Community's assessments? If not, please specify those assessments with which you disagree.

RESPONSE: I have not reviewed their assessments, but I assume I would have no reason to disagree with their assessments.

d. Given the extent of your involvement in President-Elect Trump's political campaign, will you recuse yourself from any decision regarding whether to bring federal criminal prosecutions in connection with Russian hacking of the election? If not, why not?

RESPONSE: I am not aware of a basis to recuse myself from such matters. If a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

e. Please identify all persons with whom you have spoken who share your view that the U.S. response to Russian hacking should be limited to "the political response, the international foreign policy response."

RESPONSE: My view is not that the response "should be limited" to a political or international foreign policy response. When I testified before the Committee, I was merely suggesting that in some cases, such a response may be the only recourse. As you point out, federal criminal statutes may be applicable. However, I am not privy to the facts or details of any ongoing investigations and my knowledge of the subject is limited to what is contained in public reporting, so I do not know what the appropriate response should be in this particular case.

3. The Department of Justice Inspector General recently wrote to Congress indicating that the OIG would be reviewing a number of issues with respect to the Hillary Clinton email server investigation.

   When asked during your oral testimony how you would handle any investigation involving Secretary Clinton or the Clinton Foundation, you stated, "I believe the proper thing for me to

do would be to recuse myself from any questions involving those kind of investigations that involve Secretary Clinton and that were raised during the campaign or could be otherwise connected to it."

a. Does your commitment to recuse yourself extend to the recently-announced review by the Department of Justice's Office of the Inspector General into a number of issues with respect to the Hillary Clinton email server investigation? If not, why not?

RESPONSE: I stand by my commitment to recuse myself from any investigation of Secretary Clinton or the Clinton Foundation. I do not have sufficient information with respect to the Inspector General's investigation at this time and so I am unable to make a decision about recusal in that matter. If I am fortunate enough to be confirmed as Attorney General and a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed.

b. If confirmed, who will handle any recommendations made by DOJ regarding any investigation involving Secretary Clinton or the Clinton Foundation? Who will handle recommendations by the Inspector General?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, in any matter where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed.

c. Senator Grassley posed the following question to Attorney General Lynch after her hearing, and I would pose the same question: "Given the clear language of the Inspector General Act, will you give me your commitment that, if confirmed, you will not stonewall the Inspector General or delay his work?"

RESPONSE: The role of the Inspector General is critical to any agency's operation and provides a vital service to the general public. If I am fortunate enough to be confirmed as Attorney General, I will respect the independence of the Inspector General and cooperate with him or her in every way possible.

d. Will you also give me your commitment that you will not allow any subordinate official at the Department to stonewall or delay the Inspector General's work?

RESPONSE: Yes.

4. You testified at your hearing that the Supreme Court's decision in *Roe v. Wade* is "the law of the land. It has been so established and settled for quite a long time and it deserves respect. And I would respect it and follow it."

a. How will you "respect it and follow it"?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, my personal convictions on the issue of abortion—which are well known—would not hinder me in my duty to faithfully enforce federal law and adhere to Supreme Court precedent on this issue.

b. What is your understanding of the meaning of a case being "settled law"?

RESPONSE: The 1973 decision of *Roe v. Wade* established a constitutional right to privacy that included the right to an abortion. Though limitations to this right have been upheld as constitutional by the Court in later cases, the basic premise of *Roe* has not been disrupted, meaning that it is settled law. There have been clarifying opinions on the subject of abortion since then.

c. Do you commit that the Department of Justice will not file amicus briefs or in other ways try to alter case law on reproductive rights?

RESPONSE: Such decisions would depend upon the unique circumstances of the case or cases as they arise. If I am fortunate enough to be confirmed, I will ensure all matters receive a thorough and careful evaluation to ensure the fair administration of justice and will follow the law and the Constitution without reservation.

5. You also testified at your hearing that the *Roe* decision "violated the Constitution and really attempted to set policy and not follow law."

a. If you believe a case is "the law of the land" and "settled for a long time" but you also believe the case "violated the Constitution," how would that impact the conduct of the Justice Department under your leadership? Are there other Supreme Court cases you believe to be settled law, yet which you also believe violate the Constitution? If so – please list each and explain the constitutional provision that is violated.

RESPONSE: As a Senator, I have expressed opinions on a number of Supreme Court cases. As Attorney General, my role would be very different. If a matter arose before the Department and circumstances demanded a fresh analysis of a Supreme Court decision, that would be conducted by the Solicitor General and the attorneys at the Justice Department. Asking the Supreme Court to overrule its own precedent is a very serious matter that requires careful, case-specific analysis at the time of the litigation. If I am fortunate enough to be confirmed, I will ensure all matters receive a thorough and careful evaluation to ensure the fair administration of justice and will follow the law and the Constitution without reservation.

6. Senator Hirono asked you at your hearing whether you would "direct or advise your Solicitor General to weigh in before that Supreme Court which has an opportunity to overturn *Roe v. Wade*?" You responded that the decision is "firmly ensconced as the law of the land, and I do not know we would see a change in that."

   In that same answer, you told Senator Hirono that "cases seldom come up on such a clear issue. They come up at the margins" of the constitutional right to have an abortion as set forth in *Roe*.

a. If confirmed, will the Justice Department under your leadership argue that Roe v. Wade and its progeny (e.g., Planned Parenthood v. Casey, Whole Woman's Health v. Hellerstedt) should be overturned? Please answer yes or no.

RESPONSE: Such decisions would depend upon the unique circumstances of the case or cases as they arise. I will not pre-judge the issues. If I am fortunate enough to be confirmed, I will ensure all matters receive a thorough and careful evaluation to ensure the fair administration of justice and will follow the law and the Constitution without reservation. As stated above, asking the Supreme Court to overrule its own precedent would be a very serious matter that would only come as the result of careful, case-specific analysis at the time of the litigation.

7. Violence at women's health clinics remains a very serious issue. In the fall of 2015, for example, a Colorado man killed three people at a clinic. At your hearing, you testified that you will "enforce the laws that make clear that a person who wants to receive a lawful abortion cannot be blocked by protesters and disruption of a doctor's practice…I am pro-life, as you know, but we have settled on some laws that are clearly effective, and as Attorney General, you can be sure we would follow them." You also testified that medical professionals who provide abortions "deserve the same protection that any entity, business or otherwise or health care entity is entitled to…[Maybe] [e]ven more so, because we have a specific law about abortion clinics." That law, of course, is the Freedom of Access to Clinic Entrances Act (FACE) of 1994.

8. Part of the Justice Department's efforts to enforce FACE and protect women and providers from violence at women's health clinics is the National Task Force on Violence Against Health Care Providers, which was established in 1998 by then-Attorney General Janet Reno and which is staffed through the Department's Civil Rights Division. The Task Force includes DOJ attorneys as well as investigators from the FBI, ATF, and the U.S. Marshals Service.

a. Will you ensure that the National Task Force on Violence Against Health Care Providers has adequate resources?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will endeavor to direct and utilize the resources of the Department in the most effective manner possible to ensure the enforcement of federal law.

b. Will you ensure that the Department will continue to be active and engaged on issues related to patient and provider safety at women's health clinics, including by bringing relevant cases under FACE and interacting with groups that represent providers and clinics?

RESPONSE: As I testified before the Committee, if I am fortunate enough to be confirmed as Attorney General, I will faithfully follow and enforce federal laws as defined by the courts, including the FACE Act and all other federal laws that the Attorney General is authorized to enforce. I will use the resources of the Department to ensure the full and fair enforcement of

federal law. Any specific enforcement decisions or actions would depend upon the facts and circumstances of each case.

9. At the nomination hearing, I asked you about a provision of the Justice for Victims of Trafficking Act, which sets aside at least $5 million and up to $30 million of funding for grants or programs for "the provision of health care or medical items or services to victims of trafficking." (18 U.S.C. § 3014(h)(1)-(2))

   I read the following from Senator Cornyn's floor remarks explaining that these funds are subject to the Hyde Amendment and its important exceptions:

   "[E]veryone knows the Hyde amendment language contains an exception for rape and the health of the mother. So under this act, these limitations on spending wouldn't have anything to do with the services available to help those victims of human trafficking."

   You testified that you were "not aware of how the language for this grant program has been established," but that you "would follow the law."

   Please review the provision and Senator Cornyn's explanation above to answer the following question:

   a. Will you commit that these grant funds will not be denied to service providers who assist victims of sex trafficking in obtaining the comprehensive health services they need, including an abortion?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I would consult with the attorneys at the Justice Department to analyze the Hyde Amendment and the statutory language in question to determine what the intersection of these laws dictates in regard to anti-trafficking expenditures.

10. In response to Senator Hatch's question about the importance of religious freedom, you testified that "It would be a very high priority of mine."

    a. If confirmed, how would you ensure that enforcement of religious freedoms will not harm women's access to healthcare, including contraception, or the rights of LGBT individuals?

RESPONSE: The Supreme Court has held that there are protections available under the Religious Freedom and Restoration Act for religious individuals and businesses. However, I have not personally studied the parameters of the Court's relevant decisions on this question or their impact. If I am confirmed, when such matters come before the Department of Justice, I will carefully and objectively evaluate the facts and circumstances of each case and endeavor to uphold and defend the Constitution in the pursuit of justice.

b. Do you believe that a business open to the public has a right under the First Amendment to refuse to serve an individual because that individual is gay, or lesbian, or bisexual, or transgender?

RESPONSE: That question has not been clearly settled by the Supreme Court or by statute. Typically, these matters are decided by state-enacted public accommodation laws and it is unlikely that the federal government would be directly involved in such cases. However, if I am so fortunate as to be confirmed as the Attorney General, it will be my duty to uphold and defend the Constitution and to do so in keeping with Supreme Court precedent.

11. The Office of Government Ethics (OGE) wrote a letter to Congress warning that President-Elect Trump's nominees' hearings are taking place even before OGE has completed its review of all of the nominees to ensure there are no ethical, financial or criminal concerns. The Director of OGE stated: "I am not aware of any occasion in the four decades since OGE was established when the Senate held a confirmation hearing before the nominee had completed the ethics review process."

    On May 6, 1998, you expressed similar concerns when discussed your experience as a former prosecutor and stressed the importance of adhering to ethics laws. You also stressed the role of OGE in preventing government corruption and analyzing whether waivers should be provided.

    In this particular speech, you were speaking in opposition to legislation that would have allowed someone paid by the IRS employees' union to participate on an IRS oversight board. You stated that such an arrangement flouted OGE advice, and was arguably criminal. You stated, in part:

    > *We have crafted over the years a series of laws that are designed in such a way that those laws protect the public from conflicts of interest and other types of unhealthy relationships that would put that person in office in a position in which his total fidelity is to anything other than the government which he represents.*
    >
    > *Somewhere in the Book of Ecclesiastes the preacher said "A bribe corrupts the mind." A conflict of interest corrupts the mind. The person is torn. You cannot serve two masters. You can only serve one master.*
    >
    > *You can't serve two masters.*

    After making these comments, you then enumerated the conflicts of interest statutes in the criminal code. Those statutes are aimed at preventing officials with financial interests from making government decisions clouded by financial interests.

a. If you are confirmed—and President-Elect Trump's other nominees are confirmed—you will work together closely together in the President's Cabinet. If any of President-Elect Trump's nominees are confirmed prior to ethics clearance and a criminal conflict of interest is discovered, will you recuse yourself from the investigation?

RESPONSE: The Attorney General is different from other cabinet members because he or she is responsible for fair enforcement of the law. I am not aware of a basis to recuse myself from such investigations. If a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

b. If you do not recuse yourself, what steps will you take to ensure that the Department faithfully investigates and prosecutes, if appropriate, such violations?

RESPONSE: All investigations by the Department of Justice must be initiated and conducted in a fair, professional, and impartial manner, without regard to politics or outside influence. The Department must follow the facts wherever they lead, and make decisions regarding any potential charges based upon the facts and the law, and consistent with established procedures of the Department. That is what I always did as a United States Attorney, and it is what I will insist upon if I am confirmed as Attorney General.

12. Last week, President-Elect Trump announced that he would retain ownership of his company while shifting assets into a trust managed by his sons; make "no new foreign deals"; subject any new domestic business deals to review by an ethics adviser whom he would appoint; give up his position as an officer at the Trump Organization; and limit communications with company executives to profits and loss statements.

    The Director of OGE said that "stepping back from running his business is meaningless from a conflict of interest perspective." He also stated that "the plan does not comport with the tradition of our Presidents over the past 40 years. This isn't the way the Presidency has worked since Congress passed the Ethics in Government Act in 1978 in the immediate aftermath of the Watergate scandal."

    a. President-Elect Trump has decided to maintain his financial interests in entities that are likely to be impacted by his Presidential decisions – such as decisions about laws to sign, executive actions to take, treaty negotiations, military decisions, and domestic policy decisions. Do you believe that if his financial interests are impacted by his decisions, this violates the anti-corruption principles that you identified in 1998? If yes, what are the proper steps for the Attorney General to take in such a situation? If not, why not? Please explain your answer in detail.

RESPONSE: The question posited is not one on which I have devoted any study, and would depend on a number of facts and specific circumstances. Therefore, I am not in a position to offer even an informal opinion on it. If confirmed as Attorney General, I would provide legal advice on such matters only after examining the relevant facts and circumstances presented, and consulting with the Office of Legal Counsel and any other component of the Department having expertise bearing on such matters.

b. You testified that you would be willing to say "no" to the President. Have you communicated with President-Elect Trump about his business interests and how to

resolve any conflicts arising from those interests? If your answer is yes, please describe those communications. If your answer is no, do you plan to? Please explain your rationale.

RESPONSE: I have not communicated with the President regarding his business interests or how to resolve any conflicts arising from those interests. If confirmed as Attorney General, I would provide legal advice on such matters only after examining the relevant facts and circumstances presented, and consulting with the Office of Legal Counsel and any other component of the Department having expertise bearing on such matters.

President-Elect Trump has claimed on many occasions that he cannot release his tax returns because of an ongoing audit by the Internal Revenue Service ("IRS").

a. Do you believe the President-elect should release his tax returns when the IRS audit is complete? If not, why not?

RESPONSE: As required by a law passed by Congress, President Trump released a financial disclosure form that is available to the public. I have not studied it. However, it is my understanding that no law requires the disclosure of a President's tax returns. The mandated financial disclosure provides public disclosure of the key financial matters that Congress believed necessary.

b. If confirmed, as a general matter, what specific steps do you envision taking to ensure that any legal issues arising from President-Elect Trump's business interests are handled in the same manner by the Department as any other American citizen?

RESPONSE: All investigations by the Department of Justice must be initiated and conducted in a fair, professional, and impartial manner, without regard to politics or outside influence. The Department must follow the facts wherever they lead, and make decisions regarding any potential charges based upon the facts and the law, and consistent with established procedures of the Department. That is what I always did as a United States Attorney, and it is what I will insist upon if I am confirmed as Attorney General.

c. You were extensively involved in President-Elect Trump's political campaign. If the IRS determines that the President-Elect has potentially violated a criminal or civil tax law, and the case is referred to the Department of Justice, will you recuse yourself from any decisions that are made regarding possible criminal or civil actions? If not, why not?

RESPONSE: I am not aware of a basis to recuse myself from such matters. However, if a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

d. If you do not recuse yourself, what steps will you take to ensure the Department of Justice thoroughly investigates any allegations and appropriately pursues any civil or criminal enforcement action that is within the Department's jurisdiction?

RESPONSE: See response to 12(b).

13. There is a clause of the Constitution that prohibits foreign government payments to federal officials. This clause is called the Emoluments Clause. It states:

> "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

This Clause has become more and more important as President-Elect Trump's dealings abroad and conversations with foreign leaders have become known.

According to longstanding Office of Legal Counsel (OLC) opinions, this clause was intended by the Framers to preserve the independence of officers of the United States from corruption and foreign influence. One of the relevant OLC opinions states: "Those who hold offices under the United States must give the government their unclouded judgment and their uncompromised loyalty."

a. OLC opinions clearly establish that the President is covered by the Emoluments Clause. Will you assure the Committee that you will uphold this OLC precedent?

RESPONSE: While I have not reviewed the OLC opinions referred to above, nor have I devoted any study to this issue, in general, OLC opinions should be overturned only rarely and after careful study and reflection. If I am confirmed, I have no reason to believe that the Office of Legal Counsel would change its approach to such matters.

b. Do you agree that cabinet officers are covered by the Clause?

RESPONSE: While I have not devoted any study to this issue, it is my understanding that cabinet officers are covered by the Foreign Emoluments Clause.

c. OLC opinions clearly establish that foreign state-owned or state-controlled businesses are "presumptively foreign states under the Emoluments Clause" – so that U.S. officials cannot receive emoluments from foreign state-owned businesses. Will you assure the Committee that OLC will not change its view during President-Elect Trump's administration?

RESPONSE: It is my understanding that OLC opinions have examined ownership and control exercised by foreign states in determining whether a business should be deemed a foreign state under the Emoluments Clause. If I am confirmed, I have no reason to believe that the Office of Legal Counsel would change its approach to such matters.

d. What is the proper enforcement mechanism for an emoluments violation?

RESPONSE: The Constitution is the supreme law of the land, and all federal office holders are obligated to abide by its terms. If confirmed as Attorney General, I will discharge all of the responsibilities of the office based upon my understanding of the requirements of the Constitution.

14. As Attorney General you will be charged with enforcing the Voting Rights Act. This obligation is all the more important after the Supreme Court's 2013 decision in *Shelby County, Alabama v. Holder*, which struck down a key component of the Voting Rights Act.

That same year, however, you spoke about voting rights issues and declared that "there's just huge areas of the South where there's no problem."

In 2013, the Department of Justice sued the State of Texas, alleging that its voter ID law violated the Voting Rights Act. And just last year, the *en banc* Fifth Circuit Court of Appeals agreed, holding that Texas' voter ID law violated the Voting Rights Act and "diminished African Americans' and Hispanics' ability to participate in the political process."

Also in 2013, the Department of Justice sued the State of North Carolina, alleging that a state law had been adopted with the purpose, and would have the result, of denying or abridging the right to vote on account of race, color, or membership in a language minority group, in violation of the Voting Rights Act. And just last year, the Fourth Circuit Court of Appeals found that a North Carolina law, including voter ID provisions, was enacted with discriminatory intent and "restricted voting and registration in five different ways, all of which disproportionately affected African Americans".

a. If you are confirmed, will the Justice Department continue to investigate claims that voter ID laws have a disproportionate impact on minority voters, and bring charges if the evidence supports bringing such a case? Please answer yes or no. If yes, will the Department work to investigate those matters quickly?

RESPONSE: As I testified before the Committee, government cannot create laws designed to improperly inhibit the right of any eligible citizens to vote. The voting rights of Americans are protected by federal law, including the Voting Rights Act. The Supreme Court held in *Crawford v. Marion County Election Board* that voter identification laws are neither *per se* unconstitutional, nor do they necessarily violate the Voting Rights Act. The analysis of such laws are specific to the particular law, the jurisdiction, and a wide range of factors that Congress has identified as relevant in determining whether a particular voting practice comports with the Voting Rights Act. If I am confirmed as Attorney General, I am committed to enforcing all of the federal laws within the Department's jurisdiction, and particularly the laws regarding voting, in a fair and even-handed manner.

b. Texas has sought Supreme Court review of the Fifth Circuit's decision in Veasey v. Abbott, the Texas voter ID case. In October, the Justice Department filed a brief in

opposition to Texas's petition for certiorari. If confirmed, do you plan to continue defending the position that the Justice Department has taken since 2013—that Texas's law violates the Voting Rights Act? If not, please explain.

RESPONSE: If I am confirmed as Attorney General, I will enforce the law and the Constitution. This question implicates an ongoing legal matter that I likely will be called upon to review and therefore it would be inappropriate for me to comment at this time. However, as with all cases, I will carefully and objectively evaluate the facts and circumstances of the case and endeavor to uphold and defend the Constitution in the pursuit of justice.

c. If confirmed, will the Justice Department change its position in any current voting rights case? If so, please identify all such cases.

RESPONSE: This question implicates ongoing legal matters that I will be called upon to review if confirmed; therefore, it would be inappropriate for me to comment at this time. I will carefully and objectively evaluate the facts and circumstances of each case and endeavor to uphold and defend the Constitution in the pursuit of justice.

15. During the hearing, I asked you, "Do you believe that the government can, pursuant to a general authorization to use military force, indefinitely detain Americans in the United States without charge or trial?"

    You answered: "Classically, the answer is yes. Classically, if you captured a German soldier, they could be held until the war ended. That was done, I'm sure, at the Civil War and most wars since."

    I responded: "I'm talking about Americans."

    You then stated:

    "I hear you. So then the question is, we're in a war like we have now that's gone on multiple years and I would think the principle of law certainly would appear to be valid. But as reality dawns on us, and wars might be even longer, you know, it's honest to discuss those issues.

    "So I respect your willingness to think about that and what we should do, but in general I do believe – and Senator Graham has argued forcefully for many years – that we are in a war and when members who – unlike the Japanese who were never proven to be associated with a military regime like the Japanese government, these individuals would have to be proven to be connected to an enemy, a designated enemy of the United States."

    "So I am – I probably explained more than I should, but that's basically the arguments and the issues we're facing. I respect your concerns and I'm sure they will continue to be debated in the future."

    a. Do you believe that an American citizen or lawful permanent resident apprehended in the United States can, pursuant to an authorization to use military force, be indefinitely

detained by the U.S. Government without charge or trial? I am not asking about detention pursuant to criminal or immigration proceedings, but specifically detention pursuant to an authorization to use military force. Yes or no, and please explain your answer.

The following discussion took place between you and Senator Graham:

Senator Graham. So as to how long an enemy combatant can be held, traditionally under the law of war, people are taken off the battlefield until the war is over or they are no longer a danger. Does that make sense to you?
Senator Sessions. It does make sense, and that is my understanding of the traditional law of war.
Senator Graham. … When do you think this war will be over? Do you think we'll know when it's over?
Senator Sessions. I've asked a number of witnesses in armed services about that, and it's pretty clear we're talking about decades before we have a complete alteration of this spasm in the Middle East that just seems to have legs, and will continue for some time.

b. Is it your understanding that the law allows the U.S. Government to militarily detain American citizens or lawful permanent residents captured in the United States for decades pursuant to an authorization to use military force? Yes or no, and please explain your answer.

RESPONSE to (a) – (b): Under current law, it would appear that the United States may detain an active member of al Qaeda or other enemy combatants for as long as the conflict persists. As you know, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a plurality of the Supreme Court stated that "[t[here is no bar to this Nation's holding one of its own citizens as an enemy combatant." The plurality relied in part on *Ex Parte Quirin*, 317 U.S. 1 (1942), in which the Court held that Congress authorized the military trial of a U.S. citizen who entered the country with orders from the Nazis to blow up domestic war facilities, but was captured before he could execute them. *See also Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005); *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008). Of course, citizens can contest their detention in federal court by writ of *habeas corpus*.

16. The Department of Justice currently is confronted with a clear conflict in federal and state law, and a determination of how to use federal enforcement resources in marijuana cases. Currently, twenty-eight states and the District of Colombia have legalized medical or recreational marijuana, or both. This includes Colorado, Washington, and most recently, California. An additional 14 states have laws in place related to cannabidiol, a non-psychoactive component of marijuana, in place.

    Federal law, as you know, prohibits numerous actions with respect to marijuana, including possession of marijuana with the intent to distribute it.
    In December 2014, Congress passed an appropriations bill that contained the following provision:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Subsequently, the Ninth Circuit – in an opinion written by Judge Diarmuid O'Scannlain, and joined by Judges Carlos T. Bea and Barry G. Silverman – concluded that this language, "at a minimum, . . . prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws." (*United States v. McIntosh*, Aug. 16, 2016)

a. How do you intend to balance federal marijuana enforcement with other enforcement priorities, given the number of states that have legalized recreational or medical marijuana under their own laws?

RESPONSE: As former Attorney General Loretta Lynch herself said during her confirmation hearings almost two years ago, marijuana is still a criminal substance under federal law, and it is also still illegal under federal law not only to possess marijuana, but to distribute marijuana. I echo Attorney General Lynch's comments, and commit, as she did, to enforcing federal law with respect to marijuana, although the exact balance of enforcement priorities is an ever-changing determination based on the circumstances and the resources available at the time.

b. If confirmed, do you plan to continue the policies contained in the "Cole Memo", which set forth eight enforcement priorities for federal marijuana enforcement? If you do intend to change the Cole Memo, how do you intend to change it?

RESPONSE: While I am generally familiar with the Cole memorandum, I am not privy to any internal Department of Justice data regarding the effectiveness of the policies contained within that memorandum. If I am fortunate enough to be confirmed as Attorney General, I will certainly review and evaluate those policies, including the original justifications for the memorandum, as well as any relevant data and how circumstances may have changed or how they may change in the future.

17. The National Academy of Sciences just released a report entitled "The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research" (2017). According to the press release issued with the report, this report was "an in-depth and broad review of the most recent research to establish firmly what the science says and to highlight areas that still need further examination."

The National Academy of Sciences also stated: "One of the therapeutic uses of cannabis and cannabinoids is to treat chronic pain in adults. The committee found evidence to support that patients who were treated with cannabis or cannabinoids were more likely to experience a significant reduction in pain symptoms. For adults with multiple sclerosis-related muscle spasms, there was substantial evidence that short-term use of certain "oral cannabinoids" – man-made, cannabinoid-based medications that are orally ingested – improved their reported symptoms. Furthermore, in adults with chemotherapy-induced nausea and vomiting, there was conclusive evidence that certain oral cannabinoids were effective in preventing and treating those ailments."

The National Academy of Sciences also stated: "Regarding the link between marijuana and cancer, the committee found evidence that suggests smoking cannabis does not increase the risk for cancers often associated with tobacco use – such as lung and head and neck cancers."

However, the National Academy also stated: "Evidence suggests that cannabis use prior to driving increases the risk of being involved in a motor vehicle accident. Furthermore, evidence suggests that in states where cannabis use is legal, there is increased risk of unintentional cannabis overdose injuries among children."

The National Academy also noted that there are numerous challenges and barriers to conducting research on the beneficial and harmful effects of cannabis and cannabinoid use.

During the last session of Congress, Senators Grassley, Leahy, Tillis and I introduced legislation to reduce barriers associated with researching marijuana. This legislation would expedite the Drug Enforcement Administration registration process to research marijuana, and allow doctors to use their existing registrations to conduct research and clinical trials on cannabidiol, rather than the Schedule I registration that is currently needed. It would also increase the scientific research base for marijuana by authorizing medical and osteopathic schools, as well as research universities and pharmaceutical companies, to conduct research using their own strains of marijuana and cannabidiol. The goal, if the science shows that marijuana or its components are indeed helpful in treating certain medical conditions, is to develop medicines that can be brought to the market with FDA-approval, just like any other medicine. I believe this is important legislation and plan to reintroduce it again this session.

a. Given the number of states that have legalized recreational and medical marijuana under their own laws, wouldn't you agree it is important that we know as much as possible about the health-related and other impacts of marijuana usage?

RESPONSE: Yes.

b. What do you intend to do as Attorney General to advance our knowledge in that area? Are there specific regulations that you would ease related to marijuana research? If so, which ones?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will defer to the American Medical Association and the researchers at the National Institutes of Health and elsewhere about the medical effects of marijuana. Without having studied the relevant regulations in depth, I cannot say whether they may need to be eased in order to advance research; but, I will review this. If confirmed, will be to enforce federal law, under which marijuana is currently a Schedule One controlled substance—defined as a drug with no currently accepted medical use and a high potential for abuse.

18. Senator Leahy asked you about the most recent FBI hate crimes statistics. The FBI's most recent annual hate crimes report found that in 2015, there were 5,818 single-bias incidents involving 7,121 victims. Of those victims, 17.7 percent were targeted because of their sexual orientation; and 1.7 percent because of their gender identity. We also know that these numbers are likely underreported.

    a. Senator Graham asked you "If a state is not prosecuting crimes against people based on their sex, their race, whatever reason, then it's proper for the federal government to come in and provide justice, don't you think?" You responded "I do."

    Do you similarly agree that if a state is not prosecuting crimes against people based on their sexual orientation or gender identity, it is likewise proper for the federal government to "come in and provide justice," in accordance with the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, my duty will be the pursuit of equal enforcement of the law for all Americans. From time to time, this duty may necessitate federal involvement in a state where federal law is not being followed or where equal justice under the law is not being administered.

    b. ***Do you believe it is inappropriate for the Justice Department to prosecute cases under the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009 if the state is prosecuting the same defendant based on the same factual scenario?***

RESPONSE: Any decision by the Justice Department to initiate a prosecution must be conducted in a fair, professional and impartial manner, and only after careful consideration of the facts and law presented by the case. The Department must follow the facts wherever they lead, and make decisions regarding any potential charges based upon the facts and the law, and consistent with established procedures of the Department. That is what I always did as a United States Attorney, and it is what I will insist upon if I am confirmed as Attorney General.

    c. ***Five states do not have any hate crimes laws—including South Carolina, where Dylann Roof was recently convicted and sentenced by a jury on federal hate crimes and firearms charges. Additionally, 14 states have hate crimes laws that do not include sexual orientation, and 28 states have hate crimes laws that do not include gender identity—but sexual orientation and gender identity are covered under the Shepard-Byrd Act. Under your leadership, if confirmed, what steps will the Department take to ensure hate crimes that occur in these states continue to be prosecuted?***

RESPONSE: Any decision by the Justice Department to initiate a prosecution must be conducted in a fair, professional and impartial manner, and only after careful consideration of the facts and law presented by the case. The Department must follow the facts wherever they lead, and make decisions regarding any potential charges based upon the facts and the law, and consistent with established procedures of the Department. That is what I always did as a United States Attorney, and it is what I will insist upon if I am confirmed as Attorney General.

d. ***Can you assure the Committee hate crimes enforcement will remain vigilant? Yes or no. If your answer is yes, please detail the steps you will take to ensure that enforcement of such crimes across the country remains a priority. For example, in 2015, the Civil Rights Division – in conjunction with U.S. Attorneys Offices and the FBI –organized a series of regional hate crimes trainings in Mississippi, California, Oregon, Kansas and Florida. These meetings helped to train local and federal law enforcement in how to recognize, investigate, and prove hate crimes. They helped to educate communities and engage them in the process of ensuring public safety. And they helped to encourage better hate crime reporting and data collection. If the answer is no, please explain your rationale.***

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, the Department will be vigilant in the full enforcement of all federal laws. I will endeavor to direct and utilize the resources of the Department in the most effective manner possible to ensure the enforcement of federal law. The specific steps I will take to ensure the enforcement of any particular law will be decided after careful evaluation of any current practices of the Department and the effectiveness of those practices.

e. ***Many other crimes—crimes involving the possession and distribution of illegal drugs, for example—are criminalized at both the state and federal level. Please provide to the Committee all other examples where you, as a Senator, sought evidence that states were doing an inadequate job prosecuting certain crimes before you voted to criminalize certain conduct at the federal level, or voted increase penalties for certain conduct at the federal level. If there are no other examples you can identify, please say so.***

RESPONSE: Over the course of nearly 20 years serving in the Senate, I have cast numerous votes against federal action or interference when I believed that principles of federalism demanded it. A review of my voting history and public statements clearly reflect an adherence to this philosophy. Nevertheless, if I am fortunate enough to be confirmed as Attorney General, my duty will be to enforce federal laws enacted by Congress and I will do so without reservation.

19. The career civil service in our country is a fundamental part of the guarantee to all Americans that nobody will be targeted for investigation or prosecution based on political beliefs or favoritism. That means that protection for career Department of Justice attorneys is extremely important. During the Bush Administration, even the hiring of career Department attorneys, particularly in the Civil Rights Division, became politicized.

You did an interview on *American Family Radio* on November 7, 2016, the day before the election, and the radio host stated that, in her view, the Department of Justice was "being filled, packed, with left-wing attorneys." She called Department attorneys "the left of the left," and "a nightmare."

She then asked you, "If Donald Trump is elected, what would happen to the Justice Department, do you think?"

You responded: "First, you are exactly right." You then noted you had spoken with former Attorney General John Ashcroft about how, in your view, "If Hillary Clinton is elected, there will be four more years of filling every spot in the Department of Justice with these secular, progressive, liberals that are going to make the Department even less traditional and lawful in its policies, more of a political machine, and that is the wrong direction. But every other cabinet person, place will be the same—whether it's EPA, whether it's the Department of Commerce, the Department of Education, the Department of Health and Human Services—all of those Departments will be packed with also, now, for 12 consecutive years, with the secular left. It just—is. And this is another reason this election's stakes are so high."

a. Please explain your comments on this radio program. What did you mean by your statements?

RESPONSE: These comments were made in response to my perception that individuals within the Department were using their own opinions of "truth" to decide when particular laws ought to be enforced, rather than consulting federal statutes or the Constitution. Abdicating a duty to enforce the law based on one's personal belief that an act clearly prohibited by law is nonetheless acceptable would fit my definition of "unlawfulness." The Department of Justice is an organization composed overwhelmingly of career professionals who do their duty every day. I will provide leadership that respects their professionalism and insists upon it. I will strive to enforce laws and set priorities that are consistent with the Constitution and the legislated intent of Congress.

b. Will you assure this Committee that the Department of Justice will not make any hiring, promotion, transfer, termination, or evaluation determinations based on an individual's political or religious beliefs?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, the Department will follow federal law and Departmental regulations regarding all personnel decisions.

20. U.S. Attorneys are, as you know, selected with the advice of their home-state senators—and they are subject to an approval process for those senators known as a blue slip, which you yourself have used many times.

a. How do you and the Administration intend to consult with home-state senators from both parties and ensure that politics is kept out of the U.S. Attorney appointments?

RESPONSE: While I have not discussed this matter with the President, I have no expectation that this process will deviate from the precedent set by prior Administrations and hope that the Senate will follow its traditions so that the process works to the benefit of the American people.

21. In your Committee Questionnaire, you listed four civil rights cases on your list of top ten "most significant litigated matters which you personally handled." I would like to better understand your role in these cases, and the extent to which you "personally handled" them. For each of these four cases—*Davis v. Board of School Commissioners of Mobile County, United States v. Concunah County, United States v. Dallas County Commission*, and *United States v. Marengo County Commission*—please list the following:

    a. Every pleading or document filed with the court that you not only read, but also edited or otherwise substantially contributed to the arguments or positions developed therein.

RESPONSE: It is my understanding that these pleadings and documents have been entered into the record for this hearing. As each pleading or document evidences, I was responsible for all of the content consistent with my ethical obligations under the Alabama State Bar's professional responsibility regulations and Rule 11 of the Federal Rules of Civil Procedure. My name and signature on the pleadings signified my full support of the pleading, that it was justified, and it represented my view as to what was appropriate, just as it did in criminal or other cases that I did not personally try.

    b. Every hearing, oral argument or other court proceeding in which you directly participated.

RESPONSE: These cases were adjudicated over thirty years ago and I did not keep a record of every hearing, oral argument, or other court proceeding associated with them. My role as U.S. Attorney was to represent to the court my decision in these cases.

    c. Any other role you may have had in litigating or supervising other government attorneys who worked on these cases.

RESPONSE: The role I had in these cases was equal to that of my five co-counsel in that we were each responsible for all of the content contained in the filings and for all representations made to the court, consistent with our ethical obligations under our State Bar's professional responsibility regulations and Rule 11 of the Federal Rules of Civil Procedure.

22. At your hearing, you were asked about your vote against reauthorization of the Violence Against Women Act in 2013. The law included important expanded protections for vulnerable groups, including LGBT, Native American, and immigrant victims, in an effort to ensure that all victims of violence are protected.

    You testified that you voted against the bill because of "some specific add-on revision in the bill that caused my concern." You also testified that "[o]ne of the more concerning provisions was a provision that gave tribal courts jurisdiction to try persons who were not tribal members."

a. Which provisions of the law do you mean to indicate were "add-ons"?

RESPONSE: My testimony referred to the tribal-jurisdiction provision. This provision was not part of the original Violence Against Women Act, or a part of the 2000 and 2006 reauthorizations (which I supported). Further, as I recall, the addition of this provision was the principal reason why eight of the nine Republican members of the Senate Judiciary Committee opposed the 2013 bill.

b. If the provision on tribal jurisdiction had not been part of the bill, would you have supported the bill's protection from discrimination for LGBT victims? If not, why not?

RESPONSE: My principal concerns about the 2013 VAWA reauthorization centered on the tribal jurisdiction provision. The 2013 Act also includes a provision that prohibits recipients of federal grants (such as women's domestic-violence shelters) from discriminating on the basis of, among other things, sex, gender identity, and sexual orientation. This provision includes an exception that a grantee may carry out sex segregation or sex-specific programming if it can show that such programming is "necessary to the essential operation of a program," and if it provides comparable services to individuals who cannot be provided with sex-segregated or sex-specific programming. My and other Senators' concerns about this provision centered on the fact that, on its face, its broad prohibition would appear to preclude operation of a women-only (or women and children-only) domestic violence shelter, and the Act's exception to this prohibition appears narrow and is unclear. Although a woman who has been the victim of violence at the hands of a husband or boyfriend may be better served by services that are provided outside the presence of men, it is unclear whether a women's domestic-violence shelter would be able to meet the Act's requirement that it show that providing women-only services is "necessary to the essential operation" of the shelter. I believe that, in some circumstances, it is appropriate for VAWA grant recipients to provide services that are limited to women. To the extent that VAWA 2013's new anti- discrimination provision is construed to, for example, prevent or make it difficult for a women's domestic violence shelter to provide services that it believes should be limited only to women, I continue to have serious reservations about that provision. In the past, I have received strong objections from a respected women and children's shelter on this very issue.

c. If the provision on tribal jurisdiction had not been part of the bill, would you have supported the bill's expanded protections for immigrant victims? If not, why not?

RESPONSE: My principal concerns about the 2013 VAWA centered on the tribal jurisdiction provision. The 2013 Act also includes a provision that expands the U visa program. U visas are available to aliens who have been victims of domestic violence and other crimes—they are intended to allow the alien to assist with a prosecution of the offense. These visas allow an alien to remain in the United States for four years and seek permanent-resident status. The Judiciary Committee received numerous statements from American citizens who have been victims of marriage fraud perpetrated by aliens who have abused the U visa program. These aliens have married a U.S. citizen without the intention of remaining married, and then falsely accused their spouse of domestic violence or other crimes in order to obtain a U visa and remain in the United States. During the Judiciary Committee's consideration of the VAWA reauthorization, an

amendment was offered as an alternative to VAWA 2013 that would have applied basic anti-fraud protections to the U visa program. These proposals would have required that an alleged crime that justified a U visa be recently reported, that it be under actual investigation, and that U.S. Citizenship and Immigration Services interview the parties (including the alleged perpetrator, if the victim consents) to determine if the allegations are credible. The Committee's then-majority refused to include any of these anti-fraud measures in VAWA 2013, and instead expanded the number of visas available from 10,000 to 15,000. I continue to have concerns about fraud, and believe that the 2013 Act's expansion of the program should have been accompanied by provisions that would prevent such abuse of the program.

d. Now that the 2013 reauthorization of the Violence Against Women Act has been implemented for three years, including the provision on tribal jurisdiction, do you still oppose it? If so, why? And would you seek to challenge that provision of the law? Would you seek to challenge any other provisions of the law?

RESPONSE: If I am confirmed as Attorney General, I will enforce all federal laws, including the 2013 reauthorization of VAWA. I understand that a pilot program has been initiated that seeks to conform tribes' exercise of criminal jurisdiction over non-Indians to the requirements of the Sixth Amendment. I will carefully study this program before reaching any legal conclusions about the VAWA tribal jurisdiction provision.

During my meetings with Senators in preparation for this hearing, I have heard numerous concerns about non-enforcement in these matters. I will work to improve this issue. Sexual assault and other violent crime on Indian reservations are very serious problems—in some places, the problem has reached epidemic proportions. The federal government exercises criminal jurisdiction over many Indian reservations. If I am confirmed as Attorney General, I will be committed to ensuring that federal law enforcement resources are fully deployed to investigate and prosecute crime on federal reservations, and will request additional resources where existing resources are inadequate. Finally, I would note that on many Indian reservations, state and local authorities exercise criminal jurisdiction. State and local law enforcement resources greatly exceed those of federal and tribal governments combined. On the exclusively federal reservations where federal law enforcement has proved to be inadequate to reduce high levels of violent crime, Congress may consider allowing state and local authorities to exercise criminal jurisdiction. State and local law enforcement has proven effective on many existing Indian reservations, and the extension of such criminal jurisdiction to both Indians and non-Indians in Indian country does not offend constitutional guarantees.

I am not aware of any other provision of the law that raises constitutional concerns.

e. If confirmed, will you recommend that the Administration support reauthorization of the law as-is?

RESPONSE: If I am confirmed as Attorney General, I will study the law and its impact to determine whether improvements can be made.

23. A 2016 report from the American Association of University Women states: "At the rate of change between 1960 and 2015, women are expected to reach pay equity with men in *2059*. But even that slow progress has stalled in recent years. If change continues at the slower rate seen since 2001, women will not reach pay equity with men until *2152*." ("The Simple Truth about the Gender Pay Gap," Fall 2016)

    In addition, the Bureau of Labor Statistics' data from 2014 showed that women earned dramatically less than men in occupations from legal, to sales, to education, to technology, to healthcare.

    a. Do you believe that there is a pay gap for women in which women are discriminated against and paid less for doing substantially similar or the same work even when factors such as education or experience are accounted for?

RESPONSE: Any discrimination against a woman, because she is a woman, would violate federal law. I will enforce the law to the letter where evidence of such discrimination exists, if I am fortunate enough to be confirmed as Attorney General. There should be equal pay for equal work.

24. Lilly Ledbetter had worked for Goodyear in Gadsden, Alabama for 19 years, mostly as a manager. During the years she worked at Goodyear, her pay "slipped in comparison to the pay of male area managers with equal or less seniority." (Ginsburg dissent.) The problem Lilly Ledbetter had a problem, however, because she had no idea she was being discriminated against. By the time she found out, it had been going on for years.

    In a 5-4 decision, the Supreme Court concluded her claims were barred. The Court ruled the deadline to bring a case started to run at the time the discrimination first occurred – not when she found out it happened. This decision meant employers could discriminate with impunity so long as they kept it hidden from their employees for 180 days.

    Congress voted to overturn this decision in the Lilly Ledbetter Fair Pay Act of 2009. Four Republican women Senators voted for the law. At the hearing, you were asked about your vote against the legislation. You testified, "We had a hearing on it in the Judiciary Committee. A number of witnesses testified, and the testimony, as I understood it, was that [Lilly Ledbetter] did in fact have notice, and the Court found that she had notice, and that is why they had that statute of limitations was enforced. You need a statute of limitations of some kind, and if they do not know, then you can allow it to continue indefinitely. But as I understood, that was the ruling. So it was less problematic for future cases than was discussed, but my recollection is not perfectly clear on that issue. That was one of the factors I remember being involved in my decision."

    a. Now that you have had an opportunity to review the issue and the Supreme Court's decision, please discuss the reasons you were opposed to the Lilly Ledbetter Fair Pay Act of 2009. Are you still opposed to the law?

RESPONSE: It is my recollection that the legislation would have effectively eliminated the statute of limitations for Title VII pay discrimination claims as long as an employee is receiving paychecks. This would appear to undermine the traditional goals that limitations periods seek to further even where, as here, according to testimony at Judiciary Committee hearings, a person had actual notice of alleged pay disparity, long before filing the action. Nevertheless, no position I took as a Senator would hinder me from enforcing any duly-enacted law.

b. Please provide with specificity the basis of your statement at the hearing: "We had a hearing on it in the Judiciary Committee. A number of witnesses testified, and the testimony, as I understood it, was that [Lilly Ledbetter] did in fact have notice, and the Court found that she had notice, and that is why they had that statute of limitations was enforced."

RESPONSE: On Tuesday, September 23, 2008, the Senate Judiciary Committee held a hearing entitled "BARRIERS TO JUSTICE: EXAMINING EQUAL PAY FOR EQUAL WORK." Lilly Ledbetter, Cyrus Mehri, and Lawrence Lorber testified about the case and the Supreme Court's ruling in favor of the employer, Goodyear. Testimony offered by the witnesses, and the facts that were exposed in the case, indicated that Ms. Ledbetter's record included poor performance reviews and repeated layoffs. Nevertheless, she waited more than five years before filing a claim.

25. Pursuant to 8 C.F.R. § 1003.1, the Attorney General has authority to certify cases of the Board of Immigration Appeals (BIA) to himself. Through this authority, the Attorney General can establish or reverse precedent in immigration law. According to the Congressional Research Service, in the past this authority has been used very rarely: it was used in just five cases by Attorney General Mukasey, and in just three cases by Attorney General Holder.

a. Do you believe that, in line with established practice, this authority for the Attorney General to decide immigration appeals himself or herself must be used sparingly—leaving the adjudicative process to function as it usually does with decisions made by immigration judges and members of the board of immigration appeals?

RESPONSE: My understanding is that this authority is entirely discretionary. Decisions to use such authority would only be decided on a case-by-case basis, and I cannot speculate as to how often that authority should be exercised.

b. If confirmed as Attorney General, what criteria do you intend to consider in deciding which BIA cases you will seek to certify to yourself?

RESPONSE: I have not given thought to what criteria would be essential to a determination of whether to certify a case to myself for review.

26. The Department of Homeland Security (DHS) has acknowledged that its resources enable it to remove only a fraction of the undocumented population each year. You have also

recognized that financial considerations do not make it possible to identify and remove everybody who is in the country illegally.

a. Do you believe that young people who have qualified and received deferred action through the 2012 Deferred Action for Childhood Arrivals (DACA) program constitute high enforcement priorities?

RESPONSE: As you know, decisions about "enforcement priorities" with regard to our civil immigration system reside in the Department of Homeland Security. Should I be confirmed as the Attorney General, I will have no role in establishing the Department of Homeland Security's civil enforcement priorities.

b. What about the parents of children who are U.S. citizens or legal permanent residents?

RESPONSE: Please see response to 26(a).

c. Which types of individuals do you believe constitute high enforcement priorities?

RESPONSE: Please see response to 26(a).

27. 8 U.S.C. § 1373 establishes certain guidelines regarding communication between state and local governments and federal immigration agencies with respect to an individual's citizenship or immigration status. In interpreting this statute, the Department of Justice's Bureau of Justice Assistance (BJA) has concluded that it "does not impose on states and localities the affirmative obligation to collect information from private individuals regarding their citizenship or immigration status, nor does it require that states and localities take specific actions upon obtaining such information."

a. Will you adhere to BJA's current interpretation of 8 U.S.C. § 1373?

RESPONSE: Should I be confirmed as Attorney General, I will faithfully execute the laws for which I am responsible for administering.

b. If not, what is your interpretation of 8 U.S.C. § 1373? And what is your interpretation based on?

RESPONSE: I have not had the opportunity to undertake a detailed review of the BJA'S interpretation of the statute. If the BJA's interpretation of the statute is correct, I see no reason not to follow it.

28. The principle of birthright citizenship, regardless of the citizenship or immigration status of an individual's parents, is enshrined in the Citizenship Clause of the 14th Amendment. That clause provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The Supreme Court affirmed this principle almost 120 years ago in *U.S. v. Wong Kim Ark,* 169 U.S. 649 (1898), noting: "But citizenship by birth is established by the mere fact of birth

under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization." And: "In the forefront both of the Fourteenth Amendment of the Constitution and of the Civil Rights Act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms."

a. Do you believe that a child born in the United States to undocumented parents is a citizen of the United States?

RESPONSE: As I testified before the Committee, under the current state of the law, children born in the United States become citizens.

b. With respect to a child born in the United States, under what circumstances do you believe that Congress can modify the scope of birthright citizenship by statute?

RESPONSE: I have not reviewed the details of that. I do know there is some dispute about whether or not the Congress could change the status of current law regarding birthright citizenship.

c. If you are confirmed, will the Justice Department file briefs in support of efforts to alter the constitutional provision regarding birthright citizenship?

RESPONSE: The determination as to how to handle a particular case is fact-specific, and I cannot speculate as to how the Department of Justice might litigate future hypothetical cases.

29. A number of states across the country, including California, have passed laws allowing undocumented students to qualify for in-state tuition. California's in-state tuition law has made it possible for undocumented students in the state to pursue higher education and develop the skills and knowledge to contribute more fully to their communities and our economy.

a. Do you believe that federal law prohibits states from providing access to in-state tuition for undocumented students?

RESPONSE: My current understanding is that responding to this question would require an analysis of the laws of each individual state, compared with applicable federal law. At this time, I cannot comment on this issue.

b. Do you intend to take any action against states that provide in-state tuition for undocumented students? If so, what type of legal action do you intend to pursue against these states?

RESPONSE: Should I be confirmed as Attorney General, I will faithfully execute the laws of the United States.

30. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court held that states cannot deny undocumented children free K-12 public education. In its opinion, the Court noted: "By

denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."

a. Will you commit to upholding and enforcing Plyler v. Doe?

RESPONSE: Should I be confirmed as Attorney General, I will enforce the law as interpreted by the Supreme Court.

31. On a variety of occasions you have expressed strong concerns about Congress passing immigration reforms because you were worried about jobs being taken from American citizens. In 2013 you said, "Why would any member of Congress want to vote for a bill at a time of high unemployment, falling wages, to bring in a huge surge of new labor that can only hurt the poorest among us." And on the Senate Floor on June 23, 2016, you went so far as to say that all jobs created in the country during the period between 2000 and 2014 "went to the foreign born."

The *Washington Post*, as recently as Christmas 2016, reported that a Virginia vineyard owned by President-Elect Trump or his company had applied for six H-2A visas to work seasonal jobs. Additionally, as you know, President-Elect Trump's companies have applied for a number of H-2B visas, mostly in his hotel businesses, including 20 waiters and waitresses for his Trump International Beach Resort in Florida, in December 2016 alone. Further, the *Washington Post* reported that since 2013, President-Elect Trump's businesses have requested 513 employment-based visas, with 269 of these visas for foreign workers set to begin employment after President-Elect Trump declared his candidacy for President.

a. If any of these companies, or individuals working with these companies, is believed to violate federal criminal law, how will the Department of Justice proceed to investigate or prosecute individuals from the President's own companies?

RESPONSE: I believe that all investigations by the Department of Justice must be initiated and conducted in a fair, professional, and impartial manner, without regard to politics or outside influence. The Department must follow the facts wherever they lead, and make decisions regarding any potential charges based upon the facts and the law, and consistent with established procedures of the Department. That is what I always did as a United States Attorney, and it is what I will insist upon if I am confirmed as Attorney General.

b. You were extensively involved in President-Elect Trump's political campaign. Will you recuse yourself from any decisions regarding the investigation or prosecution of President-Elect Trump's own companies?

RESPONSE: I am not aware of a basis to recuse myself from such matters. However, if a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

32. Throughout the campaign, President-Elect Trump accused U.S. District Court Judge Gonzalo Curiel of being biased based on Judge Curiel's heritage. President-Elect Trump was quoted by the press as saying:

- "*He's a Mexican. We're building a wall between here and Mexico*." (Politifact, June 8, 2016, quoting Jake Tapper interview with CNN)
- "*I'm building a wall. It's an inherent conflict of interest*." (Wall Street Journal, June 3, 2016)
- "*It's an absolute conflict*" (Wall Street Journal, June 3, 2016)
- "*He's a member of a club, or society, very strongly pro-Mexican*" (John Dickerson, Face the Nation, Interview, June 5, 2016)
- "*I think the judge has been extremely hostile to me. I think it has to do with perhaps the fact that I'm very, very strong on the border. Very, very strong on the border. ... Now, he is Hispanic, I believe. He is a very hostile judge to me. I said it loud and clear*." (Fox News Sunday, February 27, 2016)

In addition, in an interview with John Dickerson on CBS News Mr. Trump was asked whether he believed a judge who is a Muslim would also be unfair to him. He said, "*that would be possible, absolutely*."

a. Would it ever be appropriate for the Department of Justice to seek a judge's recusal from a case involving the Trump administration based on the judge's race, gender, ethnicity, family heritage or national origin, religion, sexual orientation, or gender identity? If so, please explain.

RESPONSE: No.

b. Through the Office of Legal Policy and otherwise, the Department historically has had a significant role in the judicial nominations process. Can you assure the Committee that the Department of Justice will not support any efforts by the President-Elect to reject candidates for judicial positions based on their race, gender, ethnicity, family heritage or national origin, religion, sexual orientation, or gender identity?

RESPONSE: Yes.

33. After your initial submission of your Senate Judiciary Questionnaire ("Committee Questionnaire") on December 9, 2016, you made three subsequent supplemental submissions to address missing materials. These additional submissions included over 50 hours of audio and visual material and hundreds of pages of documents. Your initial submission was, therefore, incomplete.

    Additionally, the Committee never received the following requested material from your years as U.S. Attorney for the Southern District of Alabama or as Attorney General of Alabama: Interviews: Radio, television, and print interviews while you were U.S. Attorney for the Southern District of Alabama and Attorney General of Alabama.

Nominees regularly produce materials documenting statements to the press regardless of whether a full transcript is available, or whether the statements were part of a formal interview. I identified examples of such materials to you in a list on January 5, 2017. In a letter to me on January 6, 2017, you responded that you were not sure if the materials were responsive because you could not confirm the exact circumstances under which you made the comments. However, nominees are generally expected to produce press statements whether they were part of a formal interview or not. The burden to establish exactly how the comments were made is not on the Committee.

For example, a 1996 Birmingham News article available in a public database but missing from your materials indicates you made comments during an interview about strengthening criminal laws. (Stan Bailey, *Sessions Says Crime Laws Need Change*, BIRMINGHAM NEWS, Dec. 18, 1996 ("'I was most surprised at how much more difficult it is, it seems to be, to prosecute fraud and corruption,' Sessions said in an interview Tuesday.")) Another 1996 article missing from your materials but available in a public database indicates you made comments to the press regarding the National Rifle Association (NRA) at an event while you were campaigning for U.S. Senate. (Sean Reilly, *Sessions: NRA comments were a mistake*, MOBILE REGISTER, November 2, 1996 ("'I don't agree with that comment,' Sessions said Friday of the NRA letter. 'It's not something that should have been said.'")

Speeches: For the fourteen years you served as U.S. Attorney for the Southern District of Alabama and Attorney General of Alabama, you listed just three speeches, and you had notes or transcripts for just one of these. During this time, you campaigned for Alabama Attorney General and the U.S. Senate.

You served as the U.S. Attorney for the Southern District of Alabama for 12 years. An online search shows that the current U.S. Attorney for the Southern District of Alabama has made at least ten speeches in the last five years. You also served for two years as Alabama Attorney General. An online search shows that the current Attorney General of Alabama has made at least seven speeches in the last year alone.

a. What steps did you or your staff take to ensure that the materials you provided to the Committee in response to the Questionnaire were complete? Please specifically detail the efforts you or your staff made to identify and locate materials from your time as U.S. Attorney and Alabama Attorney General.

RESPONSE: In preparing my response to the Committee's Questionnaire, my staff and I conducted a thorough review of my own files, searches of publicly available electronic databases, and consultation with the Senate Library, the Congressional Research Service, and relevant committee libraries and historical offices within the Senate. In an effort to be as responsive as possible, my staff also conducted further review of existing files from the era, including historical archives maintained in electronic research databases such as LexisNexis, WestLaw, and ProQuest, public search engines, and Internet archive services that maintain records of websites that no longer exist. Additionally, as records from my time as United States Attorney and Attorney General of the State of Alabama existed before the proliferation of the Internet and before electronic storage was as readily available as it is today, most of those

records do not exist in any electronic databases of which I am aware, and my staff and I consulted with the Alabama Attorney General's Office and with the United States Attorney's Office for the Southern District of Alabama to locate archived files from my time in those offices. All responsive records identified or located as a result of these searches were submitted to the Committee.

b. After your initial incomplete production, did you or your staff take any different or additional steps to gather a more complete set of materials? For example, did you or your staff attempt to identify and search newspaper archives of Alabama news publications that may be available in the state but not searchable nationwide? Did you or your staff ask the Alabama Attorney General to produce material in the state archive, or work with the state archives directly? Please detail your and your staff's efforts.

RESPONSE: After my initial voluminous production, which was more extensive than any Committee Questionnaire response by any Attorney General nominee in recent memory and encompassed more than 100 times the records produced by Attorney General Lynch,[1] items were brought to my attention as potentially responsive that had not been submitted. Some already had been submitted to the Committee, and some were not responsive items at all. A miniscule percentage of items, however, were responsive and subsequently submitted to the Committee in a supplemental response, which is a common practice for nominees. Additionally, in an effort to be as responsive as possible, my staff conducted additional searches to locate any other items that might have been missing.

34. During your hearing, you testified that "I've received hundreds – multiple hundreds of awards over my career." You have only listed 79 awards as part of your Committee Questionnaire.

a. What process did you use to determine which of the "multiple hundreds of awards" you have received would be listed on your Committee Questionnaire? Put another way: how did you decide which awards <u>not</u> to include on your Committee Questionnaire? Please outline what steps were taken to ensure a full inventory of your awards were provided.

RESPONSE: My comment that I had received "multiple hundreds of awards" was hyperbole and I should have been more careful with my words. I listed in my response to the Committee Questionnaire all awards that I was able to locate, identify, or remember.

b. Please provide the Committee with a list of any missing awards.

RESPONSE: I have already provided to the Committee all responsive items, including awards, that I was able to locate, identify, or remember.

[1] *Letter from Ranking Member Dianne Feinstein to Chairman Charles E. Grassley,* Dec. 13, 2016 ("Senator Sessions' production is, as I understand it, in excess of 150,000 pages of material. This is more than 100 times what Attorney General Lynch produced (1500 pages) and more than 29 times what Attorney General Holder produced (5100 pages)."

35. Since 2009, funding for the Byrne Justice Assistance Grant (Byrne JAG) program and the COPS Hiring program have dropped by 32 percent and 37 percent, respectively. Byrne JAG is the cornerstone federal justice assistance program, providing hundreds of millions of dollars to state and local law enforcement each year. The COPS Hiring program provides more than a hundred million in funding to hire new, or rehire, law enforcement or to increase community policing.

    Police officers need this support. And cutting support for this funding – or allowing cuts to be made – would undermine the brave law enforcement officers that put their lives on the line for communities every day. The cuts since 2009 have had real impact.

    a. Will you support increased funding for these essential programs?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will seek to best use the resources available to the Department of Justice to address violent and other crimes throughout the country, and to partner with State and local law enforcement agencies to help them address these issues. I will make funding decisions only after a careful evaluation of any current practice or program administered by the Department and the effectiveness of those practices to aid in the administration of justice. This will include a review of the Department's Inspector General's report criticizing program administration. As you know, resources are limited; therefore, prior to such an evaluation, it would be unwise for me to commit to an increase in funding for any specific purpose.

b. In FY16, California received $30.3 million from Byrne-JAG and $11.725 million from the COPS program. Will you ensure funding for California law enforcement in these programs is not reduced, except as may be proportional to any overall reduction in the program by Congress?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will seek to best use the resources available to the Department of Justice to address violent and other crimes throughout the country, and to partner with State and local law enforcement agencies to help them address these issues. I will make funding decisions only after a careful evaluation of any current practice or program administered by the Department and the effectiveness of those practices to aid in the administration of justice. As you know, resources are limited; therefore, prior to such an evaluation, it would be unwise for me to commit to an increase in funding for any specific purpose.

36. I believe that the men and women who serve as state and local law enforcement officers are some of the finest and bravest public servants we have. The vast majority of police officers do exemplary work and build strong relationships with the community to keep the public safe. However, we also know that in many communities, trust between community members and state and local law enforcement is deeply frayed.

    I recently convened a pair of meetings with more than 50 African American community, religious and political leaders, and law enforcement officers in San Francisco and Los Angeles. A key point that emerged was that change must take root from the bottom up, but

the federal government – especially the Justice Department – has a role to play in recommending best practices and providing or supporting civilian oversight. In some cases, where the Department has found a pattern or practice of unconstitutional policing, the Department has entered consent decrees in order to ensure that needed reforms happen at an institutional level.

During your hearing, you told Senator Hirono that "there's a concern that good police officers and good departments can be sued by the Department of Justice when you just have individuals within the department who have done wrong, and those individuals need to be prosecuted."

a. Please list all investigations or proceedings under Section 14141 that the Civil Rights Division has undertaken since 1994 that you believe were undertaken erroneously and/or should not have been brought.

RESPONSE: I have not been privy to internal Department data and information regarding every investigation undertaken under this section. However, if I am fortunate enough to be confirmed as Attorney General, I will carefully evaluate the authorities and tools available to the Department, including this section, and partner with departments to provide best practices and information whenever appropriate.

37. In addition to Section 14141 investigations, the Justice Department's Office of Community Oriented Policing Services (COPS) provides, upon request, assistance to police departments to help develop long-term, holistic strategies to improve policing.

In my home city of San Francisco, the COPS unit has helped identify specific areas for the San Francisco Police Department to improve its own policies, particularly in the wake of several use-of-force incidents that sparked protests across the state. The program under which the COPS office assisted the SFPD is called the Collaborative Reform Initiative, and it is a program that has collaborated with police departments nationwide, including in Baltimore, Memphis, Philadelphia, and Salinas.

a. Will you commit to continuing this type of technical assistance for police departments that request it?

RESPONSE: While I am unfamiliar with the specific assistance provided to San Francisco, I agree it is important for law enforcement agencies to build trust and good relationships with the communities they protect, and the Community Oriented Policing Services Office of the Department of Justice can provide valuable information, resources, and technical assistance to law enforcement agencies looking to improve their practices. If confirmed, I will support their efforts.

38. In May 2016, the Department of Justice filed an indictment against South Carolina Police Officer Michael Slager after he fatally shot Walter Scott, an African American man. Officer Slager was indicted both on federal criminal civil rights and obstruction charges.

On December 6, MSNBC's Mika Brzezinksi asked Vice President-Elect Pence "Will the next administration support the feds continuing the case against Slager?" Vice President-Elect Pence replied, "Well, I think that'll be a decision that the Attorney General will review and make after January the 20th, and I'll let our designee and of course President-Elect [Trump] review that."

a. Have you discussed this case with President-Elect Trump, Vice President-Elect Pence, or other members of the transition team? Please specify.

RESPONSE: No.

b. Do Vice President-Elect Pence or President-Elect Trump have any reason to believe that you plan to withdraw a previously-filed indictment in this case—or any other criminal or civil rights cases the Justice Department is currently prosecuting?

RESPONSE: I have not discussed this case with the President or the Vice President and therefore cannot comment on what they may or may not believe. I have not had an opportunity to review this case and have not made any decisions with regard to it or any other pending cases. However, I do not anticipate withdrawing any pending prosecutions that are justified by the facts and circumstances of the case and relevant laws.

c. Do you believe it would be appropriate for President-Elect Trump to "review" any prosecutorial decisions you, or any other employees of the Department of Justice, make?

RESPONSE: No.

39. When I was chairman of the Senate Intelligence Committee, the Committee approved a full report on detention and interrogation – more than 6,700 pages and 38,000 footnotes. This report was produced based on a fulsome staff review of mostly CIA documents describing the Central Intelligence Agency's detention and interrogation program. It includes extensive information about the Justice Department's role in authorizing this program, but also how the CIA repeatedly provided inaccurate information to the Justice Department about the operation of the program.

    This report was approved by a bipartisan vote in the Intelligence Committee of 9-6.

    After months of negotiations, the Executive Summary of this report was declassified with redactions. This summary runs 500 pages. The Committee sent copies of the full report to a number of relevant agencies, including the Department of Justice and FBI.

a. Have you read the Executive Summary?

RESPONSE: No.

b. Will you commit to reading the full report if confirmed – and instructing appropriate officials to read the full report, to ensure that we do not repeat the mistakes of the past?

RESPONSE: If confirmed, I will ensure that I and other appropriate officials are fully briefed on the contents of the report to the extent that it is pertinent to the operations and mission of the Department of Justice.

c. Will you commit that you will not return the Justice Department's copy of the report to the Senate?

RESPONSE: Yes.

40. At your hearing, Senator Graham asked you whether you support the continuation of use of Guantanamo Bay as a confinement facility for foreign terrorists.

The U.S. has been detaining individuals without charge or trial at the Guantanamo Bay detention facility for the past 15 years. A total of 780 people have been held at the facility since it opened. Of this number, approximately 540 were released during the George W. Bush administration, and 183 during the Obama administration. Another nine died in custody, six by suspected suicide. A total of 55 remain.

During this time, only a very small number of cases were prosecuted in the military commissions, fifteen in total. Eight of these resulted in convictions, three of which have been fully overturned on appeal; several others were partially overturned. A number of other appeals are pending. Other cases are bogged down in pre-trial hearings. The case against the five men accused in the September 11, 2001 attacks is in its fourth year of pre-trial hearings and a trial date is still years away.

Meanwhile, the government has prosecuted more than 500 terrorism suspects in federal court, including Dzohkar Tsarnaev, the Boston Marathon bomber; Faisal Shahzad, who tried to set off a car bomb in Times Square; and Umar Farouk Abdulmutallab, the so-called "underwear bomber," all of whom were convicted.

You have made comments indicating that individuals captured by the U.S. abroad should not be prosecuted in federal court, but rather in military commissions in Guantanamo.

a. Do you agree the Department of Justice has a record of success bringing terrorism-related criminal charges against hundreds of defendants since September 11, 2001?

RESPONSE: Yes. I also believe that the prosecution of terrorists in the military commission system would be successful if used.

b. As Attorney General, do you intend to stop prosecuting terrorist suspects in federal court? Do you intend to stop enforcing, for example, 18 U.S.C. § 2339B, which criminalizes the provision of material support or resources to a designated foreign terrorist organization?

RESPONSE: The statute you cite has proven to be a particularly valuable tool in the war on terrorism and I expect to vigorously prosecute offenses under that law where warranted.

41. In the past, you have asserted that existing gun laws must be enforced aggressively. You have said when you were the U.S. Attorney in the Southern District of Alabama, you committed yourself to prosecute violations of "hundreds of gun laws."

    You went so far as to claim you sent a newsletter to local law enforcement to bring you cases involving gun violations. You stated, "I created a newsletter and sent it to every sheriff. I said: If you have the kind of criminal that needs prosecuting under federal gun laws, you bring those cases to me and we will prosecute them."
    You also have the highest political rating from the National Rifle Association and consistently have voted against attempts to strengthen background checks and otherwise make federal gun laws stronger.

    a. Will you commit to fully enforcing existing gun laws, including by taking enforcement measures strongly opposed by gun rights groups?

RESPONSE: If I am confirmed, I will make enforcement of federal gun crimes a top priority and aggressively engage with state and local law enforcement partners to ensure consistent policies for the apprehension of those violating federal gun laws. I fully expect gun prosecutions to increase. Properly enforced, federal gun laws can reduce crime in our cities and communities.

b. **There have been legal challenges to federal, state and local gun laws since the *Heller* and *McDonald* decisions in 2008 and 2010.**

If confirmed, under what circumstances would the Department of Justice decline to defend a federal firearms law against a legal challenge?

RESPONSE: The Executive Branch has a clear and unwavering duty to vigorously defend the constitutionality of any law for which a reasonable defense may be made. This includes the responsibility to defend in court acts of Congress with which the President may disagree as a matter of policy. That is an important and a time-honored principle to which I fully subscribe. There are two exceptions: (1) where a statute intrudes upon the separation of powers by infringing on the President's constitutional authority, and (2) where there are no reasonable arguments that can be presented in defense of a statute. These are narrow exceptions, and require the most careful consideration before being adopted.

42. As you are aware, any person engaged in the business of dealing in firearms must conduct background checks on gun buyers. Courts have identified several factors to determine whether an individual is "engaged in the business" of buying and selling firearms; there is no specific threshold number of firearms purchased or sold that triggers the requirement. As ATF stated in its January 2, 2016 guidance document, "even a few firearms transactions, when combined with other evidence, can be sufficient to establish that a person is 'engaged in the business' of dealing in firearms."

For example, in *United States v. Shan*, the Second Circuit found that the defendant was properly convicted of dealing in firearms without a license when he sold just two firearms in a month and acknowledged that he had a source for more guns. The Sixth Circuit has similarly noted, "[T]he statute does not establish a minimum threshold for the number of guns sold." As a result of decisions like these, the Justice Department has brought cases against individuals who illegally sold guns without a license, only later to have those guns found at deadly crime scenes. In St. Paul, for example, a man transferred a gun at least 9 times after buying guns online and then trying to sell those guns on the secondary market. Court records indicated that several of the guns that were sold were part of drug trafficking crimes, and other "shots-fired" incidents.

This case is but one example of individuals buying guns and then illegally selling them to individuals without background checks, and the guns then being found at crime scenes.

a. Will you commit to investigating and prosecuting illegal gun dealers who are selling weapons without conducting a background check? If your answer is yes, please describe in detail your plan for doing so.

RESPONSE: When I served as a United States Attorney, protecting the public from violent gun-related crime was among my top priorities. As I testified before the Committee, I will enforce federal background check laws. Properly enforced, the federal gun laws can reduce crime in our cities and communities. Those who deliberately violate federal gun laws should be investigated and prosecuted. The Congress and government regulations set forth the circumstances and methods by which gun dealers may sell guns. If I am fortunate enough to be confirmed as Attorney General, violators will be prosecuted as appropriate.

43. In 2014, in *Abramski v. United States*, the Supreme Court held in a 5-4 decision that "a person who buys a gun on someone else's behalf while falsely claiming that it is for himself" violates the law prohibiting material false statements on federal gun forms.

This decision is vital to the prosecution of so-called "straw purchasers" who buy guns on behalf of those, such as felons, who cannot pass a background check. The Department of Justice's position in this case was that the buyer's "knowingly false statement that he was the actual purchaser of the handgun" violated the law.

The National Rifle Association's position was that this was "not a permissible construction" of the law.

a. If you are confirmed, will the Justice Department prosecute those who lie on federal firearm sale forms by falsely claiming they are the actual purchasers?

RESPONSE: Properly enforced, the federal gun laws can reduce crime in our cities and communities. Those who deliberately violate federal gun laws should be investigated and prosecuted. I have personally prosecuted and supported prosecutions of those who lie on these

forms. If I am fortunate enough to be confirmed as Attorney General, I will support the continued enforcement of federal gun laws, as appropriate.

b. Will you defend this law, including the Supreme Court's Abramski decision, against a constitutional challenge?

RESPONSE: It is appropriate for the Justice Department to consider the role of precedent whenever advocating before the Supreme Court. In addition, it is important for the Department to consider the facts of an individual case, and also to consider sound jurisprudence when determining the Justice Department's position on a legal issue. If I am fortunate enough to be confirmed as Attorney General, the Justice Department will fairly and thoroughly evaluate these factors in arguments before the Supreme Court.

44. The ATF – the agency that investigates gun crimes – lacks sufficient resources to carry out its statutory responsibilities. You and other Republican colleagues have said that we should focus on fully enforcing existing gun laws before passing new ones.

However, since Fiscal Year 2011 (the first year Republicans were in charge of the House during the Obama Administration), Congress appropriated $182.3 million over five years *less* than the agency said it needed, because of Republican opposition to greater funding.

Since Fiscal Year 2011, ATF has grown by a total of only 10 people or 0.2 percent (from 5,016 employees to 5,026 employees). Over the same period, the number of guns bought and sold in America skyrocketed. The FBI conducted 27 percent more background checks in 2014 than in 2011 (from 16.5 million to 21 million). In addition, I understand that 544 Special Agents (one-fifth of the total ATF Special Agent population) were eligible to retire last year.

The only way to truly enforce existing gun laws is to ensure agencies like ATF have the funding they need to do the job.

a. Would you agree that in order for gun laws to be fully enforced, we need ATF to be fully staffed and ATF investigators to be well-trained and well-equipped? Yes or no.

RESPONSE: Yes.

b. Will you commit, if you are confirmed as the Attorney General, to make sure that the DOJ budget request reflects the resources necessary to ensure that ATF can fully execute the mission given to it by Congress?

RESPONSE: Through my service as a United States Attorney, and as a Senator, I am aware of the difficult choices that the Justice Department has to make during this time of tight budgets. Such awareness should be present in any request for taxpayer funds. I understand the challenges that ATF faces and believe that with proper support and with vigorous prosecutions, ATF can be more productive without large increases in funding. If I am fortunate enough to be confirmed as

Attorney General, I will endeavor to direct and utilize the resources of the Department in the most effective manner possible to ensure the enforcement of federal law.

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

QUESTIONS FROM SENATOR GRAHAM

1. Along with Senator Donnelly, I introduced at the end of last Congress the INVEST to Prevent Crime Act. The Act authorizes for five years a grant program focused on neighborhoods struggling to address persistent crime. Grantees will develop cross-sector partnerships between residents, local law enforcement, a research entity, and community and business partners. The partnerships will plan and implement strategies to address specific drivers of crime in their target neighborhoods. The program builds on DOJ's Byrne Criminal Justice Innovation Program, which has been appropriated between $10.5M and $18M since FY2013, and has shown very promising results in reducing crime rates.

   Do you agree that building structured partnerships between community members and local police agencies could help reduce crime?

RESPONSE: Yes. As I noted in my written testimony, positive relations and great communication between the people and the police are essential for any good police department to be effective in reducing crime. We must re-establish and strengthen the partnership between federal and local officers to enhance a common and unified effort to reverse the current rising crime trends.

Do you plan to continue DOJ's support for grant programs like the Byrne Criminal Justice Innovation Program, which are designed to reduce crime in our country's most challenging neighborhoods while improving community-police relations?

RESPONSE: I believe these programs serve important purposes, particularly given the increase in violent crime across the country and the challenges facing state and local law enforcement and the communities they protect and serve. If I am fortunate enough to be confirmed as Attorney General, I will seek to best use the resources available to the Department of Justice to address violent and other crimes throughout the country, and to partner with state and local law enforcement agencies to help them address these issues. I will make funding decisions only after a careful evaluation of any current practice or program administered by the Department and the effectiveness of those practices to aid in the administration of justice. Resources are limited, however, and it would be unwise to commit to indefinitely providing a particular amount of to a single jurisdiction or for individual purposes without knowing how circumstances might change the needs or priorities in the future.

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

QUESTIONS FROM SENATOR FLAKE

1. Historically, the federal False Claims Act has been used to pursue entities that commit serious fraud against the government. However, under President Obama, the Department of Justice for the first time used the Act to bring claims against lenders for technical violations of Federal Housing Administration (FHA) guidelines. In many cases, these actions were based on finding minor documentation or processing errors that did not cause loan defaults or otherwise impact loan quality or performance. Many lenders have been forced to settle these allegations for billions of dollars to mitigate reputational harm and legal costs. As a result of these risks, many lenders have scaled back or left the FHA program altogether, limiting access to credit for working families that rely on FHA for financing their first home.

    a. Under your leadership, will the Justice Department only pursue False Claims Act cases in which the individual *knowingly* uses a false record or *knowingly* makes a false statement that is material to a false claim?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will faithfully enforce 31 U.S.C. § 3729 and *Universal Health Services, Inc. v. United States ex rel. Escobar,* 136 S. Ct. 1989 (2016), the most recent False Claims Act decision issued by the U.S. Supreme Court implicated by this question.

    b. During your confirmation hearing, Senator Grassley asked that you regularly report to Congress on the status of False Claims Act cases.

        i. Will you commit to reporting on outstanding False Claims Act cases?

REPONSE: If I am confirmed, I will make every effort to respond to all Congressional reporting requirements.

        ii. If so, will you identify in these reports to Congress which False Claims Act cases rely on a false-certification theory?

RESPONSE: If Congress so requires, yes.

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

QUESTIONS FROM SENATOR TILLIS

1. At your hearing, I mentioned a report published in December of 2014 by the Government Accountability Office entitled, "Department of Justice Could Strengthen Procedures for Disciplining Its Attorneys."[1] This report concluded that the Department of Justice had not appropriately addressed concerns regarding how it implements discipline for attorney professional misconduct. Will you commit to reviewing the report and reevaluating the procedures for addressing attorney professional misconduct?

RESPONSE: Yes.

2. Our immigration system needs reform. One issue that I am particularly concerned with is the backlog in our immigration courts. Under 8 U.S.C. § 1229a (b) (1), Congress gave immigration judges the authority during removal proceedings to sanction by penalty any action or inaction that is in contempt of the judge's orders under regulations prescribed by the Attorney General. To my knowledge, the Attorney General has never promulgated these regulations. As Attorney General, will you evaluate whether giving immigration judges the authority to hold individuals in contempt will help improve efficiency and reduce the backlog in our immigration courts?

RESPONSE: Yes.

[1] http://www.gao.gov/products/GAO-15-156

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

QUESTIONS FROM SENATOR LEAHY

1. At your hearing, I asked you several questions about your opposition to these two bills. With respect to VAWA, you stated "a number of people opposed some of the provisions in that bill." You mentioned specifically the tribal victims provision.

a. Did you also oppose the new protections for LGBT Americans?

RESPONSE: My principal concerns about the 2013 VAWA reauthorization centered on the tribal jurisdiction provision. The 2013 Act also includes a provision that prohibits recipients of federal grants (such as women's domestic-violence shelters) from discriminating on the basis of, among other things, sex, gender identity, and sexual orientation. This provision includes an exception that a grantee may carry out sex segregation or sex-specific programming if it can show that such programming is "necessary to the essential operation of a program," and if it provides comparable services to individuals who cannot be provided with sex-segregated or sex-specific programming. My and other Senators' concerns about this provision centered on the fact that, on its face, its broad prohibition would appear to preclude operation of a women-only (or women and children-only) domestic violence shelter, and the Act's exception to this prohibition appears narrow and is unclear. Although a woman who has been the victim of violence at the hands of a husband or boyfriend may be better served by services that are provided outside the presence of men, it is unclear whether a women's domestic-violence shelter would be able to meet the Act's requirement that it show that providing women-only services is "necessary to the essential operation" of the shelter. I believe that, in some circumstances, it is appropriate for VAWA grant recipients to provide services that are limited to women. To the extent that VAWA 2013's new anti-discrimination provision is construed to, for example, prevent or make it difficult for a women's domestic violence shelter to provide services that it believes should be limited only to women, I continue to have serious reservations about that provision. In the past, I have received strong objections from a respected women and children's shelter on this very issue.

I asked if you would defend the law's constitutionality, and you did not provide a full answer. You said only that you would "if it is reasonably defensible."

b. Do you believe the 2013 Leahy-Crapo VAWA Reauthorization, including its LGBT and tribal victims' provisions, is "reasonably defensible"?

RESPONSE: If I am confirmed as Attorney General, I will enforce all federal laws, including the 2013 reauthorization of VAWA. I understand that a pilot program has been initiated that seeks to conform tribes' exercise of criminal jurisdiction over non-Indians to the requirements of the Sixth Amendment. I will carefully study this program before reaching any final legal conclusions about the VAWA tribal jurisdiction provision.

Sexual assault and other violent crime on Indian reservations are very serious problems—in some places, the problem has reached epidemic proportions. The federal government exercises criminal jurisdiction over many Indian reservations. If I am confirmed as Attorney General, I will be committed to ensuring that federal law-enforcement resources are fully deployed to investigate and prosecute crime on federal reservations, and will request additional resources where existing resources are inadequate. Finally, I would note that on many Indian reservations, state and local authorities exercise criminal jurisdiction. State and local law-enforcement resources greatly exceed those of federal and tribal governments combined. On the exclusively federal reservations where federal law enforcement has proved to be inadequate to reduce high levels of violent crime, Congress may consider allowing state and local authorities to exercise criminal jurisdiction. State and local law enforcement has proven effective on many existing Indian reservations, and the extension of such criminal jurisdiction to both Indians and non-Indians in Indian country does not offend constitutional guarantees.

At your hearing, I asked about your statement that my hate crimes amendment "has been said to cheapen the civil rights movement."

c. What did you mean by that? Do you believe that the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act "cheapen[ed] the civil rights movement"?

RESPONSE: In a statement on the Senate floor on July 20, 2009, I outlined my opposition to the Act. Early in the speech, I stated that "the hate crimes amendment . . . has been said to cheapen the civil rights movement." Those were not *my* words. However, I did note concerns about the variances in approach to the historic civil rights laws and the hate crimes legislation, and went on to outline those concerns. Regardless of my position then, the Act is now federal law and if I am fortunate enough to be confirmed as Attorney General, I will enforce it and all other federal laws.

2. As Attorney General you would be charged with overseeing the Office of Violence Against Women. This Office is a component of the Justice Department, and was developed to reduce violence against women by prosecuting acts of domestic violence, dating violence, sexual assault, and stalking. This office provides 24 separate grant programs that support law enforcement, state and tribal coalitions, non-profit organizations, and institutions of higher education to serve survivors and hold offenders accountable.

Will you commit to preserving these critical grant programs and to ensure they receive the funding they need so that the Office can effectively carry out its mission?

RESPONSE: If I am confirmed, I will ensure that these programs, and the funds made available by Congress, are fully employed in the most effective manner possible in furtherance of their stated missions.

3. The Attorney General has delegated authority to the Executive Office for Immigration Review, which oversees our country's immigration courts and the Board of Immigration

Appeals. In recent years, developments in immigration law have led to a recognition that domestic violence can serve as the basis for an asylum claim. These cases often involve immigrant women who have endured severe abuse at the hands of their partner and would be placed in danger if returned to their home country. But asylum continues to be denied to many of them.

If confirmed as Attorney General, will you commit to protecting victims of domestic violence who fear being returned to their home countries?

RESPONSE: Should I be confirmed as Attorney General, I will faithfully enforce all federal laws, including those regarding domestic violence. It is my understanding is that if an individual receives relief from removal under the laws of the United States, then they will not be removed from the United States.

4. We have heard a lot in the last two months about the President-elect's business and financial holdings, and how he and his family might personally benefit from his decisions as President. This raises extremely troubling issues with respect to conflicts of interest, the STOCK Act, and the Emoluments Clause of the Constitution.

I understand that you plan to divest some of your holdings if you are confirmed to be Attorney General. You also stated in your questionnaire that you have consulted with the Office of Government Ethics and "will follow their guidance" on conflicts of interest.

a. Should the President-elect follow your example and heed the Office of Government Ethics' guidance and divest from assets that might create a conflict of interest?

RESPONSE: I have not studied the issue in this context and am not familiar with the details of the President's business and financial holdings as they relate to these issues. Therefore, I am not in a position to offer even an informal opinion on it. If confirmed as Attorney General, I would provide legal advice on such matters only after examining the relevant facts and circumstances presented, and consulting with the Office of Legal Counsel and any other component of the Department having expertise bearing on such matters.

b. If President-elect Trump does not follow the guidance of the Office of Government Ethics, what steps will you take to ensure that the new administration eliminates its conflicts of interest? Will you recuse yourself from conflicts of interest charges against the President-elect or members of his family?

RESPONSE: If confirmed as Attorney General, I would provide legal advice on such matters only after examining the relevant facts and circumstances presented, and consulting with the Office of Legal Counsel and any other component of the Department having expertise bearing on such matters. I am not aware of a basis to recuse myself from such matters. If a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I

made clear at my confirmation hearing, I will always work within the law and the established procedures of the Department.

In a hearing early last year, Senator Tillis raised a question about the Emoluments Clause, which states that "no person holding any office of profit or trust under [the United States] shall, without the consent of the Congress, accept of any present, emolument, office, or title … from any king, prince, or foreign state." He and Chairman Grassley both followed up with Attorney General Lynch on the issue. The question was whether the receipt of any payment "from a foreign government or an instrumentality of a foreign government" by a spouse of an executive branch officer violated the Constitution. Such questions are even more pressing when it is the constitutional officer himself who is receiving such payments.

c. If the President-elect does not fully divest, does the rent paid by the Industrial and Commercial Bank of China to the President-elect for space at Trump Tower in New York raise concerns vis a vis the Emoluments Clause? The Bank, which is owned by the Chinese government, is according to news reports the largest tenant in Trump Tower.

RESPONSE: The question posited is not one on which I have devoted any study, and the answer would depend on a number of facts and specific circumstances. I am not aware of the details of any of the arrangements in the case of Trump Tower and the lease in question. Therefore, I am not in a position to offer even an informal opinion.

d. If the President-elect does not fully divest, does money paid by the embassies of various foreign governments for the use of event space or lodging at the President-elect's hotel here in Washington raise concerns vis a vis the Emoluments Clause?

RESPONSE: The question posited is not one on which I have devoted any study, and the answer would depend on a number of facts and specific circumstances. Therefore, I am not in a position to offer even an informal opinion on it. If confirmed as Attorney General, I would provide legal advice on such matters only after examining the relevant facts and circumstances presented, and consulting with the Office of Legal Counsel and any other component of the Department having expertise bearing on such matters.

A 2009 Office of Legal Counsel opinion found that the Emoluments Clause "surely" applies to the president. As Justice Alito explained when he served in that office in 1986, the Clause is intended to minimize "the potential for 'corruption and foreign influence.'" It was good to hear you state at your hearing, in response to Senator Blumenthal, that the Clause does apply to the President.

e. What is the Justice Department's role in enforcing the Emoluments Clause?

RESPONSE: If confirmed as Attorney General, I will take all appropriate actions in the course of my duties, including providing legal advice upon request, to ensure that office holders comply with their constitutional obligations. While I am not aware of a federal law that directly charges the Department of Justice with enforcing the Emoluments Clause, the

Department is charged with enforcing conflicts of interest provisions under the U.S. Code, such as those under 18 U.S.C. § 207, and I will enforce the laws that demand my action.

f. Who would have standing to bring a case regarding the Emoluments Clause? Do states have standing to enforce it?

RESPONSE: I am not aware of any cases in which the Foreign Emoluments Clause has presented a justiciable issue, and I am unable to answer that question in the abstract. The Supreme Court has set forth the test for Article III standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and subsequent cases. If I am confirmed as Attorney General, and a case presents itself involving the Emoluments Clause, the Department of Justice would, I believe, apply that test in connection with the facts and circumstances of a particular case.

The President-elect has tried to minimize the potential conflicts of interest presented by his business interests by stating that his children will run the Trump Organization. Yet he has refused to give up his stake in the company, which does business with countless organizations and individuals tied to foreign governments. Ethics experts have declared that these conflicts of interest will not be resolved as long as the President-elect maintains a financial stake in his companies.

g. When the President has a personal financial stake in the policies and trade deals his administration pursues, doesn't that pose a conflict of interest?

RESPONSE: The question posited is not one on which I have devoted any study, and the answer would depend on a number of facts and specific circumstances, which do not exist at this time. Therefore, I am not in a position to offer even an informal opinion on it. If confirmed as Attorney General, I would provide legal advice on such matters only after examining the relevant facts and circumstances presented, and consulting with the Office of Legal Counsel and any other component of the Department having expertise bearing on such matters.

h. If President-elect Trump fails to fully divest, how will the American public know if the President is making a decision to benefit America, or to make himself or his family more money?

RESPONSE: The question posited is not one on which I have devoted any study. Therefore, I am not in a position to offer even an informal opinion on it. However, President Trump has stated that he will comply with his legal ethical obligations, and in fact, that he will take additional steps beyond what may be required under the Constitution.

i. Doesn't the public interest demand full financial disclosure and divestment?

RESPONSE: As required by law, President Trump released a financial disclosure form that is available to the public, which I have not studied. It is also my understanding that President Trump has taken steps to isolate himself from his business interests and to devote

himself fully to the duties of the presidential office.

Even if Mr. Trump fully divests himself from the Trump Organization and his children take full control of it, the problems do not go away. His children have taken an active role in the transition, and anything that benefits them will of course benefit their father.

k. Should President-elect Trump's children participate in government policy discussions or meetings with foreign governments while they are also running or maintaining a stake in the Trump Organization? Does participation by President-elect Trump's children or other family members in his administration raise concerns about possible violations of anti-nepotism laws?

RESPONSE: I have not studied this issue and am unable to provide even an informal legal opinion regarding a hypothetical situation involving the prudence or legality of a family member's participation in discussions or meetings. The answer to that question would depend on a number of facts and specific circumstances, which do not exist at this time.

Last month former House Speaker Newt Gingrich argued that "traditional rules don't work" and that Congress should change existing ethics laws in order to accommodate the incoming President. These laws exist to ensure that public officials are focused on serving the public, and not on enriching themselves.

l. Do you agree with Speaker Gingrich that we should weaken our ethics laws to accommodate the President-elect?

RESPONSE: I am not familiar with Speaker Gingrich's comments or the context in which they were made and am unable to comment on this.

5. While serving as Attorney General of Alabama, you attempted to vacate a consent decree that successfully reformed Alabama's child welfare system, turning it from "dysfunctional" to a national model, according to the New York Times. When you filed your motion to vacate the decree, you alleged that your predecessor and the client agency had colluded and engaged in "fraud upon the court." I am troubled that you made this allegation when the court "found no evidence" that "any party actively misled or deceived the Court." If confirmed as Attorney General, you will be tasked with representing the federal government in court, and you will have to defend not only laws you voted against, but administrative actions taken by prior administrations that you disagree with.

a. Is it common for an attorney to accuse their client of collusion and fraud? Do you believe that such accusations are consistent with an attorney's obligation to provide zealous advocacy on behalf of his or her client?

RESPONSE: As the Attorney General of the State of Alabama, I represented the Executive branch of the State government. However, I had a duty to the people of the State to uphold and defend the State Constitution and the laws of the State. The duties of the Attorney

General require that settlements and decrees are properly entered into and are not violative of law. I would also note that it is common for a successor administration to have a different view from the preceding administration on whether agreements to settle cases should have been made and whether they should be continued.

b. Is it appropriate for an attorney, let alone an Attorney General, to make accusations of fraud in court without evidence to support the claim?

RESPONSE: As the Attorney General of the State of Alabama, I believed then and I believe now that all applications to courts by my office were made on the basis of evidence. A trier of fact or law can, and often does, come to different conclusions based upon the set of facts presented by both sides in a dispute.

Even the judge in this case said, "If the Court were to speculate, it would guess that political gamesmanship played perhaps the biggest role in determining the timing of this challenge. What was convenient and beneficial for one administration has saddled its successor with serious obligations with which it would rather not comply."

c. Given this criticism, what steps will you take, if confirmed, to ensure that you make decisions as Attorney General only on the basis of law rather than your own ideology?

RESPONSE: If I am confirmed, I will enforce the laws as passed by Congress.

6. In the past year, four people, including a newborn baby, have died in the jail run by Milwaukee Sheriff David Clarke, and according to news reports the Department of Justice is considering opening an investigation into that jail. The Sheriff's office issued a statement that essentially says he is counting on you as Attorney General to quash any investigation into the conditions at the jail.

Did you campaign for Mr. Trump with Sheriff Clarke, or have any other interaction with him in the last year? If so, please describe them. If so, will you recuse yourself from any Justice Department investigation of that jail or of Sheriff Clarke?

RESPONSE: Yes, Sheriff Clarke and I crossed paths on the campaign trail from time to time. I have no knowledge of any such investigations. If a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed.

7. Traditionally, the Attorney General and the Department's Office of Legal Policy have had a significant role in the selection of judicial nominees. Unprecedented obstruction in the Senate has resulted in 108 current vacancies, including the vacancy on the Supreme Court to which Merrick Garland was nominated and should have been confirmed last year.

a. What will be your role in the Trump administration with respect to judicial nominations?

RESPONSE: Although I have not discussed this with the President, I expect that, consistent with prior Administrations, the Department of Justice's Office of Legal Policy will provide support to the President in his selection of judicial nominees and will assist in shepherding them through the nomination process.

I am concerned that your record on nominations does not indicate any efforts at diversity. You failed to return the blue slip for Kenneth Simon, and failed to return the blue slip for Judge Kallon, who would have been the first African American judge to fill an Alabama seat on the Eleventh Circuit. Moreover, each of the ten Bush-nominated judges confirmed to seats in Alabama was white. Just three African Americans have ever served on the federal bench in Alabama. Over the past eight years, President Obama has made judicial diversity a priority, and has made significant progress in ensuring the federal bench reflects the Nation it serves.

b. If confirmed, will you and the incoming administration commit to continuing this work, and putting forward nominees who represent a breadth of racial, religious, and professional backgrounds?

RESPONSE: I expect the President to nominate qualified individuals who will apply the laws as written and adhere to the Constitution.

I supported Judge Kallon's nomination to the United States District Court for the Northern District of Alabama in 2009 and worked to assist his confirmation. As you know, Senators exercise a more exacting review for nominees to the circuit courts, which I never had the opportunity to do in this case. I participated in negotiations with Senator Shelby and the White House in an attempt to move a diverse group of nominations for Alabama but those negotiations did not conclude.

As you may recall, ten of President George W. Bush's circuit court nominees were not confirmed and were returned at the end of his Administration. Of note, Judge William Smith was nominated to the First Circuit on December 6, 2007, and was rated "Well Qualified" by the American Bar Association (ABA), but neither Senator Reed nor Senator Whitehouse returned blue slips on his nomination, citing the need to conduct a "through and independent review" of his record and stating: "Before giving someone a lifetime appointment to the federal bench we need to carefully review their record."[1] Previously, Senator Whitehouse had suggested in September 2007 that it was too late in the president's term to consider a nomination to the First Circuit. Also notable is the nomination of Mr. Shalom Stone to the Third Circuit on July 17, 2007. He was rated "Substantial Majority Qualified/Minority Well Qualified" by the ABA, but neither Senator Lautenberg nor Senator Menendez returned blue slips on his nomination. Similarly, U.S. Attorney Rod Rosenstein was nominated to the Fourth Circuit on November 15, 2007, and was rated "Unanimous Well Qualified" by the ABA, but neither Senator Cardin nor Senator Mikulski returned blue slips on his nomination.

[1] John Mulligan and G. Wayne Miller, "Bush selects Smith for U.S. appeals court," *The Providence Journal*, Dec. 7, 2007.

As a Senator and a member of this Committee for 20 years, you are very familiar with the blue slip and the role that home state Senators play in judicial selection. You used the blue slip to block the nominations of Kenneth Simon and Abdul Kallon. But the blue slip also guarantees the constitutional role of advise and consent as a check against presidential power, and ensure that the Senate is not a mere rubber stamp. Chairman Grassley recently reiterated his support for the blue slip and his intent to keep the current policy – that nominees will not move forward without two positive blue slips – in place.

c. If confirmed, will you continue to support this policy, even if it means nominations made by the President-elect do not receive a hearing?

RESPONSE: If confirmed as Attorney General, my role will be different than has been as a U.S. Senator serving on the Judiciary Committee. Decisions on committee and Senate process will be the responsibility of members of the Senate.

During the previous Republican administration, many Senators were concerned that the administration circumvented its traditional role of making recommendations for judgeships and instead effectively outsourced the process to right-wing legal groups.

d. Will you and the incoming administration commit to preserving the rights of home state Senators, and work with all 100 of us to find consensus nominees to serve on our independent judiciary?

RESPONSE: I expect the President to nominate qualified individuals who will apply the laws properly and adhere to the Constitution. I have no reason to expect that the Trump Administration will deviate from precedent set by prior administrations in consulting with home state Senators when selecting judicial nominees.

8. When evaluating President Clinton and President Obama's judicial and executive branch nominees, you often asked questions based on nominees' associations with particular groups and organizations, particularly if nominees had been members of organizations such as the ACLU. For example, when opposing Judge Susan Mollway, you said:

"I know all of us are active in various activities. And I think it is appropriate that we be asked about those activities when we are nominated for a position like this… I am certain that as a board member she did not sign those pleadings, and maybe did not personally conduct in-depth research. In fact, I think she suggested she has not researched each one of these issues. But I think it is appropriate for us to ask about those positions"

You concluded that this organization held views that were "outside the mainstream." You noted that "when asked at our confirmation hearing if there were any policy positions of the Hawaii ACLU that she disagreed with" this nominee did not name any, and you argued this was "a sufficient basis…to have a serious concern" about the nomination.

I have grave concerns regarding organizations with which you have been involved.

In 2014, you accepted the "Daring the Odds" award from the David Horowitz Freedom Center. The Southern Poverty Law Center has repeatedly called David Horowitz an "anti-Muslim extremist" and has an extensive and detailed profile of Mr. Horowitz's racist and repugnant remarks against Muslims, Arabs, and African-Americans.

In your hearing, you stated to Senator Blumenthal with regard to Mr. Horowitz that "I am not aware of everything he has ever said or not." You also defended your association with him by saying "I am not aware of those comments, and I do not believe David Horowitz is a racist or a person that would treat anyone improperly, at least to my knowledge." Now you have had the opportunity to learn more about the extremist remarks Mr. Horowitz has made.

For example, Mr. Horowitz has repeatedly claimed that the United States government has been infiltrated by Muslims. He has referred to Muslims as "Islamic Nazis" who "want to kill Jews, that's their agenda."

a. Do you disavow and condemn that remark?

Mr. Horowitz has said "Obama is an anti-American radical and I'm actually sure he's a Muslim, he certainly isn't a Christian. . . . He's a pretend Christian in the same way he's a pretend American."

b. Do you disavow and condemn that remark?

Mr. Horowitz has even claimed that Muslims have "infiltrated" the Republican Party, and that "Grover Norquist is a Muslim, he is a practicing Muslim."

c. Do you disavow and condemn that remark?

Given statements like those, it's not shocking that Mr. Horowitz was cited in the manifesto written by Norway terrorist Andres Breivik. Mr. Breivik killed 77 people in a 2011 attack that was inspired by his belief that Muslims were taking over Europe.

RESPONSE to (a) – (c): First, I am not a board member or even a member of this organization. The judicial nominees I questioned were active members of the ACLU and some held offices such as chair of a litigation committee. I then respectfully asked the nominee if they shared the ACLU's position, the organization of which they were a member or officer, on issues such as drug legislation, child pornography, and the like. As I recall, I have voted for many nominees who were affiliated with the ACLU. I believe that all of us have a responsibility to work for harmony and not discord. While I do not hold the views that these questions attribute to Mr. Horowitz, I have no knowledge of whether he actually said the remarks or in what context.

d. Other than that award, have you had any involvement with that organization? Has all such involvement been disclosed in your Questionnaire?

RESPONSE: The Annie Taylor "Daring the Odds" award to which this question refers was listed on my original Questionnaire on page 4, fifth from the bottom of the page. My limited involvement with the David Horowitz Freedom Center and Restoration Weekend is disclosed in my Questionnaire. A number of prominent people have received that award or spoken at events sponsored by Mr. Horowitz, including Senators Sam Nunn, Zell Miller, Joe Lieberman, and Lindsay Graham, former Mayor of Washington D.C. Adrian Fenty, women's rights advocate Gloria Allred, civil rights activist and president of Operation Hope, John Bryant, and Governors George W. Bush, George Voinovich, Tim Pawlenty, and Sam Brownback. I have spoken at the Weekend or participated in several panel discussions over the years. I am not aware of any other involvement with the Freedom Center.

In 2015, you received the "Keeper of the Flame" award from the Center for Security Policy. The Center for Security Policy has been strongly criticized by the Anti-Defamation League, and is considered a hate group by the Southern Poverty Law Center.

In 2011, its founder, Frank Gaffney, was banned from the Conservative Political Action Conference (CPAC) because, in the words of one board member, "they didn't want to be associated with a crazy bigot." Among his disgraceful statements, Mr. Gaffney has said that the two Muslims in Congress, Representative Keith Ellison and Andre Carson, have "longstanding Muslim Brotherhood ties."

e. CPAC did not want to be associated with a "crazy bigot," but you accepted an award from him in 2015. Do you condemn Mr. Gaffney's remarks and his insinuation that the two Muslim Congressmen are affiliated with the Muslim Brotherhood?

RESPONSE: I have not and will not associate myself with any racially insensitive or discriminatory remarks made by anyone. I have no knowledge of the information on which CPAC relied in forming their opinion of the gentleman in question.

f. Do you believe it is acceptable for the Attorney General to associate with Mr. Gaffney and his extremist organization?

RESPONSE: No government official should lend the prestige of his or her office to any individual or organization that does not reflect American values.

g. Mr. Gaffney has complained about Somali refugees holding jobs in the meat processing industry, saying "it kind of creeps me out that they are getting jobs in the food supply of the United States." Do you condemn that statement?

h. Mr. Gaffney argued that a Muslim member of Congress should not be allowed to serve on the House Intelligence Committee because of his "extensive personal and political associations with…jihadist infrastructure in America." Do you condemn that remark?

i. Mr. Gaffney has said of President Obama that it is an "increasingly indisputable fact that this president is providing aid and comfort to enemies of the United States. And that is

the definition, as you know, of treason." Do you condemn the offensive allegation that President Obama is a traitor?

RESPONSE to (g) – (i): While I do not hold the views that this question attributes to Mr. Gaffney, I have no knowledge of whether he actually said these remarks or in what context.

j. Other than that award, have you had any involvement with that organization or with Mr. Gaffney? Has all such involvement been disclosed in your Questionnaire?

RESPONSE: My involvement has been disclosed in my Questionnaire to the best of my recollection. In addition, my staff and I conducted a review of my own files, searches of publicly available electronic databases, and consultation with the Senate Library, the Congressional Research Service, and relevant committee libraries and historical offices within the Senate. In an effort to be as responsive as possible, my staff also conducted further review of existing files from the era, including historical archives maintained in electronic research databases such as LexisNexis, WestLaw, and ProQuest, public search engines, and Internet archive services that maintain records of websites that no longer exist. Additionally, as records from my time as United States Attorney and Attorney General of the State of Alabama existed before the proliferation of the Internet and before electronic storage was as readily available as it is today, most of those records do not exist in any electronic databases of which I am aware, and my staff and I consulted with the Alabama Attorney General's Office and with the United States Attorney's Office for the Southern District of Alabama to locate archived files from my time in those offices. All responsive records identified or located as a result of these searches were submitted to the Committee.

President-elect Trump has appointed Michael Flynn to be his National Security Advisor. The National Security Advisor has typically been the President's principal advisor on national security matters, a position that does not require Senate confirmation.

Mr. Flynn serves on the board of advisors for an organization called ACT for America. The Southern Poverty Law Center has called this organization "far and away the largest grassroots anti-Muslim group in America." In August 2016 – less than six months ago – Mr. Flynn spoke at an event for this group. He is on video saying that Islam "is a political ideology. It definitely hides behind this notion of it being a religion." He also added that Islam is "like a malignant cancer."

k. Do you disavow and condemn Mr. Flynn's remarks?

RESPONSE: I have not made such a statement and will not associate myself with any racially or religiously insensitive or discriminatory remarks. I have no knowledge whether the gentleman referred to in this question actually said the remarks that the question attributes to him or in what context.

l. Do you believe that the President's national security advisor should refer to Islam as a "malignant cancer"?

RESPONSE: I have not made such a statement and will not associate myself with any racially or religiously insensitive or discriminatory remarks. I have no knowledge whether the gentleman referred to in this question actually said the remarks that the question attributes to him or in what context.

m. Do you believe the National Security Advisor should be associated with organizations that promote anti-Islamic bigotry and conspiracy theories?

RESPONSE: I have not made such a statement and will not associate myself with any racially or religiously insensitive or discriminatory remarks. I have no knowledge whether the gentleman referred to in this question actually said the remarks that the question attributes to him or in what context.

In the unclassified Intelligence Community Assessment on "Assessing Russian Activities and Intentions in Recent US Elections" released on January 6, 2017, there are seven pages describing the activities of RT America TV. The report notes that the network's "Leadership [is] closely tied to, controlled by Kremlin." Mr. Flynn has given a paid speech to RT, and attended a dinner celebrating the network's anniversary, where he sat at the same table as Vladimir Putin.

n. What legal issues does the relationship between the incoming National Security Advisor and the Russian government raise?

RESPONSE: As with any case, any legal issues raised would depend on the actual facts of any such relationship.

In 2015, you received an award from the Eagle Forum for "Excellence in Leadership." The late founder of that organization has a long history of controversial remarks. That includes advocating for "railroad cars full of illegals going south" and increasing the pay gap between men and women, and arguing that married women by definition cannot be raped by their husbands.

o. Do you agree that there should be "railroad cars full of illegals going south"? Do you condemn that remark?

p. Do you agree that married women by definition cannot be raped by their husbands? Do you condemn that remark?

q. Do you agree that the pay gap between men and women should be increased, rather than diminished?

r. Ms. Schlafly also claimed "it would be useful to reinstate the House Committee on Un-American Activities" to target Muslims. Do you agree with that statement?

RESPONSE to (o) – (r): While I do not hold the views that this question attributes to the deceased woman referred to in this question, I have no knowledge of whether she actually said

these remarks or in what context.

s. Other than that award, have you had any involvement with that organization? Has all such involvement been disclosed in your Questionnaire?

RESPONSE: I have been friends with some of the members of the local organization over the years and I have attended a few events, to my recollection. My involvement has been disclosed in my Questionnaire to the best of my recollection. In addition, my staff and I conducted a review of my own files, searches of publicly available electronic databases, and consultation with the Senate Library, the Congressional Research Service, and relevant committee libraries and historical offices within the Senate. In an effort to be as responsive as possible, my staff also conducted further review of existing files from the era, including historical archives maintained in electronic research databases such as LexisNexis, WestLaw, and ProQuest, public search engines, and Internet archive services that maintain records of websites that no longer exist. Additionally, as records from my time as United States Attorney and Attorney General of the State of Alabama existed before the proliferation of the Internet and before electronic storage was as readily available as it is today, most of those records do not exist in any electronic databases of which I am aware, and my staff and I consulted with the Alabama Attorney General's Office and with the United States Attorney's Office for the Southern District of Alabama to locate archived files from my time in those offices. All responsive records identified or located as a result of these searches were submitted to the Committee.

9. Over the course of the 2016 campaign, you offered extensive criticisms of the power that elites and special interests have in our politics. Even after *Citizens United* unleashed a massive flow of money into our elections, there are still laws that regulate political spending and coordination between campaigns and PACs. Under the leadership of Eric Holder, the Department of Justice in 2015 successfully prosecuted illegal coordination between a campaign and a PAC. This was the first prosecution of its kind. The lead prosecutor on the case stated: "The Department of Justice is fully committed to addressing the threat posed to the integrity of federal primary and general elections by coordinated campaign contributions, and will aggressively pursue coordination offenses at every appropriate opportunity."

If confirmed, you will be joining an administration that has pledged to "drain the swamp" in Washington. In order to ensure that our government is open responsive to its citizens, it is critical that Americans know who is lobbying their representatives. The Lobbying Disclosure Act created a registration requirement for lobbyists which is enforced by the Department of Justice through the U.S. Attorney's Office in Washington, DC. Will you ensure that the Lobbying Disclosure Act and its reporting requirements are fully enforced, and that the President-elect's choice for U.S. Attorney in Washington, DC, makes it a priority?

RESPONSE: If I am fortunate enough to be confirmed, I will enforce the law. U.S. Attorneys are presidentially-appointed subject to confirmation by the Senate and report to the Attorney General. The Attorney General outlines the enforcement priorities for the Department and may set rules for how cases are handled.

10. The President-Elect has proposed that to fight terrorists, the United States should "take out their families." Intentionally killing the family members of a terrorist would violate any number of laws, including the Geneva Conventions as well as U.S. statutes.

If you are confirmed, would you advise the President that targeting and killing family members of terrorists is not a legal option?

> **RESPONSE:** Yes, intentionally targeting and killing family members of terrorists would not be a legal option.

11. Too often, deportation cases are brought against immigrant children who do not have lawyers. Last year, I was appalled when I heard that an immigration judge stated it is possible to teach immigration law to three- and four-year olds. That is outrageous. These vulnerable children have often fled horrific violence in their home countries. Then they are expected to navigate our complex immigration laws on their own, without counsel. That hardly constitutes justice. The least we can do is give these children a fair day in court.

When Senator Coons asked you about this issue, you deflected, saying only that "I do not believe we can afford nor should we undertake to provide free lawyers for everybody that enters the country unlawfully." You added simply that "Congress would need to decide what to do about it." If confirmed as Attorney General, you will have broad discretion over the immigration courts system, including the appointment of immigration judges, and so I am asking about your personal views.

a. Do you believe that unaccompanied minors in immigration court should receive access to counsel? Do you agree that toddlers can learn immigration law sufficiently to understand the consequences they are facing and meet the requirements of due process?

> **RESPONSE:** My understanding is that immigration laws of the United States provide all aliens with the privilege of being represented by the counsel of their choosing in civil immigration proceedings. It is also my understanding that Congress has specified that, while an alien retains such a privilege, any such representation must occur at no expense to the government. The sole exception to this is codified in section 1232(a)(5)(C) of Title 8, which charges the Department of Health and Human Services with ensuring:
>
> > to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A), have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.

b. If confirmed as Attorney General, how will you ensure that these vulnerable children

receive due process?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will faithfully enforce the duly-enacted immigration laws of the United States, which are determined by Congress.

12. The First Amendment and a free and vibrant press are at the heart of our democracy. As the President-elect takes office, conscientious whistleblowers may seek to provide the press with vital information about abuses. Too often, when the government or private litigants are unhappy with leaks, they seek to punish the journalists for doing their job. Given that the incoming White House Press Secretary has demanded a journalist apologize for attempting to ask the President-elect a question, and threatened to have him removed from future press conferences, I am deeply concerned about the incoming administration's commitment to bedrock First Amendment principles.

This Committee twice approved bipartisan federal media shield legislation that would establish a qualified privilege for journalists to protect their sources and the public's right to know. On both occasions, you voted against the shield bill.

a. Will you maintain existing Department regulations restricting subpoenas issued to the news media (28 CFR 50.10)?

RESPONSE: I have not had the occasion to study the outgoing Administration's regulations on this matter. If I am confirmed as Attorney General, I would discuss this matter with the Justice Department's career experts before making any decision to maintain or modify the current regulations. I would note, however, that the existing regulations did not prevent the outgoing Administration from aggressively investigating and prosecuting a larger-than-normal number of leak cases. Leaks of classified information can be damaging to U.S. national security, and can also violate the federally-protected rights of other federal employees—for example, in cases where restricted information from an individual's personnel file is leaked to the press. In some cases, the only way to investigate wrongdoing is by subpoena. Such subpoenas to reporters, however, raise concerns about intimidation or restriction of the press. A free press plays a vital role in ensuring the accountability of powerful institutions in our society. For these reasons, I support Justice Department caution when contemplating the use of a subpoena to obtain material from a journalist.

b. What limits do you believe the First Amendment places on attempts to stifle the free press? What role should the Justice Department play to protect journalists?

RESPONSE: The First Amendment generally proscribes governmental efforts to "stifle" a free press. In addition to being careful with the use of subpoenas against journalists, I believe that the Justice Department protects journalists by enforcing the criminal laws when a journalist is the target of threats or extortion.

13. We are grappling with a new wave of drug abuse, this time to powerful prescription opioids

and heroin. Rural states, like my home state of Vermont, have been particularly hard-hit. You have said that "The best way for us to improve our pressure from the law enforcement end on drug trafficking in America is to increase prosecutions and investigations." Enforcement will always play a role, and the Justice Department's Drug Enforcement Administration plays a critical role in preventing the diversion and over-prescription of opioid painkillers. But at the root of every drug crisis is addiction. And we cannot arrest our way out of this problem. One important lesson from the failed war on drugs is that supply will relentlessly chase demand fueled by addiction – regardless of the penalties. We must confront addiction like we do any other public health crisis: through evidence-based prevention, treatment, and recovery efforts.

a. If you are confirmed, what will your strategy be to confront addiction to prescription painkillers?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will work with law enforcement partners to enforce the law, reduce the availability of illicit drugs that cause addiction, and support treatment and recovery efforts to help addicted individuals overcome their addiction. The *New England Journal of Medicine* has reported that the heroin surge is a result of more availability, higher purity and lower price. Enforcement impacts these factors.

b. The Justice Department currently supports numerous diversion programs to keep certain offenders with addiction issues out of the criminal justice system, and naloxone programs to save addicts' lives. Would you continue both the diversion programs and the naloxone programs?

RESPONSE: Many diversion programs, such as drug courts, have proven to be effective solutions for some offenders. I have been a strong supporter of drug courts. Naloxone, likewise, has shown promise as a way to help save lives of some individuals who have overdosed on heroin and other opioids. If I am fortunate enough to be confirmed as Attorney General, I will support efforts to provide appropriate opportunities and support to drug users looking to turn their lives around, as well as efforts to ensure first responders are able to assist in saving lives destroyed by addiction. To date, treatment has not proven universally successful. Prevention of use and addiction is critical, also.

14. John Yoo's 2002 OLC memo justifying torture stated that: "Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief in the President."

a. You voted against both of Senator McCain's amendments to ban torture and other cruel treatment by U.S. officials, first in 2005 and again last year. Do you agree with John Yoo that congressional regulation of torture is unconstitutional?

b. Will you commit that you will not reinstate that OLC opinion, or any of the other OLC opinions justifying torture that were later rescinded?

RESPONSE to (a) – (b): Federal law is clear that it is unlawful for either the military or our

intelligence agencies to subject detainees to cruel, inhuman, or degrading treatment, and that it is illegal to use interrogation techniques that are not prescribed by the Army Field Manual. I believe that this statute is constitutional, and thus do not anticipate issuing any opinion that does not require compliance with this statute.

c. Is John Yoo participating in any capacity on the new administration's transition team? What role is he playing? Have you been in contact with him in the last year?

RESPONSE: I have not been in contact with Mr. Yoo within the last year, and do not know of any work that he has done for the transition team.

During the Bush Administration, John Yoo and Jay Bybee wrote OLC opinions stating that the President has the power, as Commander-in-Chief, to violate acts of Congress – both the criminal prohibition on torture, and the Foreign Intelligence Surveillance Act. That dangerous theory has been largely repudiated. Many of the memos they drafted or signed have been rescinded.

d. Do you believe that the President has the authority under any circumstances to exercise a "commander-in-chief override" to violate acts of Congress?

RESPONSE: The President does have some constitutionally assigned powers that cannot constitutionally be rescinded by Congress. I have no reason to believe that the existing law referred to above contravenes these constitutional limits.

15. The Department of Justice is responsible for enforcing the National Voter Registration Act (NVRA), which sets forth certain voter registration requirements in connection with federal elections, including at Department of Motor Vehicle offices (the "motor-voter" registration process). The Tenth Circuit Court of Appeals recently held that a Kansas law requiring that voter registration applicants provide documentary proof of citizenship would cause a "mass denial of a fundamental constitutional right," and enjoined the Kansas law from being enforced because it conflicts with the NVRA's federal voter registration form. As a result, the Court held that the Kansas law was preempted by the NVRA and could not be enforced with respect to motor-voter applicants. Alabama has a similar law, but the secretary of state has not enforced it. If confirmed as Attorney General, you would be responsible for making decisions regarding enforcement of the NVRA and to following court decisions on the NVRA.

If confirmed, will your Justice Department take positions that are contrary to the Tenth Circuit's ruling on the NVRA by asserting that a state may require Americans to submit proof of citizenship papers to register to vote at a DMV office?

RESPONSE: I believe the case referred to in the above question is *Fish v. Kobach,* 840 F.3d 710 (10th Cir. 2016). As the timeline for U.S. Supreme Court review has not yet terminated, and because the Department of Justice may wish to enter an appearance in the case if U.S. Supreme Court review is sought or granted, it would be inappropriate for me to comment on future plans with respect to enforcement of the panel decision at this time. If I am confirmed, I will carefully and objectively evaluate the facts and circumstances of each case

and endeavor to uphold and defend the Constitution in the pursuit of justice.

16. American consumers and employees are increasingly waiving their legal rights by agreeing to forced arbitration clauses. These are often slipped into a contract and written in legal jargon. Through hearings in this Committee and other efforts, we have learned that the arbitration process has none of the safeguards of our court system. There is no rule of law or precedent. No transparency. No way to appeal an adverse judgment.

The secrecy of the arbitration process allows wrongdoing to go undiscovered and unpunished for years. Recent examples include Wells Fargo's forced arbitration over millions of sham accounts, and Gretchen Carlson's fight against sexual harassment at Fox News.

a. If confirmed, what steps will you take to ensure that the Justice Department pursues and prosecutes companies who try to exploit consumers and employees by hiding behind one-sided arbitration agreements?

RESPONSE: In any contract, the parties must agree to all the terms and clauses included in the contract document. This includes the arbitration clause. This is basic contract law, and the basic premise of the Federal Arbitration Act for over 75 years. If the contract was obtained through exploitation, fraud or coercion, then the consequences of those actions, whether under contract law or the criminal law, will apply. Acceptable arbitration provisions in contracts should be conducted fairly and, in the past, I have offered detailed legislation to ensure fairness.

On January 13, the Supreme Court granted certiorari in three related employment arbitration cases and consolidated them for argument. In one of those cases, *NLRB v. Murphy Oil*, the Justice Department argued in its petition for certiorari that arbitration agreements that bar work-related class actions by employees violate the National Labor Relations Act and are therefore unenforceable.

b. If confirmed, do you commit that you will not change the government's position in this case in any way?

RESPONSE: Because this case involves pending litigation in which the Department is a party, it would be unwise for me to comment further. If I am fortunate enough to be confirmed as Attorney General, I will thoroughly review this case in conjunction with the expert and career attorneys in the Department of Justice to make a decision about how best to proceed.

17. When opposing many of President Obama's nominees, you argued that some were simply too political to be trusted in leadership positions at the Department of Justice. You complained that one nominee "has a record of and a reputation for very strong political activity" and that "I am concerned whether he is capable of putting aside partisan beliefs." You also stated that "The Attorney General is the top law enforcement officer in the country. This is not traditionally a political position. It is a law position." I agree with you on that.

I don't think that there is any doubt you are a conservative Republican politician. You have also been a loyal advocate for Donald Trump over the past year.

If we adopt your standard in opposing Justice Department nominees with "very strong political activity," how can we support your nomination, or those of other potential Trump nominees?

RESPONSE: You and I agree that the key qualifications for someone wishing to occupy the office of the Attorney General is a commitment to the rule of law, independence, and integrity. If confirmed, I will enforce and defend the law and the Constitution, regardless of my own personal and philosophical views.

18. Last August, the Department of Justice announced that the Bureau of Prisons would begin to phase out its use of private prisons. In her memo ordering the phase-out, Deputy Attorney General Yates wrote that private prisons "simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department's Office of Inspector General, they do not maintain the same level of safety and security." I strongly oppose the use of for-profit prison companies for detention purposes and believe this was a positive step toward ending the government's reliance on such facilities.

a. Do you believe that detention should be a for-profit business?

RESPONSE: I believe that detention facilities should be safe, secure, and humane, both for inmates and for correctional staff, regardless of whether the facilities are publicly or privately operated. They should fulfill their role in an efficient and cost-effective manner.

b. In the interests of better serving the goals of the Justice Department and reducing costs to the American taxpayer, will you continue this phase-out of for-profit prisons?

RESPONSE: I am generally aware of concerns regarding Deputy Attorney General Yates' memorandum, and whether its conclusions are fully supported by the evidence. If I am fortunate enough to be confirmed as Attorney General, I will carefully evaluate the relevant evidence and the Department of Justice's policies to ensure that its detention facilities are safe, secure, humane, and represent an effective use of resources.

19. You have been a strong and consistent proponent of the theory that the United States should treat terrorism suspects as so-called "enemy combatants." You have argued that we should subject them to mandatory military custody and interrogation, without access to lawyers, and that we should try them by military commission if at all. You have argued that this should apply even to individuals picked up inside the United States, as this country is included in the "battlefield" in the war with al Qaeda.

a. Do you believe this war framework should apply to American citizens picked up in the United States?

RESPONSE: Under the historic rules of war and U.S. law, the United States may detain an active member of al Qaeda or other enemy combatants for as long as the conflict persists. As you know, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a plurality of the Supreme Court stated that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant." The plurality relied in part on *Ex Parte Quirin*, 317 U.S. 1 (1942), in which the Court held that Congress authorized the military trial of a U.S. citizen who entered the country with orders from the Nazis to blow up domestic war facilities, but was captured before he could execute them. *See also Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005); *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008). Captured citizens who are at war with the U.S., can of course, contest their detention in federal court by writ of *habeas corpus.*

b. Should Timothy McVeigh, who killed 168 people in the Oklahoma City bombing, have been placed in military custody and treated as a wartime enemy?

RESPONSE: I have not studied this case in any depth and would want to consult with legal experts in this field before reaching a definitive opinion on such matters. It does appear that McVeigh's actions, while a heinous act of terrorism, would not have constituted part of a campaign of war against the United States.

c. If we are at war with al Qaeda, and if you believe the battlefield includes the United States, can we also use lethal force against al Qaeda suspects <u>in the United States</u>?

RESPONSE: Law enforcement officers may, even in non-terrorism criminal cases, use lethal force to defend themselves and others. Congress has declared that the U.S. may use lethal force against al Qaeda and associated forces, but great care should be taken before using lethal force in the U.S.

20. In 2000, you described the Individuals with Disabilities Education Act (IDEA) as the "single greatest obstacle our educators face." You then stated it creates "lawsuit after lawsuit, special treatment for certain children." You said it is "a big factor in accelerating the decline in civility and discipline in classrooms all over America."

a. Do you still hold believe that mainstreaming causes a "decline in civility and discipline in classrooms all over America?"

RESPONSE: The phrases cited derive from a speech I gave on the Senate floor during the last reauthorization of the Individuals with Disabilities Education Act. I believe it is important that those phrases be looked at in context, so I have provided the passages from the speech in which those phrases were used.

In addition, I would note that the issues I raised were very real problems that Senators on both sides of the aisle, including Senator Kennedy, understood the importance of addressing, which is why we developed a solution that passed into law with bipartisan support. Indeed, during a July 17, 1997, Judiciary Committee markup on another bill, while debating an amendment, Senator Feinstein offered to clarify the IDEA to ensure that all students who

bring a dangerous weapon to school would be subject to the same discipline, I said:

> "I will really tell you what I think happened from what I understand is that the Disabilities Act made it much more difficult for schools to discipline those who have disabilities. And they felt like they wanted clear language that said if they brought a dangerous weapon to school, they wouldn't have to be subjected to many of the protections that the Disabilities Act provides."

In response to my statement, Senator Feinstein said: "That is absolutely correct. Well said."

My concern was that the legal promises the set forth under the IDEA created confusion, discord, and difficulties for teachers and principals. My legislation, carefully drafted, received strong bipartisan support and improved the IDEA, not harmed it. Any suggestion that I somehow oppose special-needs children receiving the education they deserve is simply false. If I am fortunate enough to be confirmed as Attorney General, I will be committed to ensuring the equal protection of the law for all Americans and the protections inherent therein.

> *Floor Remarks, May 2000:*
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> "Over 25 years ago, for example, we passed a federal disabilities act. It was designed to mandate to school systems and require that they not shut out disabled kids from the classroom and that they be involved in the classroom. If they have a hearing loss, or a sight loss, or if they have difficulty moving around, in a wheelchair, or whatever, the school system must make accommodations for them. They would be mainstreamed. They would not be treated separately.
>
> That was a good goal, a goal from which we should not retreat. I hope no one interprets what I say today as a retreat from that goal. But in the course of that time, we have created a complex system of Federal regulations and laws that have created lawsuit after lawsuit, special treatment for certain children, and that are a big factor in accelerating the decline in civility and discipline in classrooms all over America. I say that very sincerely.
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> It was really brought to my attention a little over a year ago when a long-time friend, District Attorney David Whetstone, in Baldwin County, AL, called me about a youngster in the school system classified as having a disability. It is called "emotional conflict." He was emotionally conflicted. He could not, or would not, behave. An aide would meet him in the morning at his home, get on the bus with him, and go to school, sit through the class all day, and ride home on the school bus with him. This student was known to curse principals and teachers openly in the classroom. Because he was a disabled student, he could not be disciplined in the normal way. The maximum 10-day suspension rule-and 45 days is the maximum a child can be disciplined under this federal law and then they are back in the classroom. One day, he attacked the school bus driver on the way home.

The aide tried to restrain him. He then attacked the aide. District Attorney Whetstone told me, 'I was never more stunned when I talked to school officials and they told me this is common in our county.'

We have children we cannot control because of this federal law. He came to Washington, and we sat up in the gallery and talked about it. I respect David Whetstone and his views. He said this cannot be. I began to ask around, is this true? As a matter of fact, this very incident was focused on in Time magazine. There was a full-page story about it called 'The Meanest Kid in Alabama,' and '60 Minutes' did a story about it because it is, unfortunately, so common around the country.

What can we do about it? I began to ask leaders in education around the State. The State superintendent: 'Absolutely, it is one of the biggest problems we have.' I talked to Paul Hubbard, head of the teachers union in Alabama: 'Absolutely, it is a big problem.' 'I am tired,' he said in the newspaper recently, 'of children cursing my teachers in the classroom and nothing being done about it.'

Then we began to talk to teachers, principals, and school board superintendents. They talked about the lawyers and the complicated regulations with which they deal. It is really unacceptable. Teachers who have been trained with masters' degrees in special education to deal with these children have also overwhelmingly told me this is not a healthy thing, that we are telling special children with physical disabilities, or disabilities as defined by the federal law, that they don't have to adhere to the same standards other children do. Right in the classroom, we create, by federal law, two separate standards for American citizens. You can say to one child: You can't do this, you are out of school. But we can say to another children: You can do it, and you are only out 10 days, or maybe 45 days, and then you are back in the classroom. That is not defensible."

Last year, the Justice Department filed a lawsuit against Georgia alleging that its segregation of students with disabilities violates the Americans with Disabilities Act (ADA). You have previously argued in favor of such segregation and expressed skepticism of mainstreaming. In this lawsuit, the Justice Department noted that some of the facilities used by students with disabilities "are located in poor-quality buildings that formerly served as schools for black students during de jure segregation."

b. If confirmed, will you continue to pursue this case, and bring others where students with disabilities are being segregated from their peers in violation of the ADA?

RESPONSE: Because this case involves pending litigation in which the Department is a party, it would be unwise for me to comment further. If I am fortunate enough to be confirmed as Attorney General, I will thoroughly review this case in conjunction with the expert and career attorneys in the Department of Justice to make a decision about how best to proceed.

Last week the Supreme Court heard oral argument in *Endrew F. v. Douglas County School District*. The Justice Department filed an amicus brief in support of the petitioner, arguing that

the IDEA requires states to provide more than *de minimis* educational benefits and in fact "give eligible children with disabilities an opportunity to make significant educational progress."

c. If you are confirmed, will the Department of Justice maintain its position in this case?
The ADA contains, at 42 U.S.C. § 12202, a waiver of state sovereign immunity. Twice during the Bush administration, in Tennessee v. Lane (2004) and U.S. v. Georgia (2006), the Justice Department argued, and the Supreme Court agreed, that the waiver was a valid exercise of Congressional power under Section V of the Fourteenth Amendment.

RESPONSE: It is my understanding that this case remains as pending litigation in which the Department is a party, and for that reason, I cannot comment further. If I am fortunate enough to be confirmed as Attorney General, I will thoroughly review this case in conjunction with the expert and career attorneys in the Department of Justice and make a decision about how best to proceed.

d. If confirmed, will you commit to defending the constitutionality of this exercise of Congress's Section V power?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will vigorously defend the laws passed by Congress for which a reasonable defense can be made. 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.

The voting rights of Americans with disabilities are protected by the ADA, the Voting Rights Act, and several other statutes. But several studies have found individuals with disabilities face barriers to the franchise that are exacerbated by voter ID requirements.

e. If confirmed, what steps will you take to ensure that the voting rights of Americans with disabilities are protected?

RESPONSE: As you note, the voting rights of Americans with disabilities are protected by federal law, including the ADA and the Voting Rights Act, among others. The Supreme Court held in *Crawford v. Marion County Election Board* that voter identification laws are neither *per se* unconstitutional, nor do the necessarily violate the Voting Rights Act. The analysis of such laws are specific to the particular law, the jurisdiction, and a wide range of factors that Congress has identified as relevant to determining whether a particular voting practice comports with the Voting Rights Act. If I am confirmed as Attorney General, I am committed to enforcing all of the federal laws within the Department's jurisdiction, including investigating alleged violations of the federal voting rights laws in a fair and even-handed manner.

21. You claim to be a champion of the Voting Rights Act because you voted for VRA's reauthorization in 2006. But aside from this single vote, you have consistently criticized the VRA. You have called it an "intrusive piece of legislation" and have questioned its

constitutionality based on your belief that there is "relatively little present-day evidence" of voter discrimination. When the 2013 *Shelby County* decision struck down a central provision of the VRA, you argued that the decision was "good news…for the South" and observed that "Shelby County never had a history of denying the vote."

a. Since the *Shelby County* decision, some individuals have argued that there is no need to restore the protections of Section 5 because the Justice Department can still use Section 2 to bring lawsuits against states and localities that are discriminating against voters. But at the same time, some of these same individuals have argued that Section 2 might also be unconstitutional. Do you believe that Section 2 of the Voting Rights Act is unconstitutional?

RESPONSE: First, the above question does not provide a full accounting of my statement, so I will complete it for the record. Over 30 years ago, I said that the VRA "is an intrusive piece of legislation, but I do not believe—and I have seen, and I am absolutely certain of this, that racial progress could not have been made in the South without the power of the federal courts and the federal Government." When I testified before the Committee, I added that "[t]he Voting Rights Act passed in 1965 was one of the most important Acts to deal with racial difficulties that we face. And it changed the whole course of history, particularly in the South." Second, and to your direct question, the Supreme Court has concluded that Section 2 is constitutional, and if I am so fortunate as to be confirmed, I will enforce this important section and others.

The current Justice Department is involved in several suits against states that have enacted severe voting restrictions that disproportionately harm minority voters. In two of these cases, courts of appeals found that voter ID laws in North Carolina and Texas were discriminatory and violated the VRA.

b. If you are confirmed, will the Justice Department maintain its current position in these cases – especially since federal appeals courts have found these voter ID laws to be discriminatory?

RESPONSE: Because this case involves pending litigation in which the Department is a party, it would be unwise for me to comment further. If I am fortunate enough to be confirmed as Attorney General, I will thoroughly review this case in conjunction with the expert and career attorneys in the Department of Justice to make a decision about how best to proceed.

22. The intelligence community has concluded that Russia intervened in the 2016 election in an effort to help elect Donald Trump. The report is available at https://www.dni.gov/files/documents/ICA_2017_01.pdf. Russian interference in our elections is larger than any candidate or political party. This is about protecting our democracy.

a. Do you accept the conclusion of the intelligence community that Russia was responsible for the hack of the DNC and Hillary Clinton's campaign chair?

RESPONSE: I have not reviewed the report, but I have no reason not to accept the intelligence community's conclusion(s) as contained in the report.

b. Do you accept the conclusion of the intelligence community that Russia provided to Wikileaks the information that it stole?

RESPONSE: I have not reviewed the report, but I have no reason not to accept the intelligence community's conclusion(s) as contained in the report.

c. Do you accept the conclusion of the intelligence community that Russia engaged in these activities in order to interfere with the election in Donald Trump's favor?

RESPONSE: I have not reviewed the report, but I have no reason not to accept the intelligence community's conclusion(s) as contained in the report.

d. Do you consider this to be illegal behavior, and a threat to our democratic process?

RESPONSE: I have not reviewed the matter in any detail; therefore, I am not in a position to opine on it.

e. Several of the President-Elect's nominees or senior advisers have Russian ties. Have you been in contact with anyone connected to any part of the Russian government about the 2016 election, either before or after election day?

RESPONSE: No.

f. Attorney General Lynch has confirmed that career officials are investigating Russian interference in the 2016 elections. If confirmed, will you commit to allowing this investigation to move forward? What will you do if the White House directs you to end the investigation?

RESPONSE: I am unaware of any investigations beyond what is contained in public reporting. As such, I am unable to comment on the status of any such investigations except to say that I believe all investigations by the Department of Justice must be initiated and conducted in a fair, professional, and impartial manner, without regard to politics or outside influence. The Department must follow the facts wherever they lead, and make decisions regarding any potential charges based upon the facts and the law, and consistent with established procedures of the Department. That is what I always did as a United States Attorney, and it is what I will insist upon if I am confirmed as Attorney General.

23. I am greatly concerned about racial disparities within our criminal justice system. In 2010, you agreed to reduce the dramatic disparity between sentences for crack and powder cocaine offenses, but you refused to eliminate the disparity altogether or to allow the changes in the Fair Sentencing Act to be retroactive.

But our justice system is full of disparities. Racial minorities still receive nearly 80 percent of all mandatory minimum sentences for drug offenses. For years I have worked with a bipartisan group of senators on this Committee to reduce mandatory minimum sentences for drug offenses. This bipartisan effort has had the strong support of the Justice Department and many others in law enforcement.

You were the most vocal opponent of those efforts on this Committee. That concerns me.

a. If you are confirmed to be the next Attorney General, what do you plan to do to reduce racial disparities in our criminal justice system?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will faithfully enforce the law equally to all persons and defend the Constitution of the United States. Our laws, including our drug laws, should be enforced as written, with no special or harsher treatment given to anyone on account of their race. That is how I would direct the Department of Justice to proceed. I would note that as a Senator, I offered legislation to reduce mandatory sentences in 2001 for crack cocaine and my legislation was opposed by the Bush Administration.

In 2013, the Justice Department established a policy to reserve the most severe mandatory minimum sentences for high-level or violent drug traffickers. This was after the Sentencing Commission found that nearly half of mandatory minimum sentences in drug cases were imposed on lower-level offenders, not managers and importers. That is not what Congress intended. The often used 10- and 5-year minimums, for example, were intended to capture only serious traffickers – not low-level offenders like couriers.

b. If confirmed as Attorney General, would you leave the 2013 policy in place to focus these mandatory minimum penalties on high-level and violent offenders, consistent with the Justice Department's current policy?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will carefully evaluate any current practices or policies in place by the Department and the effectiveness of those practices to aid in the administration of justice.

24. When you were Attorney General of Alabama, your office was reprimanded for prosecutorial misconduct in a case against a Birmingham-based company called TIECO. The judge in that case found "extensive evidence of serious and wholesale prosecutorial misconduct by the Office of the Attorney General." While you were investigating TIECO, your office seized TIECO's business records, and then made those confidential records available to another company, which then sued TIECO.

Ultimately, the criminal case against TIECO was thrown out because of the prosecutorial misconduct findings against your office. These findings are deeply troubling.

I understand that your deputy Attorney General, Bill Pryor, took over for you, and was heading

up the office when the criminal case against TIECO was dismissed. But the misconduct occurred when the office was under your watch. And Attorney General Pryor did not appeal the dismissal.

a. Why do you think that the office you had led decided against appealing the misconduct order in that case? It was not just a reflection on you, but the entire office. Do you agree that your office mishandled the case?

RESPONSE: First, much of the language and the entire statement of facts in the county judge's order were adopted from Tieco's motion to dismiss. Second, the Alabama Ethics Commission addressed the sharing of investigatory materials with the alleged victims of Tieco's conduct and unanimously exonerated me. Third, the Alabama State Bar received the criminal court's order and a bar complaint filed against me by one of Tieco's lawyers. After reviewing over 20 ethics charges, the State Bar took no action on the complaint. Fourth, the Eleventh Circuit reviewed the county judge's order that had been used to support Tieco's counterclaims for a violation of its constitutional rights and malicious prosecution in a civil case between U.S. Steel and Tieco. The Eleventh Circuit concluded that the criminal court's order was "particularly unreliable and misleading," and that the statement of facts was "self serving," as it was drafted by Tieco's defense counsel. Without the misleading order, the Eleventh Circuit concluded there was "no evidence" that Tieco's constitutional rights were violated and that there was probable cause to support an indictment as a matter of law; thus, Tieco's malicious prosecution claim failed.

After the Attorney General's office dismissed many of the counts of the indictment, the county judge dismissed the remaining counts. It is unclear why my successor decided not to appeal that judge's adoption of Tieco's motion to dismiss, as I am not aware of any statement or press release made about the decision not to appeal. As for whether my office mishandled the case, the decisions of the Ethics Commission, the State Bar, and the Eleventh Circuit in reviewing the conduct underlying the county judge's order speak for themselves.

b. The judge said "[T]he misconduct of the Attorney General in this case far surpasses in both extensiveness and measure the totality of any prosecutorial misconduct ever previously presented to or witnessed by this court." How would you conduct the case differently, if you were able to do it over again?

RESPONSE: The sentence referenced in the above question is taken from Tieco's motion to dismiss, which the state judge made a part of his order, and which the Eleventh Circuit characterized as self-serving, misleading, and unreliable. If I could go back in time and re-do the litigation, I may have realized more quickly that the multi-pronged attack on my office by Tieco might have been partially related to my first run for the Senate. *See* "Democrats Level Guns at Sessions as Senatorial Rhetoric Picks Up," *The Birmingham News*, 4C, April 2, 1996 ("The Democratic Senatorial Campaign Committee is focusing on Sessions because he appears to be the front runner, said committee spokeswoman Kate Jeffrey in Washington. . . . The Democratic committee has touted an ethics complaint filed against Sessions, alleging he has allegedly gave records seized from the Birmingham-based Tieco Inc. to that company's

competitor, USX Corp.").

These findings also suggest a lack of understanding that sensitive documents collected by law enforcement officials must not be handed over to political allies. In the past year, DOJ and FBI have been involved in some very sensitive investigations, with very high stakes and a profound impact on our nation.

c. If confirmed, what steps would you take to guard against prosecutorial misconduct in the Justice Department?

RESPONSE: It is my understanding that the Department currently provides guidance and training opportunities to its attorneys that are aimed at preventing misconduct. If I am fortunate enough to be confirmed as Attorney General, I will carefully evaluate this training and guidance and the effectiveness of it in guarding against prosecutorial misconduct. I will likewise assess the strength of the Department's current procedures for managing complaints of misconduct and handling disciplinary decisions.

I believe it must be the highest priority of the head of a large office to provide strong leadership to ensure problems do not arise in cases and to devise mechanisms to deal with them when they arise. I have had a long career in personally prosecuting complex cases and supervising cases of all kinds. I am very proud of the professionalism and integrity of that work.

25. After the U.S. Supreme Court upheld marriage equality, Alabama Supreme Court Justice Roy Moore effectively ordered the probate judges in Alabama to refuse marriage licenses to gay couples. He was later suspended by the Alabama Court of the Judiciary for "disregard for binding federal law."

a. Do you agree with the Alabama court's decision to suspend Justice Moore for his actions?

RESPONSE: I have had no involvement in or briefings on this matter, as the events unfolded at the state level without input from my office; therefore, I have no opinion as to the appropriateness of what took place.

b. If confirmed, what actions would you take if any official refuses to issue a marriage license to a same-sex couple?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will enforce the law and adhere to Supreme Court precedent. Without having the facts of a specific case before me, it would be difficult to comment on any actions that I might take in order to carry out this duty.

c. When is it appropriate for a judge or other public official to disregard a Supreme Court decision?

RESPONSE: It is never appropriate for a judge or other public official to disregard a Supreme Court decision.

26. Last year, we enacted the most sweeping reforms to the Freedom of Information Act in decades. Our bill codified the "presumption of openness," requiring all administrations to operate with transparency as their default setting. The DOJ Office of Information Policy is responsible for enforcing compliance with FOIA across the federal government. President-elect Trump has a demonstrably poor record on transparency. He has still refused to release his tax returns. He has even denied press credentials to reporters who criticize him.

If confirmed, you will be FOIA's chief enforcer in the federal government. How will you enforce the "presumption of openness" in the face of the President-elect's resistance to transparency?

RESPONSE: The Freedom of Information Act (FOIA) is an important law that has played an integral role in providing the public with the tools necessary to oversee their government. If confirmed, I will ensure that the Department and the Executive Branch appropriately comply with FOIA, as well as work with you and this Committee to make sure that the letter and the spirit of FOIA is carried out.

27. I am very concerned about the abuse of administrative civil asset forfeiture laws, which are not overseen by a judge. As a former prosecutor, I believe that if there is a crime, you prove it. You do not let the suspect go and simply keep their cash because the seizure is protected by a low standard of proof and a labyrinth of administrative hurdles for the property owner. In a column criticizing your support for civil asset forfeiture, conservative columnist George Will compared this to "Alice in Wonderland" where the queen says "Sentence first—verdict afterwards." Chairman Grassley and I have worked on a bill to ensure that this law enforcement tool does not devolve into a mere fundraising tool.

The Justice Department recently took some very modest steps to guard against questionable seizures of cash during road-side stops, and seizures of bank accounts where there is little evidence of a crime. If you are confirmed, will you commit to maintaining these limited protections for innocent property owners?

RESPONSE: Individuals are certainly justified in wanting to ensure that law enforcement is focused on enforcing the law and that corruption is not incentivized. My understanding is that the changes announced by Attorney General Holder at the beginning of 2015, that greatly curtailed the adoption program, were in direct response to these kinds of concerns. If I am confirmed, I will review the Department of Justice's policies to ensure that these changes have adequately addressed any such issues and have not created new issues or complications. The seizure of the proceeds of illegal activity, especially drugs, is an effective way to deter drug dealing, but must be done according to law.

28. In your testimony you said "I deeply understand the history of civil rights in our country" and that "We must continue to move forward and never back." One of the witnesses who testified in

support of your nomination described you as "A son of the South who has had up-close experiences with our great civil rights movement"

a. Please describe your "up-close experiences" with the Civil Rights Movement.

RESPONSE: Most of us who grew up in Alabama during the struggle for civil rights can truthfully say that we had a number of up-close experiences with the movement. I saw and experienced segregation as well as a number of other forms of arbitrary discrimination against African-Americans. In later years, as a federal prosecutor, I had a very up-close experience with the KKK as I oversaw the investigation and prosecution of a Klansman who murdered a young African-American teenager. I experienced the segregated public school system and how separate was absolutely not equal. I have observed employment discrimination. I have seen systematic and sustained actions of white officials to deny voting rights to African-Americans. I am deeply aware of this blatant discrimination and have learned more as civil rights cases were filed to attack these discriminatory actions. The "white power" establishment worked, with only a few exceptions, to resist changes that law, morality, and decency demanded. I saw the resistance, often fierce, and my experience has caused me to more fully understand it than would someone who did not live amongst it. I can see clearly the power of Dr. Martin Luther King, Jr.'s moral leadership and how that peaceful, courageous and relentless campaign achieved historic results and laid the foundation for reconciliation, integration and progress. As an adult, I have shared in many conversations with African-American friends and colleagues who lived through the very real oppression that existed. These unique experiences with the Civil Rights Movement have provided me with insight into the challenges we have overcome and the ones we still face. I probably would not have this same appreciation had I grown up in another part of the country.

That witness also stated, "Senator Sessions is not oblivious to the fact that we have more to do in the area of racial equality."

b. In what areas do racial inequalities persist? What, specifically, are the appropriate remedies for these inequalities?

RESPONSE: Where inequality is found in the enforcement of laws, the Department of Justice and the Civil Rights Division certainly have a clear role to play in remedying disparities. Inequalities that persist outside of the enforcement of laws and their inherent protections, perhaps stemming from bias or divisive rhetoric, present a more difficult question that the citizens of this country must continue to work to correct. By engaging with state and local law enforcement and communities around the country, the Department of Justice undoubtedly has opportunities to contribute to improved race relations. Good law enforcement is essential for the safety of our minority communities but we must work constantly to ensure those communities are part of the solution and see it as fair.

This past weekend, the President-elect tweeted criticisms of Congressman John Lewis. He said: "Congressman John Lewis should spend more time on fixing and helping his district, which is in

horrible shape and falling apart (not to..... mention crime infested) rather than falsely complaining about the election results. All talk, talk, talk - no action or results. Sad!"

c. Do you agree with President-elect Trump that John Lewis is "All talk, talk, talk?"

RESPONSE: Congressman Lewis was a key figure in the civil rights movement and has my utmost respect. Though I am disappointed to learn of his concerns about my nomination, if confirmed, I hope that he will be willing to work with me in the Department's ongoing efforts to protect the civil rights of all Americans. I was proud to co-sponsor with Senator Booker the Congressional Gold Medal for the Selma to Montgomery marchers and to be with Congressman Lewis on that bridge where that historic event occurred 50 years before.

29. While your hearing was happening, Congressman Brooks stated "in a radio interview on Tuesday that criticism of Alabama Sen. Jeff Sessions…is part of an ongoing 'war on whites' by Democrats."

Do you agree that Democrats are waging "war on whites?"

RESPONSE: I did not hear the interview and will not speculate on what Congressman Brooks meant in his statement. I do have concerns about the growing frequency with which those who disagree with a number of conservative policies use that as a basis to loosely accuse conservatives of bigotry and racial animus. I would not label these tactics as a "war on whites," however.

30. According to several news reports, Florida Attorney General Pam Bondi will hold a position in the Trump administration. In 2013, while Bondi's office was considering joining a lawsuit against Trump University for fraud (which was settled two months ago for $25 million), Mr. Trump donated $25,000 to a group supporting Bondi. The donation was made illegally from Mr. Trump's foundation, and he was forced to reimburse the foundation and to pay a penalty to the IRS. One month after the donation was received, Bondi's office decided not to join the lawsuit against Mr. Trump.

Do you believe that the decision not to join the lawsuit against Trump University, following Mr. Trump's illegal donation, raises concerns questions about a quid pro quo?

RESPONSE: I am not aware of facts that would support the assertions made in the above question and an unable to opine on this matter.

31. In 2015, after Chairman Grassley and I wrote several letters expressing concerns about the use of cell-site simulators (sometimes called "Stingrays"), which can sweep up cell signals indiscriminately from cell phones in their vicinity, the Justice Department issued new policy guidance governing their use.

Will you commit to keeping that policy in place?

RESPONSE: While I am generally familiar with this policy, I am not privy to any internal Department of Justice data regarding the effectiveness of the policy in balancing the interests of law enforcement and public safety with protection of civil liberties. If I am fortunate enough to be confirmed as Attorney General, I will carefully review and evaluate this policy, including any relevant data and how circumstances may have changed or how they may change in the future and will be prepared to listen to members of Congress and their concerns.

32. In 2010, the Antitrust Division and the U.S. Department of Agriculture held five joint public workshops to explore competition issues affecting the agricultural sector and the appropriate role for antitrust and regulatory enforcement. Many in agriculture were very frustrated that those workshops, although they highlighted many concerns and antitrust problems in agriculture, did not appear to lead to any new enforcement or stricter actions by the Department of Justice in the agriculture sector.

a. In your opinion, are there areas within the agriculture sector where the Department should take a stronger look at competition affecting agriculture?

RESPONSE: I know that several members of this Committee have particular concern about ensuring competition in the agricultural sector of our economy. If I am confirmed as Attorney General, the Antitrust Division will conduct a thorough evaluation, consistent with federal law, of proposed mergers and acquisitions to determine whether they violate federal antitrust law and policies. I look forward to working with you and this Committee to learn more about these particular issues and to ensure that the Department has the information and tools it needs to carry out its duties in antitrust enforcement, particularly in this vitally important sector of our economy.

b. Do you believe that there are actions that the Department should take regarding consolidation and the conduct of dominant players in the dairy industry? If confirmed, what will you do to address the long-standing concerns to make sure that dairy farmers, small processors, and consumers are treated fairly in the marketplace?

RESPONSE: As I testified before the Committee, I have no hesitation to enforce antitrust law to protect against anti-competitive transactions and behavior. If I am confirmed as Attorney General, the Antitrust Division will look at all markets to ensure compliance with federal antitrust law.

In the last quarter-century, as highlighted in the Judiciary Committee hearing on September 20, 2016, the agricultural industry has consolidated dramatically into what many refer to as the "Big Six" companies that now control the market for seeds and agrochemicals. Due to several mergers proposed last year, the market may soon shift to the "Big Four." Many concerns have been raised in the agriculture industry that this will raise barriers to entry for new innovators and increase the prices that farmers pay.

c. How will the proposed agriculture mergers involving Dow, DuPont, Monsanto, Bayer,

and Syngenta affect small businesses and the prices our farmers pay?

RESPONSE: I cannot at this time comment or commit specifically on any ongoing investigations by the Department, but if I am confirmed as Attorney General, the Antitrust Division will conduct a thorough evaluation, consistent with federal law, of proposed mergers and acquisitions to determine whether they violate federal antitrust law and policies. The agricultural sector of our Nation's economy is of vital importance, and I look forward to working with you and this Committee to learn more about these particular issues and to ensure that the Department has the information and tools it needs to carry out its duties in antitrust enforcement.

d. How should the Justice Department evaluate these proposed agriculture mergers? Do you believe that the effects of these mergers on American farmers and consumers should be reviewed collectively?

RESPONSE: I understand that the Department of Justice is currently reviewing a number of mergers in the agricultural sector of our economy, and I understand your concerns about the cumulative impacts of these transactions. While I cannot at this time comment or commit specifically on any ongoing investigations, if I am confirmed as Attorney General, the Antitrust Division will conduct a thorough evaluation, consistent with federal law, of proposed mergers and acquisitions to determine whether they violate federal antitrust law and policies.

Last year the French-Multinational food-products corporation Danone proposed to acquire White Wave Foods, Inc. ("White Wave"), which many in the organic dairy sector fear could lessen producers' leverage in any contract negotiations on pay price and contractual obligations, effectively creating a monopsony.

e. If confirmed, what will you do to scrutinize this proposed acquisition and ensure that the Department applies conditions to this merger to alleviate the very real monopsony concerns that have been raised?

RESPONSE: I cannot at this time comment or commit specifically on any matter currently being reviewed by the Department, but if I am confirmed as Attorney General, the Antitrust Division will conduct a thorough evaluation, consistent with federal law, of proposed mergers and acquisitions to determine whether they violate federal antitrust law and policies.

According to reports you have accepted contributions from Monsanto and Bayer, two companies with mergers currently being reviewed by the Department of Justice. I have seen reports that President-elect Trump also holds stock in Monsanto.

f. If confirmed, how will you ensure that you and the Department of Justice will remain objective in any review and scrutiny of these mergers? Will you recuse yourself from reviews of mergers involving companies from which you have received campaign contributions?

RESPONSE: I am not aware of a basis to recuse myself from such matters. If a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

g. If confirmed, will you ensure that the President-elect provides solid evidence to substantiate the claims made by his Transition Team that he sold off all of his investments in the stock market last year, to ensure that he does not have a financial interest in the mergers and acquisitions that the Department of Justice reviews?

RESPONSE: If I am confirmed as Attorney General, I will take whatever steps are necessary to ensure that the Department of Justice represents the interests of the American people in the impartial enforcement of the law, including its review of mergers and acquisitions. At this point, and without the resources of the Department of Justice at my disposal, it would be premature to announce specific steps to mitigate a hypothetical conflict of interest.

I am deeply concerned by reports that "Top executives of Bayer AG and Monsanto Co. met with President-elect Donald Trump…to pitch the benefits of their planned deal."

h. If confirmed, what steps will you take to ensure that reviews of proposed mergers are free of political considerations?

RESPONSE: While I am not familiar with the Department's specific procedures for the review of proposed mergers, if I am fortunate enough to be confirmed as Attorney General, I will have no hesitation to enforce antitrust law. I will ensure that proper safeguards are in place and, assuming they are already in place, that they are followed to the letter to guard against political influence in these decisions.

33. If confirmed, you will be the first Attorney General in 12 years to have previously been an elected official, which raises concerns about decisions the Justice Department may make regarding your campaign contributors. The Project on Government Oversight has found that approximately one-third of your top donors have "current, known matters involving the Department of Justice." As others have noted, you were also a strong supporter and surrogate of the President-elect, which raises concerns about how you would handle Department actions against Mr. Trump or businesses to which he is connected. In a November 5, 2016, op-ed, you and several other prominent Trump supporters harshly criticized Attorney General Lynch for not recusing herself from matters involving Hillary Clinton because Lynch had had a "39-minute conversation" with President Bill Clinton.

a. By the recusal standard that you put forth in that op-ed, is it fair to expect you to recuse yourself from any matters regarding Mr. Trump or his finances?

RESPONSE: There are significant differences between the issue discussed in the op-ed

referenced above and the broad hypothetical presented regarding an investigation into the President. Secretary Clinton was under investigation at the time Attorney General Lynch met with President Clinton. If merely being a supporter of the President's during the campaign warranted recusal from involvement in any matter involving him, then most typical presidential appointees would be unable to conduct their duties. I am not aware of a basis to recuse myself from such matters. If a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

b. In cases or investigations involving Mr. Trump or your own campaign contributors, what will your recusal standard be, if not the standard articulated in the op-ed?

RESPONSE: I am not aware of a basis to recuse myself from such matters. If a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

34. At a Senate Judiciary Committee executive business meeting on March 26, 2015, you voted against reporting my Bulletproof Vest Partnership Grant Program Reauthorization Act, which reauthorized a grant program that has helped state and local law enforcement agencies to purchase more than 1.2 million protective vests. This program's reauthorization will ensure that more than 200,000 more officers receive such vests. You also voted against reporting the Rafael Ramos and Wenjian Liu National Blue Alert Act, which created a national alert system for law enforcement officers who are missing, killed, or seriously injured in the line of duty. The bills were reported by voice vote, but you requested to be recorded as a "nay" to both. Despite your opposition in Committee, both bills ultimately passed and are now law. These bills will save officers' lives, and both received enthusiastic support from the law enforcement community.

Why did you vote against my Bulletproof Vest Partnership reauthorization? Why did you vote against Blue Alert?

RESPONSE: With respect to both, my concerns with the legislation were fiscally-related and shared by several of our colleagues on the Judiciary Committee. Since that time, the bills were passed and signed into law by the President. If I am fortunate enough to be confirmed as Attorney General, I will seek to ensure that these programs are properly administered and implemented by the Department in a manner that achieves the stated objective of the law.

35. At your confirmation hearing, in response to a question of mine on whether you would use our limited federal resources to prosecute sick people who followed their state laws with regards to medical marijuana, you said "I won't commit to never enforcing federal law, Senator Leahy, but absolutely it's a problem of resources for the federal government."

a. Does this mean you would consider arresting and prosecuting patients who follow their

state medical marijuana laws?

RESPONSE: As I testified before the Committee, I will not commit to never enforcing Federal law. Whether an arrest and investigation of an individual who may be violating the law is appropriate is a determination made in individual cases based on the sometimes unique circumstances surrounding those cases, as well as the resources available at the time.

Congress, through an appropriations amendment, has decided the federal government should not dismantle state medical marijuana programs. Since 2014, the Justice Department cannot "prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Last August, in *United States v. McIntosh,* the U.S. Court of Appeals for the 9th Circuit held that "at a minimum, [this amendment] prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws."

b. Would this congressional prohibition prevent the DEA from raiding medical marijuana dispensaries that are compliant with state law, or from shutting down banks or other businesses that work with dispensaries?

RESPONSE: The Ninth Circuit case you referenced is relatively recent, and I am not familiar with how other courts may have interpreted the relevant appropriations language or the Ninth Circuit's opinion. As an emerging issue, that is one that will need to be closely evaluated in light of all relevant law and facts. I am fortunate enough to be confirmed as Attorney General, I will conduct such a review. Of course, medical marijuana use is a small part of the growing commercial marijuana industry.

36. Article 36 of the Vienna Convention on Consular Relations (VCCR) requires parties to the treaty, including the United States, to promptly inform, upon arrest, nationals of signatory nations, that they have the right to meet with consular officials. Thousands of Americans are arrested in foreign countries every year, sometimes on questionable charges. The right to visit with U.S. consular officials provides U.S. nationals the ability to communicate with their families, retain competent legal counsel, and receive assistance from the U.S. Government. To help ensure domestic compliance with Article 36, the U.S. Supreme Court adopted an amendment to Rule 5 of the Federal Rules of Criminal Procedure mandating that a judge presiding at the defendant's initial appearance inform "a defendant who is not a United States citizen [that he or she] may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested."

a. Do you agree that this amendment to the Federal Rules of Criminal Procedure is a helpful change that will ensure Article 36 compliance at the Federal level? What other steps would you take to ensure compliance with Article 36?

RESPONSE: The United States is a signatory to the VCCR, and the amendment is helpful in

ensuring that foreign nationals are informed that they may ask for consular notification. The Committee Notes on that particular amendment recognize that certain questions remain unresolved by the courts concerning Article 36. If I am fortunate enough to be confirmed as Attorney General, I will review those unresolved questions and determine whether additional changes or steps are necessary.

There are a number of well documented cases in which the U.S. is not in compliance with our Article 36 obligations, and that noncompliance has strained our relationships with a number of important allies including Great Britain and Mexico. President Bush attempted to remedy one set of cases in 2008 through Executive Memorandum. However, the Supreme Court in *Medellín v. Texas* recognized the obligation but instructed that Congress must pass legislation to provide a remedy in these cases.

b. In order to meet our legal obligations and protect the interests of U.S. national traveling abroad, would you work with the Congress to enact legislation that provides a mechanism to redress failures to provide the legally required VCCR notifications?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I would be glad to work with Congress to ensure that the United States meets its international legal obligations and protects the interests of U.S. citizens.

37. At a hearing before the Senate Select Committee on Intelligence in 2016, the Director of the National Security Agency and Commander of U.S. Cyber Command Admiral Mike Rogers testified that "[e]ncryption is foundational to the future. And anyone who thinks we are just going to walk away from that, I think, is totally unrealistic." Secretary of Defense Ash Carter has similarly stated that "encryption is a necessary part of data security and strong encryption is a good thing. . . . [W]e need our data security and encryption to be as strong as possible."

In addition to Admiral Rogers and Secretary Carter, countless other national security experts have emphasized that strong encryption is vital to our national security and that any attempt to weaken encryption only makes Americans less secure – particularly when the United States and the American people face increased threats of cyberattack from hostile nation-states and cybercriminals.

Do you agree with NSA Director Rogers, Secretary of Defense Carter, and other national security experts that strong encryption helps protect this country from cyberattack and is beneficial to the American peoples' digital security?

RESPONSE: Encryption serves many valuable and important purposes. It is also critical, however, that national security and criminal investigators be able to overcome encryption, under lawful authority, when necessary to the furtherance of national-security and criminal investigations.

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

QUESTIONS FROM SENATOR DURBIN

For any questions with subparts, please respond to each subpart separately.

1. When we met in my office prior to your confirmation hearing, I talked with you about the epidemic of gun violence facing the City of Chicago.

   In September, Mayor Emanuel put forward a public safety plan; I handed you a copy of it at our meeting. The plan calls for hiring nearly a thousand more Chicago police officers and detectives. It calls for more training and equipment, like body-worn cameras and gunshot detection technology. It calls for more mentoring programs for youth. And it calls for policing reforms to rebuild trust and cooperation between the police and the community.

   All of these are areas where the Justice Department can help. The COPS grant program helps put local police departments put more cops on the beat. The Byrne-JAG program helps them buy equipment. The Office of Juvenile Justice and Delinquency Prevention provides mentoring and violence prevention funds. And the Justice Department was invited in by the mayor, the state Attorney General and me to review the Chicago Police Department's policies and practices.

   I believe the Justice Department must sustain and increase its support for Chicago in light of the crisis there. On January 2, President-elect Trump tweeted that Mayor Emanuel should ask for federal help in light of the violence. I was surprised in our meeting when I asked if you would support programs like COPS and Byrne-JAG as Attorney General and you replied "well, I'm going to take what Congress gets me." I then asked if you would include those grant programs in Justice Department budget requests and you said, "well, I'll think about it. I've thought in the past the money is not best spent on COPS." Your comments troubled me, because cutting these programs is the last thing Chicago needs now.

   Now that you have had further time to think about it, please answer the following questions:

   a. Will you commit that, if you are confirmed as Attorney General, you will not seek to cut Justice Department grant funding for the City of Chicago and instead seek increases in that funding to help address the gun violence crisis there?

RESPONSE: I am committed to working with you and Mayor Emanuel on addressing the violent crime problem in Chicago. If I am fortunate enough to be confirmed as Attorney General, I will seek to best use the resources available to the Department of Justice to address violent and other crimes in Chicago and elsewhere throughout the country, and to partner with state and local law enforcement agencies to help them address these issues. Resources are limited, however, and it would be unwise to commit to indefinitely providing a particular amount

of federal resources to a single jurisdiction or for individual purposes without knowing how circumstances might change needs or priorities in the future.

b. Will you commit to provide federal resources and support to improve Chicago's public safety, including helping the City to (1) hire additional officers and detectives through the COPS program; (2) purchase body-worn cameras and other equipment through the Byrne-JAG program and other Office of Justice Programs initiatives; (3) boost mentoring and violence prevention programs through the Office of Juvenile Justice and Delinquency Prevention and other Office of Justice Programs initiatives; and (4) reform its policing practices pursuant to the investigation findings and recommendation made by the Department on January 13? Please respond to each subpart of this questions separately.

RESPONSE: I agree with you that each of the federal resources mentioned in your question are important for improving public safety and I am committed to working with you and Mayor Emanuel on addressing the violent crime problem facing Chicago. If I am fortunate enough to be confirmed as Attorney General, I will seek to best use the resources available to the Department of Justice to address violent and other crimes in Chicago and elsewhere throughout the country, and to partner with state and local law enforcement agencies to help them address these issues. Resources are limited, however, and it would be unwise to commit to indefinitely providing a particular amount of federal resources to a single jurisdiction or for individual purposes without knowing how circumstances might change needs or priorities in the future.

c. Will you commit not to request cuts to the COPS Hiring Program below FY17 levels in the Justice Department's budget requests if you are confirmed as Attorney General?

RESPONSE: I believe the COPS Hiring Program serves an important purpose, particularly given the increase in violent crime across the country and the challenges facing State and local law enforcement and the communities they protect and serve. If I am fortunate enough to be confirmed as Attorney General, I will seek to best use the resources available to the Department of Justice to address violent and other crimes throughout the country, and to partner with State and local law enforcement agencies to help them address these issues. Resources are limited, however, and it would be unwise to commit to indefinitely providing a particular amount of federal resources for certain purposes without knowing how circumstances might change needs or priorities in the future.

d. Will you commit not to request cuts to the Byrne-JAG program below FY17 levels in the Justice Department's budget requests if you are confirmed as Attorney General?

RESPONSE: I believe the COPS Hiring Program serves an important purpose, particularly given the increase in violent crime across the country and the challenges facing State and local law enforcement and the communities they protect and serve. If I am fortunate enough to be confirmed as Attorney General, I will seek to best use the resources available to the Department of Justice to address violent and other throughout the country, and to partner with State and local

law enforcement agencies to help them address these issues. Resources are limited, however, and it would be unwise to commit to indefinitely provide a particular amount of federal resources to a single jurisdiction or for individual purposes without knowing how circumstances might change needs or priorities in the future.

e. Will you commit not to request cuts to the Office of Juvenile Justice and Delinquency Prevention below FY17 levels in the Justice Department's budget requests if you are confirmed as Attorney General?

RESPONSE: I believe the Office of Juvenile Justice and Delinquency Prevention serves an important purpose. If I am fortunate enough to be confirmed as Attorney General, I will seek to best use the resources available to the Department of Justice to address violent and other crimes throughout the country, and to partner with State and local law enforcement agencies to help them address these issues. Resources are limited, however, and it would be unwise to commit to indefinitely provide a particular amount of federal resources to a single jurisdiction or for individual purposes without knowing how circumstances might change needs or priorities in the future.

2. On January 13, the Department of Justice announced the findings of an investigation into the Chicago Police Department (CPD) that had been initiated on December 7, 2015 by the Civil Rights Division and the U.S. Attorney's Office for the Northern District of Illinois. The investigation had been requested by a number of Illinois federal, state and local officials, including myself, Illinois Attorney General Lisa Madigan, and Chicago Mayor Rahm Emanuel, after the release of the videotape of the fatal police shooting of Laquan McDonald. The investigation lasted for 13 months and was conducted with thoroughness and professionalism by career Department employees.

   The Department's findings reveal that the Department found reasonable cause to believe that the CPD has engaged in a pattern or practice of using force, including deadly force, in violation of the Constitution. The Department largely attributes this pattern or practice of unconstitutional force to deficiencies in CPD's training, supervision, accountability, and data collection systems. The findings also reveal that CPD's pattern or practice of unreasonable force falls disproportionately on predominantly minority neighborhoods, and that some CPD officers have engaged in racially discriminatory conduct. The findings are sobering, and they make clear that CPD must undergo significant reforms to restore the trust and confidence of the communities it polices and also to boost the morale of CPD officers who are committed to engaging in effective, ethical and active policing but who feel they are insufficiently trained and supported in that effort.

   On January 13, the City of Chicago and the Justice Department signed an Agreement in Principle in which they commit to negotiate reforms over the coming months to ensure sustainable, constitutional and effective policing in Chicago. The Agreement states:

   > Going forward, the Parties commit to negotiate in good faith to reach a comprehensive settlement in the form of a consent decree to be entered as an order of the U.S. District Court for the Northern District of Illinois. The Settlement Agreement will include

reforms of CPD's use of force practices and accountability mechanisms, as well as its training, community policing, supervision, data collection, transparency, officer wellness systems and promotion practices.

When I met with you prior to your confirmation hearing, I told you about this Justice Department investigation into the CPD and asked you about moving forward with a consent decree upon the issuance of the investigation's findings. You replied that you "don't know anything about" the investigation and that you "would have to study it." At your confirmation hearing, you responded to a question by Senator Hirono by saying "[t]he consent decree itself is not necessarily a bad thing, could be a legitimate decision…I just think that caution is always required in these cases."

It was the assessment of the career Justice Department professionals who conducted the CPD investigation that the CPD must undergo significant reforms to rebuild trust with the communities most challenged by violent crime and that "it is not likely to be successful in doing so without a consent decree with independent monitoring."

a. Will you commit that, if you are confirmed, you will honor the Agreement in Principle that the Justice Department signed on January 13?

RESPONSE: While I have not been privy to the discussions that led to the aforementioned agreement, I believe it is important to partner with law enforcement agencies that require assistance, and the recommendations made by career staff can be useful in attempting to achieve those goals. As I testified before the Committee, I think that there are concerns with the impact of using consent decrees for policy purposes and that caution should be used in these cases. If I am fortunate enough to be confirmed as Attorney General, I will carefully evaluate this agreement and the internal information that led to that agreement, and continue to search for solutions to problems in policing so we can best protect the rights of individuals while also protecting the public from crime. I look forward to working with you, the City of Chicago, and the Chicago Police Department on this important matter.

b. Will you commit that, if you are confirmed, you will work with the City to implement the reform recommendations made by the Department, including through the use of a consent decree?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will carefully evaluate this agreement and the internal information that led to that agreement, and continue to search for solutions to problems in policing so we can best protect the rights of individuals while also protecting the public from crime. I look forward to working with you, the City of Chicago, and the Chicago Police Department on this important matter.

3. I sent a letter on December 13 to Attorney General Lynch inquiring whether there is an ongoing criminal investigation by career Justice Department employees into Russian interference in the 2016 U.S. presidential election. That night Attorney General Lynch stated in a television interview that an investigation is ongoing.

When you and I met prior to your confirmation hearing, I asked if you would continue this investigation if you were confirmed as Attorney General. You responded "If there's a basis to continue it, yes. There may be. But Congress also has investigations ongoing."

I was troubled by your answer. Congress does have a key role to play in investigating Russia's actions and amplifying the Obama Administration's sanctions on Russia. But only the Justice Department has the authority to prosecute the perpetrators. We need an Attorney General who will protect our democratic processes from foreign interference. And that Attorney General may also have to stand up to President-elect Trump, who inexplicably continues to embrace Russian President Vladimir Putin.

a. Have you read the unclassified or classified versions of the January 6 Intelligence Community Assessment "Assessing Russian Activities and Intentions in Recent US Elections"?

RESPONSE: No.

b. Do you believe that this assessment provides the "basis" you said you needed for the Department of Justice to continue a criminal investigation into Russian interference in the 2016 U.S. presidential election?

RESPONSE: See response to 3(a).

c. Will you commit that, if you are confirmed as Attorney General, you will not impede or shut down any FBI or Justice Department investigation into Russian efforts to influence the 2016 U.S. presidential election?

RESPONSE: I am unaware of any investigations beyond what is contained in public reporting. As such, I am unable to comment on the status of any such investigations except to say that I believe all investigations by the Department of Justice must be initiated and conducted in a fair, professional, and impartial manner, without regard to politics or outside influence. The Department must follow the facts wherever they lead, and make decisions regarding any potential charges based upon the facts and the law, and consistent with established procedures of the Department. That is what I always did as a United States Attorney, and it is what I will insist upon if I am confirmed as Attorney General.

d. Will you commit that, if you are confirmed as Attorney General, you will recuse yourself from any ongoing FBI or Justice Department investigation into Russian efforts to influence the 2016 U.S. presidential election?

RESPONSE: I am not aware of a basis to recuse myself from such investigations. However, if a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

e. Will you commit that, if you are confirmed as Attorney General, you will recuse yourself from any investigation into whether President-elect Trump or any of his family, campaign staff, business associates or advisors had any communication with Russian officials or operatives during the 2016 U.S. presidential campaign, or had any connection to, knowledge of, or involvement in Russian efforts to influence the 2016 U.S. presidential election?

RESPONSE: I am not aware of a basis to recuse myself from such investigations. However, if a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

4. In 2008, Donald Trump Jr. said the following about the Trump Organization: "we see a lot of money pouring in from Russia."

a. Do you know how much of the Trump Organization's assets or debts are held or owned by Russian individuals, businesses, and/or government officials?

RESPONSE: No.

b. Do you know how much money Russian individuals, businesses and/or government officials have paid to, invested in, or otherwise "pour[ed] in" the Trump Organization?

RESPONSE: No.

c. If you are confirmed as the chief law enforcement officer of the United States, how will you ensure that the actions of President-elect Trump and his administration are not influenced or impacted by the Trump Organization's financial connections with Russian individuals, businesses, or government officials?

RESPONSE: If I am confirmed as Attorney General, I would faithfully enforce federal laws, including any applicable laws regarding conflicts of interest. I will also instruct the Office of Legal Counsel to provide the President with guidance on identifying and mitigating conflicts of interest.

d. Do you believe the American people would benefit from full transparency of the Trump Organization's assets, debts, and foreign entanglements?

RESPONSE: As required by law, President Trump released a financial disclosure form that is available to the public. I have not studied it. However, it is my understanding that while a tax return shows how much a taxpayer paid in taxes, it does not provide any more information than a financial disclosure about the identity and nature of one's assets.

e. Should such transparency include the public release of President-elect Trump's tax returns for each year in which he has campaigned for or served in the office of President of the United States?

RESPONSE: See response to 4(d).

5. On July 9, 1997, you expressed strong support for robust bipartisan Congressional investigations into whether China attempted to influence the 1996 presidential election. You said on the Senate floor:

> We need a bipartisan effort, similar to those conducted in the past. We need the spirit of Howard Baker in the Watergate hearings who, as a Republican, made sure that he cooperated in that investigation and sought the truth. We need the spirit of Warren Rudman, Republican, who participate in the Irangate matters that were investigated here. He always sought to get to the truth regardless of politics.

a. Do you believe that we need to "get to the truth" about Russian interference in the 2016 U.S. presidential election, "regardless of politics"?

RESPONSE: It is always important to see truth, regardless of politics.

b. If your answer to question 5(a) is yes, how do you believe we should get to this truth?

RESPONSE: In general, the best way to get to truth is in a fair, professional, and impartial manner, without regard to politics or outside influence.

c. If your answer to question 5(a) is no, how do you differentiate allegations of Chinese interference in the 1996 election from allegations of Russian interference in the 2016 election?

RESPONSE: I do not have a basis for comparison, as I am not aware of the details of any investigations beyond what is contained in public reporting. As such, I am unable to comment on the status of any such investigations except to say that I believe all investigations by the Department of Justice must be initiated and conducted in a fair, professional, and impartial manner, without regard to politics or outside influence. The Department must follow the facts wherever they lead, and make decisions regarding any potential charges based upon the facts and the law, and consistent with established procedures of the Department. That is what I always did as a United States Attorney, and it is what I will insist upon if I am confirmed as Attorney General.

d. If you are confirmed as Attorney General, will you support and assist Congressional investigations into Russian interference in the 2016 U.S. presidential election, including by providing information that Members of Congress – Democrats, Republicans and Independents alike - request as part of such investigations?

RESPONSE: I will support all appropriate investigations and respond to appropriate requests.

6. During his confirmation hearing, Congressman Michael Pompeo, the nominee for the Director of the Central Intelligence Agency, was asked by Senate Select Committee on Intelligence (SSCI) Vice Chairman Mark Warner "[d]o you pledge to continue to pursue your own investigation into ongoing Russian active measures and any attempts they or others may have to undermine the United States, our political system, or our position in the world?" Congressman Pompeo answered "Senator, I do."

   Do you pledge to continue to pursue any ongoing investigation by the Justice Department into Russian interference in the 2016 election or any other attempts Russia may have made to undermine the United States, our political system, or our position in the world?

RESPONSE: I am unaware of any investigations beyond what is contained in public reporting. As such, I am unable to comment on the status of any such investigations except to say that I believe all investigations by the Department of Justice must be initiated and conducted in a fair, professional, and impartial manner, without regard to politics or outside influence. The Department must follow the facts wherever they lead, and make decisions regarding any potential charges based upon the facts and the law, and consistent with established procedures of the Department. That is what I always did as a United States Attorney, and it is what I will insist upon if I am confirmed as Attorney General.

7. On September 28, 2016, Director James Comey of the Federal Bureau of Investigation testified before the House Judiciary Committee and was asked about the Department's standard for commenting on whether an investigation is underway. Director Comey stated that "[o]ur standard is we do not confirm or deny the existence of investigations," but he cited examples of "exceptional circumstances" that he said justified commenting on the existence of investigations, including "when there is a need for the public to be reassured" and "where the public needed transparency."

   a. Do you agree with Director Comey that Department of Justice officials are justified in commenting on the existence of investigations in exceptional circumstances, including "when there is a need for the public to be reassured" and "where the public need[s] transparency"?

RESPONSE: I am not familiar with the basis for Director Comey's remarks.

   b. Do you believe that the American people deserve to know whether the Department of Justice is fully investigating the extent of Russian interference in the 2016 U.S. presidential election?

RESPONSE: Decisions regarding informing the public of ongoing Department investigations should comply with the law and departmental procedures.

c. Will you commit to promptly inform the American people about the outcome of the Department of Justice's investigation of Russian interference in the 2016 U.S. presidential election?

RESPONSE: If confirmed, I will follow the law and departmental procedures with regard to informing the public regarding the outcome of Department investigations.

d. Will you commit to promptly inform the American people if the Department of Justice closes, terminates, or declines to further pursue an investigation into Russian interference in the 2016 U.S. presidential election?

RESPONSE: If confirmed, I will follow the law and departmental procedures with regard to informing the public regarding the outcome of Department investigations.

8. During his confirmation hearing, General John Kelly, the nominee for Secretary of Homeland Security, was asked if he accepted the conclusions of the intelligence community regarding Russian interference in our election. He answered "yes, with high confidence."

Do you agree with General Kelly's answer?

RESPONSE: I have no reason to disagree with him.

9. The Foreign Emoluments Clause in Art. I, Section 9, Clause 8 of the Constitution states that "No Title of Nobility shall be granted by the United States; and no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

The Foreign Emoluments Clause reflects a fundamental priority of the Founding Fathers as they designed our form of government. They were worried about foreign powers attempting to influence and corrupt the leadership of our nation, so the Constitution included safeguards against pressure from such powers, particularly the Foreign Emoluments Clause, which was adopted unanimously at the Constitutional Convention. As Delegate Edmund Randolph of the Continental Congress said during the ratification debates in Virginia, "[i]t was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states."

a. Do you believe that all current provisions of the Constitution must be followed and enforced, including the Foreign Emoluments Clause?

RESPONSE: Yes.

b. If you are confirmed as Attorney General, what steps will you take to ensure that the Foreign Emoluments Clause is followed and enforced?

RESPONSE: If confirmed as Attorney General, I will take all appropriate actions in the course of my duties, including providing legal advice upon request, to ensure that office holders comply with their constitutional obligations.

c. President-elect Trump says that he is taking steps to avoid unconstitutional emoluments. But without seeing his federal tax returns and having full transparency of his and his family's business holdings and debts, how can the American people be confident that all potential emoluments have been eliminated and will continue to be avoided throughout his Presidency?

RESPONSE: As you noted, President Trump has stated that he will comply with his obligations under the Foreign Emoluments Clause, and in fact, will take additional steps beyond what may be required under the Constitution.

d. President-elect Trump has said he will donate to the U.S. Treasury profits from foreign government payments made to his hotels. Do you believe that the subsequent donation of payments can cure a violation of the Foreign Emoluments Clause, which provides that no officeholder may "accept" such payment? If so, why?

RESPONSE: The question posited is not one on which I have devoted any study, and would depend on a number of facts and specific circumstances, which do not exist at this time. Therefore, I am not in a position to offer even an informal opinion on it. If I am fortunate enough to be confirmed as Attorney General, I would provide legal advice on such matters only after examining the relevant facts and circumstances presented, and consulting with the Office of Legal Counsel and any other component of the Department having expertise bearing on such matters.

e. If the Office of Legal Counsel is asked to assess the legality of any receipt of emoluments by President Trump, would you recuse yourself from reviewing or influencing the Office's decision? If not, why not?

RESPONSE: I am not aware of a basis to recuse myself from such matters. If a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

f. On what basis will you decide when to personally recuse yourself from involvement in a case, investigation or other matter involving the financial interests of President-elect Trump or his family?

RESPONSE: I am not aware of a basis to recuse myself from such matters. If a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at

my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

g. If you recuse yourself from involvement in a case, investigation, or other matter involving the financial interests of President-elect Trump or his family, will you commit to having the matter handled by career Justice Department officials instead of political appointees? If not, why not?

RESPONSE: I am not aware of a basis to recuse myself from such matters. If a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

10. If we are serious about reducing the number of shootings in Chicago, we cannot ignore the pipeline of illicitly-trafficked guns from Indiana into Chicago. As Lake County Indiana Sheriff John Buncich said last year, hundreds of guns from Lake County show up in Chicago crimes every year, and "individuals are skirting federal law, especially at these gun shows…there's a lot of illegal gun sales."

a. Will you commit that, if you are confirmed, you will work with officials in Indiana on reforms that will reduce the illicit trafficking of guns from Indiana gun shows to the streets of Chicago?

RESPONSE: If I am confirmed, I will make enforcement of federal gun crimes a top priority and aggressively engage with state and local law enforcement partners to achieve consistent policies for the apprehension of those violating federal gun laws. Properly enforced, federal gun laws can reduce crime in our cities and communities.

b. Will you commit that, if you are confirmed, you will make it a priority of the Department of Justice to investigate and prosecute those who are selling guns that supply Chicago's criminal gun market?

RESPONSE: If I am confirmed, I will make enforcement of federal gun crimes a top priority and aggressively engage with state and local law enforcement partners to achieve consistent policies for the apprehension of those violating federal gun laws. Properly enforced, federal gun laws can reduce crime in our cities and communities.

c. If you are confirmed, what steps will you take to ensure that cases involving straw purchasing, gun trafficking, and dealing in firearms without a license are prosecuted? Will the Department of Justice's budget requests support additional resources, specifically for ATF, to enforce these laws?

RESPONSE: If I am confirmed, I will make reduction of illegal interstate trafficking of firearms a priority. I will work with Congress to ensure that the ATF has the resources necessary to fairly and efficiently investigate criminal activity. I understand the challenges ATF faces and believe

with proper support and with vigorous prosecutions, ATF will be more productive without large increases in funding.

11. Two critically important law enforcement tools for fighting violent crime are crime gun tracing and ballistics matching. Local police departments and sheriff's offices can use ATF's online eTrace tool to trace guns recovered in crime in order to generate leads in criminal investigations and to identify those who illegally traffic in guns. And ATF's National Integrated Ballistic Information Network (NIBIN) lets local law enforcement take digital computer images of ammunition casing evidence recovered at crime scenes and match them to particular guns. This helps law enforcement identify trigger-pullers and helps discover links between gun crimes.

    I have made it a priority to encourage every local law enforcement agency in Illinois to trace all of their crime guns through eTrace and to use NIBIN for all recovered ammunition casings. I have reached out to hundreds of police chiefs and sheriffs in my state about these tools, and 476 Illinois law enforcement agencies now use eTrace and 260 use NIBIN. These tools help solve crimes.

    If confirmed as Attorney General, would you take steps to urge all state and local law enforcement agencies to use eTrace and NIBIN for all guns and ammunition casings recovered in crimes?

RESPONSE: I have always believed that forensic analysis, and particularly firearms analysis, is key in reducing gun crime. If I am confirmed, I look forward to working with you with respect to eTrace and NIBIN.

12. You have repeatedly emphasized the importance of enforcing the gun laws on the books. FBI NICS background checks on prospective gun purchasers are one of the most important mechanisms we have to enforce the laws that prohibit felons, the mentally unstable, and other prohibited purchasers from obtaining guns.

    a. **Will you commit that, if you are confirmed, you will work to ensure that the records in the NICS background check system are as complete and up-to-date as possible?**

RESPONSE: Yes.

    b. **Will you commit that, if you are confirmed, the Department of Justice will not submit budget requests that seek to reduce the amount of FBI resources and the number of FBI personnel dedicated to operating the NICS system below FY17 levels?**

RESPONSE: Through my service as a United States Attorney, and as a Senator, I am aware of the difficult choices that the Justice Department has to make during times of fiscal uncertainty. If I am fortunate enough to be confirmed as Attorney General, I will strive to ensure that the Department maintains the resources necessary to accomplish its mission, and that those resources are utilized in the most efficient and effective manner possible.

c. Will you commit that, if you are confirmed, the FBI will respect and enforce current federal and state laws regarding NICS background checks, including by assisting each state to conduct checks on gun sales in that state?

RESPONSE: Yes.

d. Will you commit that, if you are confirmed, the FBI will continue to run NICS background checks on private sales in any state when the private seller voluntarily goes to a federally-licensed dealer to conduct a background check on the buyer?

RESPONSE: Yes.

13. On May 6, 1998, you spoke at length on the Senate floor about federal conflict of interest laws. You described the "fundamental principle that a man or woman can only serve one master, not two, and should not be holding public office with a clear conflict of interest."

You continued:

> We have crafted over the years a series of laws that are designed in such a way that those laws protect the public from conflicts of interest and other types of unhealthy relationships that would put that person in office in a position in which his total fidelity is to anything other than the government which he represents. That is what we are looking for. Somewhere in the Book of Ecclesiastes the preacher said "A bribe corrupts the mind." A conflict of interest corrupts the mind. The person is torn. You cannot serve two masters. You can only serve one master.

You also said in a press release that day that "Laws should apply equally to all people."

a. Do you believe that President-elect Trump has rid himself of his conflicts of interest such that his "total fidelity" is now only to the government which he represents?

RESPONSE: While I have not studied this matter, it is my understanding that President Trump has taken steps to isolate himself from his business interests and to devote himself fully to the duties of the presidential office.

b. How can the American people verify that President-elect Trump's "total fidelity" is only to the government which he represents if he does not release his annual tax returns?

RESPONSE: As required by law, President Trump released a financial disclosure form that is available to the public. I have not studied it. However, it is my understanding that while a tax return shows how much a taxpayer paid in taxes, it does not provide any more information than a financial disclosure about the identity and nature of one's assets.

14. In an interview on November 23, President-elect Trump said "the president can't have a conflict of interest.

    In your view, is this an accurate statement?

RESPONSE: I have not discussed this matter with the President and therefore do not know what he meant by that statement.

15. In your May 6, 1998 Senate floor speech on conflicts of interest you said "U.S. attorneys are prosecuting people who do these kinds of things with these kinds of conflicts. To pass a law to say everybody else has to adhere to them except for one individual because he or she is special is a big mistake."

    Do you think it is a "big mistake" to have federal criminal conflict of interest laws that do not apply to the President?

RESPONSE: I have not had a chance to study this issue in any detail. It is my understanding that in recent history, Presidents have followed the conflicts statute as though it applied to them, but the Department of Justice has explained that applying conflicts laws to the President would either disable him from performing one or more of his constitutional duties or augment the Constitution's qualifications for becoming President because, in general, conflicts laws force either recusal or divestiture. The Constitution precludes both.

16. On January 5, *The Wall Street Journal* published a story entitled "Trump's Debts are Widely Held on Wall Street, Creating New Potential Conflicts." The story noted that President-elect Trump said in his financial disclosure form that his businesses owe at least $315 million to ten companies. But *The Wall Street Journal* analyzed these debts and found that they had been securitized and are now held by more than 150 companies. Also, Mr. Trump did not list in his disclosure form his debts for partnerships that he does not fully control. *The Journal* was able to identify at least $1.5 billion in such debts, including loans that Mr. Trump personally guaranteed.

    The potential for conflicts of interest here is staggering. For example, as *The Journal* noted, "Deutsche Bank, which is under investigation by the U.S. Justice Department over its equity trades for wealthy clients in Russia, is the single biggest lender to properties controlled by Mr. Trump."

    In addition, *The Journal* found that "If the Trump businesses were to default on their debts, the giant financial institutions that serve as so-called special servicers of these loan pools would have the power to foreclose on some of Mr. Trump's marquee properties or seek the tens of millions that Mr. Trump personally guaranteed on the loans." One of the main servicers of Mr. Trump's debt is Wells Fargo, which was recently penalized by the Consumer Financial Protection Bureau for creating sham consumer accounts.

    As *The Journal* concluded, a broad array of financial institutions "now are in a potentially powerful position over the incoming president."

a. Do you agree with this conclusion?

RESPONSE: I have not had a chance to study this issue, and I am not privy to the details of the Department's settlement with Deutsche Bank, nor am I familiar with the President's interests as they relate to Deutsche Bank. Without all the facts and without the resources of the Department of Justice at my disposal, it would be premature for me to provide a legal opinion on the matter.

b. What would be your plan, if you are confirmed, to ensure that President Trump and his family are not susceptible to pressure from the financial institutions that hold their and their businesses' debt?

RESPONSE: If I am confirmed, I will take whatever steps are necessary to ensure that the Department of Justice represents the interests of the American people in the impartial enforcement of the law. I am not privy to the details of the President's or his family's interests as they relate to any financial institutions. Therefore, it would be premature to announce how the Department might proceed in mitigating a hypothetical conflict of interest.

17. There is an important program in the Justice Department's Office of Justice Programs called the John R. Justice Program. Named after the late former president of the National District Attorneys Association, the John R. Justice Program provides student loan repayment assistance to state and local prosecutors and public defenders across the nation. Congress created this program in 2008 and modeled it after a student loan program that DOJ runs for its own attorneys. The John R. Justice program helps state and local prosecutors and defenders pay down their student loans in exchange for a three-year commitment to their job. This is a very effective recruitment and retention tool for prosecutor and defender offices. And since DOJ is giving hundreds of millions of dollars in grants each year to state and local law enforcement, which generates more arrests and more criminal cases, it is critical that we help prosecutor and defender offices keep experienced attorneys on staff to handle these cases.

    The John R. Justice Program has helped thousands of prosecutors and defenders across the country. But for the program to remain successful, the Department of Justice must remain committed to funding this program and to carefully administering it.

    Will you commit to keep this program operating during your tenure if you are confirmed?

RESPONSE: While I am not familiar with the specifics of the current funding levels associated with the John R. Justice Program, if confirmed, I will make funding decisions only after a careful evaluation of any current practice or program administered by the Department and the effectiveness of those practices to aid in the administration of justice. I will endeavor to direct and utilize the resources of the Department in the most effective manner possible to ensure the enforcement of federal law and the protections they provide.

18. You have said that marijuana should not be legalized and that "good people don't smoke marijuana."

Would you oppose the nomination of a person to a position in the Justice Department or a federal judgeship if you found out that the person had used marijuana in his or her life?

RESPONSE: My words have been grossly mischaracterized and taken out of context. As can be seen from the full quote, which I have provided below, I was discussing the value of treating people for using dangerous and illegal drugs like marijuana, and the context in which treatment is successful. As I have done in the Senate, if I were fortunate enough to be confirmed as Attorney General, I would look closely at potential nominees to evaluate their character and fitness for the position.

Senate Caucus on International Narcotics Control, April 2016:

"I'll just comment, because I was talking to somebody that's experienced in this, recently; it was the prevention movement that really was so positive. And it led to this decline, to the creating of knowledge that this drug is dangerous, you cannot play with it, it's just not funny it is not something to laugh about, and trying to send that message with clarity that good people don't smoke marijuana. And the result of that is, to give that away and make it socially acceptable, creates the demand—the increased demand that results in people being addicted or impacted adversely. I just hope that we can get our thoughts together on it. I believe the Department of Justice needs to be clearer, I believe the President really needs to reassert some leadership on this; I think it's really serious."

19. Although the population of Alabama is more than one quarter African American, there has never been an African-American judge from Alabama on the federal appeals court. Last February, President Obama sought to fill an 11th Circuit vacancy by nominating Abdul Kallon, a highly-regarded African-American judge from Alabama whose district court nomination you supported in 2009. However, you did not submit your blue slip for Judge Kallon's nomination to the 11th Circuit, meaning this Committee could not move forward with a hearing.

a. Why did you not submit your blue slip?

RESPONSE: As Senator Shelby and I expressed in our statement when Judge Kallon was nominated, we had negotiated in good faith for several months with the White House to fill judicial vacancies. We believed progress had been made, but as it turned out, the White House was not interested in good faith negotiations. The White House announced Judge Kallon's nomination outside of those negotiations and at a very late date. Accordingly, we exercised our Senatorial prerogative not to return the blue slips.

b. In your view, is Judge Kallon qualified to serve on the 11th Circuit?

RESPONSE: I supported Judge Kallon's nomination to the United States District Court for the Northern District of Alabama in 2009. As you know, Senators exercise a more exacting review for nominees to the circuit courts, which I never had the opportunity to do in this case. As you may recall, ten of President George W. Bush's circuit court nominees were not confirmed and were returned at the end of his Administration. Of note, Judge William Smith was nominated to the First Circuit on December 6, 2007, and was rated "Well Qualified" by the American Bar Association (ABA), but neither Senator Reed nor Senator Whitehouse returned blue slips on his nomination citing the need to conduct a "through and independent review" of his record and stating: "Before giving someone a lifetime appointment to the federal bench we need to carefully review their record."[1] Previously, Senator Whitehouse had suggested in September 2007 that it was too late in the president's term to consider a nomination to the First Circuit. Also notable is the nomination of Mr. Shalom Stone to the Third Circuit on July 17, 2007. He was rated "Substantial Majority Qualified/Minority Well Qualified" by the ABA, but neither Senator Lautenberg nor Senator Menendez returned blue slips on his nomination. Similarly, U.S. Attorney Rod Rosenstein was nominated to the Fourth Circuit on November 15, 2007, and was rated "Unanimous Well Qualified" by the ABA, but neither Senator Cardin nor Senator Mikulski returned blue slips on his nomination.

20. On January 23, 2009, you issued a press release announcing your opposition to President Obama's nomination of Timothy Geithner for Treasury Secretary. You said:

> I have decided to vote against Mr. Geithner's nomination because his failure to properly pay his taxes on multiple occasions was, in my view, likely a deliberate attempt to avoid his tax obligations. Failure to pay taxes would disqualify any IRS agent from further employment, so it should also disqualify Mr. Geithner from being confirmed Secretary of the Treasury, a cabinet position that oversees the IRS and prosecutions for tax evasion.

You went on to say:

> The American people have made clear that they want accountability and responsibility restored to Washington. Ignoring Mr. Geithner's failure to pay his taxes and elevating him to Secretary—where he will supervise agents and other officials who would be subject to termination for a similar breach of trust—is not a good way to meet the public's expectations.

Are you confident that President-elect Trump has properly paid all his taxes? Please explain the basis for your response.

RESPONSE: President Trump is the duly-elected President of the United States. The American people have decided he is both qualified and the best person for the job of leading this country. I have no knowledge regarding the President's taxes that would cause me to doubt what he has publicly stated regarding that issue.

[1] John Mulligan and G. Wayne Miller, "Bush selects Smith for U.S. appeals court," *The Providence Journal*, Dec. 7, 2007.

21. **Will you commit that, if you are confirmed as Attorney General, you will work to enjoin state laws that restrict voting and registration in ways that disproportionately affect African-American or other minority voters?**

RESPONSE: As I testified before the Committee, government cannot create laws designed to improperly inhibit the right of any eligible citizens to vote. If I am confirmed as Attorney General, I am committed to enforcing all of the federal laws within the Department's jurisdiction, and particularly the laws regarding voting, in a fair and even-handed manner.

22. At your nomination hearing, you suggested that section 2 of the Voting Rights Act provides adequate remedies to problematic voting restrictions. However, consider the example of the North Carolina voting law, which the U.S. Court of Appeals for the Fourth Circuit held was based on discriminatory intent. While section 2 of the Voting Rights Act permitted the state's misconduct to be remedied through litigation, this only occurred after much of the law had been implemented in the 2014 election. Prior to *Shelby County*, this law would have been reviewed by DOJ through the preclearance mechanism and these unconstitutional voting restrictions would have been stopped before any harm was done.

    In light of the time lag involved in section 2 enforcement, how can you suggest a Voting Rights Act without preclearance is adequate?

RESPONSE: If I am confirmed as Attorney General, I will enforce the law and the Constitution and leave to Congress the determination of whether to enact changes to the law. Further, this question implicates an ongoing legal matter that I may be called upon to review; therefore, it would be inappropriate for me to offer an opinion at this time.

23. At your nomination hearing, you stated that the "Supreme Court decided that we should not have…preclearance." However, in *Shelby County v. Holder*, the Supreme Court did not find that preclearance was unconstitutional, but that the formula for determining which jurisdictions are subject to preclearance is unconstitutional.

    In 2015, I joined Senator Leahy and Senator Coons in introducing the Voting Rights Advancement Act (VRAA), in order to update the preclearance formula and restore the Voting Rights Act. The VRAA responds to many of the Court's concerns about the original preclearance formula, which you also criticized during the 2006 reauthorization of the Act. For example, the VRAA includes a rolling preclearance coverage formula that applies to all states and hinges on a finding of repeated voting rights violations in the preceding 25 years.

    a. Do you agree that the Supreme Court has not held that preclearance is unconstitutional?

RESPONSE: The U.S. Supreme Court has not held that preclearance is necessarily unconstitutional. The Court has concluded that preclearance is an "extraordinary" remedy that may be permitted in the appropriate circumstances under Congress's exercise of its power under the Reconstruction Amendments.

b. Without asking you to take a position on the specifics of the VRAA, would an updated coverage formula address your concerns about preclearance?

RESPONSE: If confirmed as Attorney General, I would welcome the opportunity to work with your office and any members of the Committee on legislation affecting our nation's voting laws. This would include legislation that is both consistent with constitutional limits and designed to address the issues you have raised. I would defer to Congress on how this important issue should be deliberated within the legislative branch.

24. In Wisconsin, a newly-implemented voter photo identification law led to challenges and confusion in the April primary. Consider the case of Eddie Lee Holloway, Jr. He moved from my home state of Illinois to Wisconsin in 2008 and was able to vote without any problems before the voter ID law went into effect. After the law was passed, Mr. Holloway went to a DMV in Milwaukee with an expired Illinois photo ID, his birth certificate, and his Social Security card to obtain a Wisconsin photo ID for voting. However, his application was rejected due to a clerical error on his birth certificate, which read "Eddie Junior Holloway."

    Mr. Holloway spent hundreds of dollars traveling to Illinois to try to fix this problem. In addition to the Milwaukee DMV, he visited the Vital Records System in Milwaukee, the Illinois Vital Records Division in Springfield, an Illinois DMV, and his high school in Decatur, Illinois—all in an attempt to obtain sufficient records for a Wisconsin voter ID. Despite all of these efforts, Mr. Holloway was unable to vote in the April primary.

    Unfortunately, Mr. Holloway is not alone. Last year, a study based on data from the annual Cooperative Congressional Election Study found: "The patterns are stark. Where strict identification laws are instituted, racial and ethnic minority turnout significantly declines." For example, among Latino voters, "turnout is 7.1 percentage points lower in general elections and 5.3 percentage points lower in primaries in strict ID states than it is in other states."

    What is your response to people like Mr. Holloway who have been prevented from exercising their fundamental right to vote due to burdensome voter ID laws?

RESPONSE: As I testified at the hearing, government cannot create laws designed to improperly inhibit the right of any eligible citizens to vote. The voting rights of Americans are protected by federal law, including the Voting Rights Act. The Supreme Court held in *Crawford v. Marion County Election Board*, that voter identification laws are neither *per se* unconstitutional, nor do they necessarily violate the Voting Rights Act. The analysis of such laws are specific to the particular law, the jurisdiction, and a wide range of factors that Congress has identified as relevant in determining whether a particular voting practice comports with the Voting Rights Act. If I am confirmed as Attorney General, I am committed to enforcing all of the federal laws within the Department's jurisdiction, and particularly the laws regarding voting, in a fair and even-handed manner.

25. In 2014, GAO released a study on the impact of voter ID laws, at the request of Senators Sanders, Leahy, Schumer, Nelson, and myself. The study found that in two states with strict

voter ID laws—Kansas and Tennessee—the laws hurt turnout. The impact of the law was greatest among African-Americans, young people, and newly-registered voters.

Do the results of this study concern you?

RESPONSE: I am not familiar with this study. I would note, however, that the bipartisan Carter-Baker Commission report, "Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform," found that "there is no doubt" that voter fraud occurs, that "a good ID system could deter, detect, or eliminate several potential avenues of fraud – such as multiple voting or voting by individuals using the identities of others or those who are deceased – and thus it can enhance confidence," and that "most advanced democracies have fraud-proof voting or national ID cards, and their democracies remain strong."

26. At our meeting before your nomination hearing, you acknowledged that in your state, there was a "brutal, ruthless denial of the right to vote." You went on to say that the Voting Rights Act "fixed it." However, just two years ago, your state made national headlines for closing or reducing service at more than 30 DMV locations, shortly after Alabama enacted a law requiring voters to present a photo ID to vote.

    The NAACP Legal Defense Fund wrote to state officials to "raise [their] grave concerns regarding the State's intended closures" which occurred "predominantly in rural counties with large Black populations, high poverty rates, and little to no public transportation." Congresswoman Terri Sewell called for a DOJ investigation into the closures, stating that the "closures will potentially disenfranchise Alabama's poor, elderly, disabled, and black communities." The federal Department of Transportation opened a civil rights investigation to examine the incident.

    Did you disagree with Congresswoman Sewell's conclusions on how the closures might impact Alabama voters?

RESPONSE: As I testified before the Committee, it is my understanding that these offices were closed and selected for consolidation due to state budgetary constraints and that the offices were selected based on areas with the lowest population levels. It was later determined that many of the closures were in counties with large African-American populations and so the decision was reversed. It is my understanding that every county in the state has a Board of Registrars and state election officials now issue photo voter identification cards on their own to ensure residents in affected counties retain the ability to obtain state-issued identification for the purposes of voting. As a federal elected official, I was not involved in or consulted regarding this process.

27. You have been outspoken in your defense of religious freedom for Christians. For example, you denounced a 1997 court order that limited prayer in Alabama public schools, calling it "one more example of the effort by the courts to eliminate the natural expression of religious belief from public life." A year later, you introduced a Senate resolution "affirming the right to display the Ten Commandments in public places, including government offices and courthouses." You said "[w]e've got to end the hostility toward the display of the Ten Commandments in public places."

You have been much more ambivalent about religious freedom for Muslims. You have referred to it as "a toxic ideology" and said of American Muslims "our nation has an unprecedented assimilation problem." In response to President-elect Trump's proposed ban on Muslim immigrants, you said, "I think it's appropriate to begin to discuss this, and he has forced that discussion."

President-elect Trump has gone further, saying "Islam hates us." He has also said that there is "absolutely no choice" but to close some mosques and that he would consider creating a database of American Muslims. And, last July, he launched an offensive attack against Khizr and Ghazala Khan—the grieving parents of a fallen Muslim-American solider.

At the same time, American Muslims are facing a surge in anti-Muslim hate crimes, according to the FBI and other experts.

a. Will you commit to vigorously enforcing civil rights laws to combat discrimination against American Muslims, including federal hate crimes laws?

RESPONSE: If I am confirmed as Attorney General, I will enforce all civil rights law to combat discrimination against all Americans, including American Muslims.

b. Do you believe it would be legally permissible to shut down mosques?

RESPONSE: This scenario certainly does not sound like something that a law enforcement official normally would be engaged in, but without knowing more specifics, I am not able to respond to the hypothetical.

c. Do you believe it would be legally permissible to create a database of American Muslims?

RESPONSE: I do not believe a database of any group of Americans based on their religion would pass constitutional scrutiny.

d. Do you think that President-elect Trump's comments on the Khan family were appropriate?

RESPONSE: I believe that the President has made clear that he respects the sacrifice made by the Khan family.

e. Last year, President-elect Trump said American Muslims "know who the bad apples are, where the bad seeds are and they don't report them." But FBI Directors Mueller and Comey have both praised the Muslim community for cooperating with law enforcement and reporting suspected terrorists. Do you agree with the President-elect or Directors Mueller and Comey?

RESPONSE: Based on the individual situations each were referring to at the time, it is likely that I would agree with both the President and Directors Mueller and Comey.

28. Last October marked the seven-year anniversary of the passage of one of the most important civil rights laws of our time, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009.

    You vigorously opposed the law at the time of its passage, saying it was "unwarranted, possibly unconstitutional… and it violates the basic principle of equal justice under the law." You went on to say that the bill "has been said to cheapen the civil rights movement." At your nomination hearing, Senator Leahy asked you about this law. You stated:"[T]he law has been passed. The Congress has spoken. You can be sure I will enforce it."

    If you are confirmed to be Attorney General, what steps will you take to vigorously enforce the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009?

RESPONSE: I firmly believe that all Americans are entitled to equal protection under the law, no matter their background. While as Senators we may have disagreed about the most effective ways to address the challenges facing our country, my duty as Attorney General, if I am fortunate enough to be confirmed, would be to enforce the laws passed by Congress. I would approach enforcement of this law the same way that I would any other federal law—I would endeavor to direct and utilize the resources of the Department in the most effective manner possible to ensure full enforcement of federal laws and the protections inherent in them. And I will work with our law enforcement professionals to tailor our efforts to ensure the safety of all of our communities.

29. When the Senate considered the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, you expressed particular concern about a provision in the law that expanded federal hate crime protections to cover victims who are targeted based on their gender, gender identity, sexual orientation, or disability. You even suggested this provision was unnecessary because women and LGBT individuals do not face serious discrimination, saying: "today I am not sure women or people with different sexual orientations face that kind of discrimination. I just don't see it."

    However, as the *New York Times* reported last year:

    > Even before the shooting rampage at a gay nightclub in Orlando, [Florida], lesbian, gay, bisexual and transgender people were already the most likely targets of hate crimes in America, according to an analysis of data collected by the Federal Bureau of Investigation.

    According to the data, LGBT Americans are "twice as likely to be targeted as African-Americans, and the rate of hate crimes against them has surpassed that of crimes against Jews."

a. At your nomination hearing, you stated that you "understand the demands for justice and fairness made by our LGBT community" and that you "will ensure that the statutes protecting their civil rights and their safety are fully enforced." Can you elaborate on how you will ensure that the civil rights of gay, lesbian, bisexual, and transgender Americans are protected?

RESPONSE: I firmly believe that all Americans are entitled to equal protection under the law, no matter their background. While as Senators we may have disagreed about the most effective ways to address the challenges facing our country, my duty as Attorney General, if I am fortunate enough to be confirmed, would be to enforce the laws passed by Congress. I would endeavor to direct and utilize the resources of the Department in the most effective manner possible to ensure full enforcement of federal laws and the protections inherent in them. And I will work with our law enforcement professionals to tailor our efforts to ensure the safety of all of our communities.

b. My staff was unable to find any other instance of you using the term "LGBT" in public prior to your nomination hearing. Is this a term that you have ever used in public prior to your hearing?

RESPONSE: Yes.

30. In a 2014 speech to the Anti-Defamation League, FBI Director Comey said:

> Hate crimes are different from other crimes. They strike at the heart of one's identity—they strike at our sense of self, our sense of belonging. The end result is loss—loss of trust, loss of dignity, and in the worst case, loss of life. Hate crimes impact not just individuals, but entire communities. When a family is attacked because of the color of their skin, it's not just the family that feels violated, but every resident of that neighborhood. When a teenager is murdered because he is gay, the entire community feels a sense of helplessness and despair. And when innocent people are shot at random because of their religious beliefs—real or perceived—our nation is left at a loss.

Do you agree with Director Comey's statement?

RESPONSE: I agree with Director Comey that attacks motivated out of prejudice have no place in our society.

31. In 2012, I chaired a hearing of the Subcommittee on the Constitution, Civil Rights, and Human Rights that examined hate crimes and the threat of domestic extremism. After the hearing, at my request, the FBI began tracking hate crimes against Arab Americans, Hindu Americans, and Sikh Americans, among others. This is a positive step, but if state and local law enforcement agencies fail to report hate crimes, we cannot understand the full extent of the problem and what steps must be taken to address it.

In his speech to the Anti-Defamation League, Director Comey also highlighted this issue, noting:

> We need to do a better job of tracking and reporting hate crime to fully understand what is happening in our communities and how to stop it. There are jurisdictions that fail to report hate crime statistics. Other jurisdictions claim there were no hate crimes in their community—a fact that would be welcome if true. We must continue to impress upon our state and local counterparts in every jurisdiction the need to track and report hate crime. It is not something we can ignore or sweep under the rug.

a. Do you share Director Comey's concerns about hate crimes being underreported?

RESPONSE: I am unable to thoroughly evaluate this assertion or offer an opinion as I have not been presented with the information necessary to do so. However, if I am fortunate enough to be confirmed as Attorney General, I would expect to learn more about this issue and give it careful consideration.

b. Will you commit that, if you are confirmed, you will take steps to ensure that the FBI and the Department of Justice work together to improve hate crime reporting by state and local law enforcement?

RESPONSE: Certainly, effective engagement of state and local law enforcement is absolutely critical to protecting all Americans. If I am fortunate enough to be confirmed as Attorney General, it will be incumbent upon me to ensure that the resources of the Department of Justice and our partnerships with state and local law enforcement are utilized in a way that will ensure the enforcement of federal law and the protections our laws provide equally for all citizens.

32. When I was Chairman of the Subcommittee on the Constitution, Civil Rights, and Human Rights, I held two hearings on the human rights, fiscal, and public safety consequences of solitary confinement. Anyone who heard the chilling testimony of Anthony Graves and Damon Thibodeaux—exonerated inmates who each spent more than a decade in solitary confinement—knows that this is a critical human rights issue that we must address.

    In light of the mounting evidence of the harmful—even dangerous—impacts of solitary confinement, states around the country have led the way in reassessing the practice. Progress has been made at the federal level as well. However, there are still nearly 10,000 federal inmates in segregation.

    a. Do you believe that long-term solitary confinement can have a harmful impact on inmates?

RESPONSE: It is vital that our prisons be able to secure prisoners and maintain order, but it is also important that they be a safe environment for those prisoners while they are incarcerated, as well as for those guarding them. I believe that we should closely evaluate the studies and evidence and make the best determination about how to handle what can be a dangerous prison

population in a way that is both constitutional and effective.

b. If you are confirmed, can you assure me that you will examine the evidence and work with BOP to make ensure that solitary confinement is not overused?

RESPONSE: Yes.

33. In federal prosecutions, the majority of drug offenders are non-violent, have low criminal histories, and are not leaders or organizers. In 2015, 48.1 percent of drug offenders were in criminal history category I, and 12.9 percent were in criminal history category II. Indeed, 82.8 percent of all drug offenses did not involve the use of a weapon. Only 7.7 percent of all drug offenders had an aggravating role adjustment (were leaders, organizers, managers or supervisors). A 2016 Report by the United States Sentencing Commission found that the number of federal offenders whose most serious offense was simple drug possession increased nearly 400 percent during the six-year period between fiscal years 2008 and 2013.

I introduced Alton Mills to you as an example of one of these low level offenders. Alton Mills spent 22 years in federal prison, on a life sentence, until December 2015 when President Obama commuted his sentence.

If you are confirmed as Attorney General, will you prioritize the prosecution of high-level drug offenders over low-level offenders?

RESPONSE: The same 2016 Sentencing Commission Report referenced above notes that the 400 percent increase in drug possession offenses "is almost entirely attributable" to marijuana offenders arrested at or near the United States' border with Mexico, and that the median quantity of marijuana possessed by those arrestees was 22,000 grams, which is 48.5 pounds. Compared to the median of 5.2 grams (one-fifth of an ounce) of marijuana possessed by arrestees for drug possession offenses in other locations, this seems excessive. These, clearly, are not low-level drug possessors, but are drug traffickers who are smuggling their life-destroying poisons across the border and into our communities to turn a profit for violent drug cartels. If I am fortunate enough to be confirmed as Attorney General, I will vigorously enforce the law and ensure that we make the most effective use of our limited enforcement resources to stop illicit drugs from being trafficked into our country and our communities.

34. During your confirmation hearing, you said "We will prosecute those who repeatedly violate our borders. It will be my priority to confront these crimes vigorously, effectively and immediately."

The bipartisan United States Sentencing Commission noted in its April 2015 report that illegal reentry cases are a significant portion of all federal cases in which offenders are sentenced under the United States Sentencing Guidelines, constituting 26 percent of all such cases in fiscal year 2013.

In April 2016, the chair of the Sentencing Commission noted that, "there are many low level offenders who return to the United States for reasons related to family or work as well as reasons relating to conditions in their home country."

a. How you would seek to balance limited prosecutorial resources when considering illegal reentry cases versus national security cases and other non-immigration criminal cases?

RESPONSE: With limited resources, it is important that the Department of Justice make the best use of its resources to address criminal activity. Striking that balance requires regular review of enforcement priorities, threats, and available resources to ensure the best allocation. If I am fortunate enough to be confirmed as Attorney General, I will endeavor to direct and utilize the resources of the Department in the most effective manner possible to ensure the enforcement of federal law.

b. How would you use your discretion in choosing to prosecute particular illegal reentry cases? Would work or family ties in the U.S., or conditions in the foreign national's home country, impact your decision?

RESPONSE: The choice of whether to prosecute any particular case should always involve a review of all of the unique and legally pertinent facts of that case, the relevant law, available evidence, and the likelihood of success in the prosecution.

35. Under the Immigration and Nationality Act, the Attorney General's determination and ruling on all questions of law is controlling. During your confirmation hearing, I asked you how you would use your vast authority as Attorney General, including in your role overseeing the immigration courts. You will also oversee the Board of Immigration Appeals (BIA), the highest administrative body for interpreting and applying immigration laws, including our asylum laws which provide protection to vulnerable individuals seeking refuge from persecution. You will have the authority to unilaterally revoke decisions of the BIA or to reduce the BIA's membership from its current number of 17. You will have the authority to hire and fire immigration judges.

a. Will you commit to not removing any currently serving immigration judges or BIA members, except for cause?

RESPONSE: I am unfamiliar with the staffing requirements at the Board of Immigration Appeals or in the immigration courts, so it would be premature for me to offer an opinion at this time on whether any changes should be made.

b. What is your plan to deal with the backlog of more than 500,000 pending cases in the immigration courts?

RESPONSE: I am very concerned by the backlog of pending cases, and if I am confirmed, I will carefully evaluate what actions should be taken to address it.

c. Will you commit to maintaining or increasing the current number of immigration judges and courts nationwide?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will devote the appropriate number of immigration judges and courts to address the current backlog and any new cases.

d. How do you plan to hire immigration judges in the future and what criteria would you use to disqualify applicants? Would you view as a negative factor prospective judges' membership in groups like the American Immigration Lawyers Association or the American Civil Liberties Union?

RESPONSE: I have not had the opportunity to review the position description for immigration judges, but would expect them to be ethical, impartial, hard-working, and well-versed in immigration law, and believe those factors are more important than membership in any particular organization.

e. Do you believe a child can represent herself fairly in immigration court without access to counsel?

RESPONSE: My understanding is that the immigration laws of the United States provide all aliens with the privilege of being represented by the counsel of their choosing in civil immigration proceedings. It is also my understanding that Congress has specified that, while an alien retains such a privilege, any such representation must occur at no expense to the government. The sole exception to this is codified in section 1232(a)(5)(C) of Title 8, which charges the Department of Health and Human Services with ensuring:

> to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A), have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.

36. The goal of so-called "sanctuary cities" policies is to promote effective community policing by encouraging immigrant communities to trust local police.

Do you believe that existing law authorizes the Executive Branch to bar or limit federal funding to the estimated 364 counties and 39 cities nationwide that have policies limiting their police department's role in enforcing immigration laws or would this require Congress to change the law?

RESPONSE: My understanding is that the Department of Justice's current position—announced after a recent review conducted by the Inspector General—is that applicants for Justice

Department grants must comply with section 1373 of Title 8, as it is "an applicable federal law" for purposes of grant eligibility.

37. Regarding refugees, a joint statement by Michael Hayden, former director of the CIA and NSA, and James Stavridis, former NATO Supreme Allied Commander, said:

> It's ironic, to say the least, that today some politicians are seeking to shut out refugees in the name of national security. The global refugee crisis is straining the resources and infrastructures of Lebanon, Jordan, and Turkey, which are hosting the vast majority of Syrian refugees. By doing more to host and help refugees, the United States would safeguard the stability of these nations and thereby advance its own national security interests.
>
> Moreover, hostility to refugees helps ISIS. Conversely, welcoming refugees regardless of their religion, nationality, or race exposes the falseness of terrorist propaganda and counters the warped vision of extremists.

Do you agree that limiting refugee resettlement could assist ISIS propaganda efforts?

RESPONSE: I have not yet been briefed on all aspects of the U.S. Refugee Admissions Program, but should I be confirmed, I will faithfully enforce our immigration law pertaining to refugees consistent with federal law and with the policy preferences of the President.

38. A document titled, Immigration Handbook For The New Republican Majority: A Memo For Republican Members From Sen. Jeff Sessions, dated January 2015, is available via your Senate website.

Did any outside groups assist you or your staff in creating, editing, or reviewing this document, and if so, which groups?

RESPONSE: My understanding is that my staff may have contacted some outside groups, such as the Center for Immigration Studies, to inquire about their publicly-available research that was cited in the document. However, we received no assistance from any outside group in creating, editing, or reviewing the document.

39. In the Immigration Handbook For The New Republican Majority: A Memo For Republican Members From Sen. Jeff Sessions, you state:

> The Congressional Research Service estimates that the foreign-born population could reach as high as 58 million within a decade based on recent trends. Only an adjustment in policy will change this trajectory—just as policy was changed early in the 20th century to allow labor markets to tighten.
>
> There had been a great wave of immigration in the four decades leading up to the

Coolidge Administration. This substantial increase in the labor pool had created a loose labor market that tilted the balance of power to large employers over everyday workers. Coolidge believed it was rational and sensible to swing the pendulum back towards the average wage-earning American.

The Immigration Act of 1924, to which you refer, limited the number of immigrants to the U.S. via a national origins quota based on the 1890 census. It excluded immigrants from Asia, and severely restricted new immigration from much of the world outside of Northwest Europe and Scandinavia.

Please explain why you cited the immigration restrictions enacted by the Coolidge Administration without mentioning their exclusionary nature?

RESPONSE: The specific restrictions per country of origin was not the focus of the paragraph. The focus of the paragraph was how President Coolidge changed the immigration laws to adjust the labor pool in a manner that would benefit the average wage-earning American worker.

40. According to the Department of Justice website, clemency applications are handled in the following manner: "After all relevant information has been received, OPA prepares a proposed recommendation for disposition of the case that is submitted to the Deputy Attorney General, who makes the final determination of the Justice Department's recommendation to the President. The Deputy Attorney General's signed recommendation is then transmitted to the White House, and the President acts on each case when he believes it is appropriate to do so."

    a. **Will you commit to keep the practice in place of the Deputy Attorney General making the final determination on a clemency application?**

RESPONSE: Internal practices exist to provide a regular process for effective, consistent execution of legal duties. However, these practices must sometimes undergo review and changes if it is found that they are ineffective, inefficient, or can be improved due to changes in the law, circumstances, or available resources. It would be unwise to commit to continuing an internal practice indefinitely and without regard to necessary changes or available improvements that may arise.

    b. **Will you commit that you will not review or overturn the Deputy Attorney General's recommendation in any clemency case?**

RESPONSE: I cannot categorically commit that, if I am confirmed as Attorney General, I would never review or take action in any future case where I have legal authority or responsibility for the actions of the Department, unless it is a particular case in which a conflict of interest has caused me to recuse myself completely.

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

QUESTIONS FROM SENATOR WHITEHOUSE

1) During your hearing before the Senate Judiciary Committee, I asked you about comments you made in November, 2016 in an interview with American Family Radio with respect to "secular, progressive liberals" and the "secular Left" making the Department of Justice "unlawful" and "less traditional." In your response, you stated that you were "not sure" whether a secular person has as good a claim to understanding the truth as a person who is religious. In addition to your comments to American Family Radio and your response to me, you have previously stated the following:

- "I really believe that this whole court system is really important and the real value and battle that we're engaged in here is one to reaffirm that there is objective truth, it's not all relative. And that means some things are right and some things are wrong, and we're getting too far away from that in my opinion and it's not healthy for any country and it's really not healthy for a democracy like ours that's built on the rule of law" (Faith and Freedom Coalition event, 2016).

- And if you don't believe there's a truth, if you don't believe in truth, if you're a secularist, then how do we operate this government? How can we form a democracy of the kind that I think you and I believe in? … I do believe we are a nation that, without God, there is no truth and it's all about power, ideology, advancement and agenda, not doing the public service" (Upon receipt of David Horowitz Freedom Center Award, 2014).

a) ***Could you elaborate on your view that secular lawyers have contributed to "unlawfulness" at the Department of Justice?***

RESPONSE: These comments were made in response to my perception that individuals within the Department were using their own opinions of "truth" to decide when particular laws ought to be enforced, rather than consulting federal statute or the Constitution. Abdicating a duty to enforce the law based on one's personal belief that an act clearly prohibited by law is nonetheless acceptable would fit my definition of "unlawfulness."

b) ***Do practicing Christians have access to the "objective truth?"***
c) ***Do practicing Jews have access to the "objective truth?"***
d) ***Do practicing Muslims have access to the "objective truth?"***
e) ***Do practicing Hindus have access to the "objective truth?"***

RESPONSE: My personal philosophy on objective truth is immaterial to my duty to enforce the law and would not hinder me from doing so, if I am fortunate enough to be confirmed as Attorney General.

f) ***Could you elaborate on your statement at the hearing that a secular attorney may not have***

as good a claim to understanding the truth as a religious one?

RESPONSE: My personal philosophy on objective truth is immaterial to my duty to enforce the law and would not hinder me from doing so, if I am fortunate enough to be confirmed as Attorney General. Justice Department attorneys, secular or religious, must likewise carry out the duties of the office with fidelity to federal law and the Constitution, regardless of their personal philosophies.

2) Sections 208 and 216, 18 U.S.C. provide civil and criminal penalties for "an officer or employee of the executive branch of the United States Government ... [who] participates personally and substantially as a Government officer or employee, through decision, approval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee ... has a financial interest.... "

a) ***Can you provide assurances that you will vigorously enforce 18 U.S.C. §§ 208 and 216, as well as other laws and policies relating to executive branch conflicts of interest?***

RESPONSE: Yes. If confirmed as Attorney General, I will enforce all federal laws, including 18 U.S.C. §§ 208 and 216, as appropriate based on the facts and circumstances of each case.

b) ***What specific policies will you put in place to ensure that referrals to the Department of Justice regarding potential violations of 18 U.S.C. §§ 208 and/or 216 by political appointees are fully and fairly investigated?***

RESPONSE: The Department of Justice has discretion to bring civil suits for penalties and injunctions for violations of this statute. If I am confirmed, I will carefully review any referrals regarding potential violations of this statute and prosecute meritorious cases. At this point and without the resources of the Department of Justice at my disposal, it would be premature to announce specific policies to process hypothetical referrals.

3) ***Does the President have the authority to fire the Director of the Office of Government Ethics (OGE)?***

RESPONSE: I have not studied this question. However, it is my understanding that the Director of the Office of Government Ethics, by statute, is appointed to a five-year term by the President and confirmed by the Senate. It is also my understanding that the current director has not completed his five-year term. While some fixed-term appointees can be released only for cause, as specified in statute, there is no such provision in place for the Director of the Office of Government Ethics. If I am fortunate enough to be confirmed as Attorney General, and the President asked me to advise him on this question, I would consult with the attorneys at the Justice Department to ensure that the law is faithfully followed in reaching a decision.

4) Terror organizations, drug cartels, human traffickers, and other criminal enterprises abuse

United States incorporation laws to establish shell companies designed to hide assets and launder money. The law enforcement community, including the Fraternal Order of Police, Federal Law Enforcement Officers Association; National Association of Assistant U.S. Attorneys; and National District Attorneys Association, have all called on Congress to pass legislation to help law enforcement identify the beneficial owners behind these shell companies. Chuck Canterbury, President of the National Fraternal Order of Police, explains, "When we are able to expose the link between shell companies and drug trafficking, corruption, organized crime and terrorist finance, the law enforcement community is better able to keep America safe from these illegal activities and keep the proceeds of these crimes out of the U.S. financial system."

a) ***Do you agree that allowing law enforcement to obtain the identities of the beneficial owners of shell companies would help law enforcement to uncover and dismantle criminal networks?***

RESPONSE: While I have not studied this issue in depth, it is important and one which I expect to learn more about should I be confirmed. I look forward to working with you and other members of Congress to find ways to improve prosecutions in these areas.

b) ***Will you commit to working with Congress on legislation to give law enforcement the tools needed to more effectively untangle the complex web of shell companies criminals use to hide assets and lauder money in the United States?***

RESPONSE: Yes.

c) ***Under current law, banks are required to undertake due diligence to ensure that their customers are not laundering funds. No similar anti-money-laundering standards apply to the attorneys who help set up the shell companies integral to criminal enterprises. Do you support extending anti-money-laundering due diligence requirements to attorneys?***

RESPONSE: While I have not studied this issue in depth, it is important and one which I expect to learn more about should I be confirmed. I look forward to working with you and other members of Congress on proposals such as this in order to increase public safety and the administration of justice.

5) As you know, U.S. intelligence agencies are unanimous in their conclusion that Russia interfered in the 2016 elections through a campaign of computer hacking, propaganda, and fake news.

a) Are you prepared to use the full resources of the Department of Justice to investigate violations of law related to Russian interference, even if such an investigation could prove politically damaging to Donald Trump?

RESPONSE: Any investigation by the Department of Justice must be initiated and conducted in a fair, professional, and impartial manner, without regard to politics or outside influence. The Department must follow the facts wherever they lead, and decisions must be based solely upon

the facts and the law, and consistent with established procedures of the Department. That is the process I followed as United States Attorney, and it is what I will insist upon if I am confirmed as Attorney General.

b) ***Will you recuse yourself and appoint special counsel to look into the matter further?***

RESPONSE: I am not aware of a basis to recuse myself from such investigations. However, if a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

6) Several Trump campaign staff and advisors have close ties to Russia. Most notably, before he resigned, former campaign manager Paul Manafort was exposed to have received $12.7 million in illegal cash payments from former Ukrainian President Viktor Yanukovych's pro-Russian political party between 2007 and 2012. Manafort even brokered a deal to sell Ukrainian cable TV assets to a partnership he put together with a close ally of Putin. ***Are you prepared to recuse yourself and appoint special counsel to investigate any possible involvement of Trump campaign staff or advisors in the Russian election interference or any other illegal transactions with Russia that may have occurred?***

RESPONSE: I am not aware of a basis to recuse myself from such investigations. However, if a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

7) Earlier this month, the Center for Strategic and International Studies (CSIS) Cyber Policy Task Force issued a report announcing recommendations to the 45th President for strengthening the nation's cybersecurity. ***Can you provide your assurances that, as Attorney General, you will familiarize yourself with these recommendations and others and equip the Department of Justice to play a strong role in deterring and combating cybercrime and holding those responsible accountable?***

RESPONSE: Yes. If I am fortunate enough to be confirmed as Attorney General, I anticipate that I and those in the Justice Department who lead its efforts on cybersecurity issues will be briefed on the recommendations of the report.

8) Referring to the "alt right," White House strategist Steve Bannon, formerly of Breitbart News, has called you "one of the intellectual, moral leaders of this populist, nationalist movement [alt right] in this country." In February 2015, you told Bannon that "Breitbart has been the absolute bright spot in this whole debate. You get it, your writers get it, every day they find new information that I use repeatedly in debate on the floor of the Senate because it's highlighting the kind of problems that we have. And nobody else is doing it effectively, it's just not happening, so to me it's like a source."

Under Mr. Bannon's leadership, Breitbart News ran the articles with the following headlines:

- Birth Control Makes Women Unattractive and Crazy
- The Solution to Online "Harassment" is Simple: Women Should Log Off
- There's No Bias Against Women in Tech, They Just Suck at Interviews
- Gabby Giffords: The Gun Control Movement's Human Shield
- Racist, Pro-Nazi Roots of Planned Parenthood Revealed
- Bill Kristol: Republican Spoiler, Renegade Jew
- Trannies Whine About Hilarious Bruce Jenner Billboard

a) Do you continue to believe that Breitbart News is a "bright spot"?
b) Do you believe Breitbart News is a reliable source of information?
c) ***Do you believe it would be appropriate to rely on Breitbart as a source in your role as Attorney General, should you be confirmed? Why or why not?***

RESPONSE: I am not familiar with the articles referenced above. I believe a number of media sources contain useful information. Of course, I would not rely on any information from any media source without verification.

9) Jurisdictions across the country, from South Carolina to California and Ohio to New Hampshire, are investing in a range of treatment alternatives to incarceration for low-level drug offenders. These programs are designed to shift the emphasis of law enforcement intervention toward the delivery of drug treatment and other services. ***In addition to drug courts, what treatment alternatives to incarceration models do you support and why?***

RESPONSE: Under the right circumstances, treatment alternatives to incarceration can be part of an effective law enforcement strategy to get people off the cycle of crime and drugs. If used, treatment alternatives should be in sync with traditional law enforcement, and be carefully implemented on a case-by-case basis. My support for treatment alternatives will be guided by many factors, including a rigorous examination of the rate of success and the effect on deterrence of criminal activity.

10) There is an emerging consensus in Congress, as well as the addiction field, and even in the law enforcement community that we can't arrest our way out of the drug problem and that the emphasis should be on directing people who struggle with addiction into treatment and away from the criminal justice system.

a) ***Do you agree with this view?***

RESPONSE: Treatment alternatives can be one part of an effective and comprehensive law enforcement response to the spread of dangerous drugs. When I was a United States Attorney, my office spent significant resources combating narcotics. I have also been a strong supporter of drug courts. If I am fortunate enough to be confirmed as Attorney General, I would carefully analyze the benefits that could be realized by alternatives to law enforcement and weigh them carefully against the costs. However, traditional law enforcement approaches have succeeded in lowering the prevalence of illegal drugs in the past, and I believe those tools should remain at the forefront of our approach. To date, treatment has not proven universally successful. Prevention of use and addiction is critical, also.

b) ***What steps would you consider taking as Attorney General to support this goal?***

RESPONSE: See response to 10(a).

11) ***Do you intend to dismantle or keep intact the Department of Justice's Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Working Group?***

RESPONSE: I am not familiar with this working group. However, if I am fortunate enough to be confirmed as Attorney General, I will carefully evaluate any current practices of the Department as to their effectiveness in the enforcement of federal law and the protections inherent therein.

12) In January 2010, DOJ attorney David Margolis issued a memorandum suggesting that attorneys in the Office of Legal Counsel may owe a duty of candor to their clients that is less than the duty owed by workaday litigators to their clients. Since that time, I have been informed that the Department no longer allows this loophole in ethical guidance it provides its attorneys. ***What is your view with respect to the duty of candor that OLC attorneys owe their clients?***

RESPONSE: The Office of Legal Counsel is a critical component within the Department of Justice. I would expect OLC to provide candid, independent, and principled advice. It is essential that OLC's lawyers be of extraordinary legal ability in order that they be able to provide strongly reasoned analysis that is clear and accurate.

13) President Trump has called the Foreign Corrupt Practices Act a "terrible law." But the Act, as amended by the International Anti-Bribery Act of 1998, is the cornerstone of federal efforts to prevent and prosecute bribery of foreign officials by U.S. corporations, and to maintain a fair and level playing field for small and mid-size corporations doing business overseas. Since 2008, the federal government—DOJ, SEC, and the FBI—have maintained about 150 active investigations at any given time, resulting in $1.56 billion in fines in 2014.

Will you commit to continued vigorous enforcement of the Foreign Corrupt Practices Act and the International Anti-Bribery Act of 1998?

RESPONSE: Yes, if confirmed as Attorney General, I will enforce all federal laws, including the Foreign Corrupt Practices Act and the International Anti-Bribery Act of 1998, as appropriate based on the facts and circumstances of each case.

14) ***Is it still your view that broad mens rea reform, such as that encompassed in the Mens Rea Reform Act of 2015 (S. 2298) would hamper the ability of prosecutors to prosecute a wide array of federal crimes?***

RESPONSE: Changes to *mens rea* requirements could have a significant impact on the ability of the Justice Department to combat crime in the United States. However, I recognize that Congress may determine to enact change to law. If I am fortunate enough to be confirmed as

Attorney General, I will enforce the laws that Congress passes.

15) In recently criticizing commutations granted by President Obama, you remarked, "So-called low-level, non-violent offenders simply do not exist in the Federal system."

a) ***Do you believe this is a true statement?***

RESPONSE: This quote is taken out-of-context from a longer statement against President Obama's commutations of 214 drug-traffickers and firearms felons. I believe it to be a true statement.

b) ***What evidence do you have to support it?***

RESPONSE: The lowering of the crack cocaine sentencing disparity that I spearheaded with Senator Durbin in the Senate, as well as changes in sentencing law and practice by the Sentencing Commission and the Supreme Court, have substantially curtailed the number of low-level, non-violent offenders in the federal system. The Bureau of Justice Statistics keeps detailed information on the federal criminal justice system, as does the federal Bureau of Prisons.

16) At your hearing, you testified: "The guidelines have been either made voluntary by the sentencing commission in the courts and the policies of the attorney general." ***Are you aware that the Sentencing Guidelines were made voluntary because of a Supreme Court decision, not because of the Department of Justice or the Sentencing Commission?***

RESPONSE: I was talking about unilateral actions by the U.S. Sentencing Commission to make changes to the sentencing guidelines, with the full support of the Obama Administration, resulting in the release of tens of thousands of federal drug offenders, many of whom are violent offenders and/or have serious criminal histories. I have often discussed the impact of the Supreme Court's decision in *United States v. Booker* and my views in that regard are well-known.

17) At your hearing, you testified: "The Justice Department now allows a prosecutor to present a case to the judge that doesn't fully reflect the evidence that they have in their files about a case. That's a problematic thing. You shouldn't charge, I think it's problematic and difficult to justify a prosecutor charging five kilos of heroin when the actual amount was 10 to get a lower sentence."

a) ***From where do you derive the idea that a prosecutor must charge the maximum charge in every case?***

b) ***Do you hold this view consistently across all federal criminal statutes and civil charges?***

RESPONSE to (a) – (b): Prosecutors retain discretion in the application of law enforcement resources available to them. Generally speaking, prosecutors evaluate the evidence available in a case as a major factor in determining what to charge.

c) The United States Attorney's Manual clearly disagrees with your narrow view of prosecutorial discretion. It states: "Under the Federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of Federal criminal law. The prosecutor's broad discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas has been recognized on numerous occasions by the courts." ***Please explain how your testimony fits with the substantial discretion retained by prosecutors to determine which specific charges should be filed in a given case.***

RESPONSE: The United States Attorney's Manual sets forth that discretion "should be read in the broader context of the basic responsibilities of Federal prosecutors: assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous offenders, and rehabilitation of offenders . . . while making certain also that the rights of individuals are scrupulously protected." If I am fortunate enough to be confirmed as Attorney General, the Justice Department will be mindful of these basic responsibilities.

d) The American Bar Association states one of the duties of a prosecutor is to "seek justice, not merely to convict," and another as, "the prosecutor must exercise sound discretion in the performance of his or her functions." ***How is it consistent with those obligations to always charge the maximum charge or charges in a given case?***

RESPONSE: As set forth in the United States Attorney's Manual, a prosecutor's discretion should be read in the broader context of the basic responsibilities of federal prosecutors. If I am fortunate enough to be confirmed as Attorney General, the Justice Department will be mindful of these basic responsibilities.

e) ***If you believe there are any considerations that counsel against levying the maximum charges in a given case, what are those considerations? Please list all of them.***

RESPONSE: See response to 17(c).

18) In the context of hate crimes prosecutions, you agreed with Senator Graham's statement as follows: "When the state's doing its job, the federal government should let the states do their job." You then said it is a "general principle." Your testimony here seems inconsistent with your view of other prosecutions, particularly drug prosecutions.

a) ***Why in some contexts do you think the federal government should step in and file maximum charges, but in other where federal charges are available you nevertheless believe the states should take the lead? Please explain.***

RESPONSE: Whether the Federal government should step into an area where States have traditional jurisdiction should be determined on a case-by-case basis, based on the facts and applicable law in each individual case.

b) ***Do you believe the federal government must always file maximum charges under the***

federal hate crimes law when the facts support such charges? Please explain.

c) ***Do you believe the federal government must always file maximum charges under the civil rights laws when the facts support such charges? Please explain.***

RESPONSE to (b) – (c): If I am so fortunate as to be confirmed as Attorney General, the Justice Department will be guided by the applicable facts and law in each individual case, together with appropriate Justice Department guidelines, in determining which charges to file.

d) ***Do you believe the federal government must always bring the most civil claims supportable by the facts under the civil rights laws? Please explain.***

e) ***Do you believe the federal government must always bring the most civil claims supportable by the facts under the voting rights laws? Please explain.***

RESPONSE to (d) – (e): If I am so fortunate as to be confirmed as Attorney General, the Justice Department will be guided by the applicable facts and law in each individual case, together with appropriate Justice Department guidelines, in determining which claims to file.

19) You opposed the Matthew Shepard Hate Crimes Prevention Act, explaining that there was not sufficient evidence that crimes against the LGBT community were being underprosecuted at the state level. ***How many underprosecuted crimes are necessary to justify federal intervention?***

RESPONSE: Any statement I made during debate over the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 reflected an opinion that I reached based on information available to me at the time. If I am fortunate enough to be confirmed as Attorney General, I will work diligently to ensure that all Americans receive equal protection under our laws.

20) The Southern Poverty Law Center and the Counsel on American-Islamic Relations both reported a sharp increase in hate crimes following the election.

a) ***Do you have an opinion on the reason for cause this increase?***

RESPONSE: I am unable to thoroughly evaluate this assertion or offer an opinion, as I have not been presented with information necessary to do so. However, if I am fortunate enough to be confirmed as Attorney General, I would expect to learn more about this issue and give it my careful consideration.

b) ***What steps will you take to investigate this trend?***

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will endeavor to direct and utilize the resources of the Department in the most effective manner possible to ensure the enforcement of federal law and the protections inherent therein. Any specific steps I will take to this end will be decided after careful evaluation of any current practices of the Department and the effectiveness of those practices.

c) ***What steps will you take to work with minority communities to build trust and open lines of communication with the Department of Justice?***

RESPONSE: Effective engagement of state and local law enforcement, and supporting their outreach efforts in communities, is absolutely critical to protecting all Americans. If I am fortunate enough to be confirmed as Attorney General, I will ensure that the resources of the Department of Justice and our partnerships with state and local law enforcement are utilized in a way that will ensure public safety and full enforcement of the law.

d) ***What is the federal role in preventing and prosecuting crimes directed against racial, ethnic, and religious minority groups?***

RESPONSE: If confirmed, it will be my duty to ensure that all Americans receive equal protection under our laws. This will necessarily entail strong communication and partnerships with state and local law enforcement. From time to time, federal involvement might be necessary where federal law is not being followed or where equal justice under the law is not being administered. Decisions to intervene must only be reached after careful consideration of the facts and applicable law.

21) ***Will the Civil Rights Division continue to investigate disparate impact discrimination claims?***

RESPONSE: The Civil Rights Division was established to ensure equal protection of the law, particularly for the vulnerable, and to enforce federal anti-discrimination laws. This will continue to be the mission of the Division, if I am fortunate enough to be confirmed as Attorney General.

22) In 2003, former Attorney General John Ashcroft directed prosecutors to charge the "most serious, readily provable offense" available. You appeared to criticize any changes in policy to the Ashcroft memo instituted by former Attorney General Eric Holder in 2013. What are the substantive changes, if any, you intend to make as Attorney General to the Holder 2013 memo on "Department Policy on Charging and Sentencing"? ***Please outline the rationale for the changes that you would propose.***

RESPONSE: I was not asked specifically for my position on the Ashcroft memo. Substantive changes, if any, to the Holder memo would be made after internal discussions with Justice Department staff, and consultation with law enforcement agencies.

23) In 1996, as Alabama Attorney General, you told the Crime Subcommittee of the House Judiciary Committee that "[w]e must end this separation of the irrational and artificial wall between [the adult and juvenile] justice systems." You also lauded your office's push to remove the ability of a juvenile to immediately appeal his transfer to adult court and lamented the "red tape" associated with transfer hearings.

a) ***Do you still believe that the division between the criminal and juvenile justice systems in this country is inappropriate?***

RESPONSE: I have spoken many times of the need to address the problem of juvenile crime in the United States. In some instances, outmoded juvenile justice systems failed to adequately address violent crime among juveniles. Division between juvenile and adult treatment is appropriate, as with misdemeanor offenders. However, in some cases it is appropriate for serious violent crime to be handled by the criminal justice system.

b) ***Do you believe that youth who are detained should be separated from adults?***

RESPONSE: It is certainly appropriate, where possible, for juveniles to be separated from adult criminals, if sufficient facilities and resources are available to law enforcement.

24) In 1997, you introduced a bill in this chamber that would allow states to jail juveniles as young as 13 with adults, prior even to conviction, would cut funding for juvenile crime prevention while increasing funding for new detention centers, and would allow states to expel children school for six months for "offenses" such as smoking cigarettes. ***Does the Violent and Repeat Juvenile Offenders Act of 1997 still reflect your views with respect to juvenile justice?***

RESPONSE: I introduced the Violent and Repeat Juvenile Offenders Act in the Senate to address a set of conditions that existed in this country 20 years ago. Since then, we have made tremendous progress in law enforcement and reduction of crime nationwide. I have not studied the provisions of that legislation in the context of present-day circumstances of juvenile crime.

25) Under President Bush, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) suffered a severe loss of morale and the desertion of numerous career civil servants. Administrator Flores left the Office under a cloud of corruption and mismanagement.

a) ***Can you assure the Senate that you will take the responsibility of this Office seriously and ensure, to the extent that you are able, its capable and competent leadership?***

RESPONSE: It is important that grant programs be run efficiently and effectively. We must ensure that we eliminate waste, fraud and mismanagement in all grant programs. To accomplish this, we need capable and competent leadership so that the money that is appropriated by Congress is used as efficiently as possible in accomplishing the ends identified in such appropriations.

b) ***As far as the Juvenile Justice and Delinquency Prevention Act (JJDPA), do we have your assurances that you will empower OJJDP to effectively monitor states' compliance with its core protections for youth?***

RESPONSE: As Attorney General, I will diligently monitor compliance with any statutory requirements of the Juvenile Justice and Delinquency Prevention Act, or any other Act of Congress, so long as they are lawful and consistent with the Constitution.

26) In a 1999 floor speech, you decried the lack of enforcement of campaign finance laws and called for increased disclosure of outside spending. You stated:

- *Frankly, we ought to start enforcing the law. I spent 15 years as a Federal prosecutor. We are not doing a very good job, in my view, of finding people who violate existing laws and seeing that people are held accountable. There are going to be mistakes, and I am not talking about witch hunts and trying to disturb honest and decent candidates who have done their best to comply with many regulations, but we really need to watch those cases where we have serious enforcement problems.*

Will you commit to vigorously enforcing existing campaign finance laws, including prosecuting individuals that opening flaunt campaign finance disclosure laws, in your role as Attorney General?

RESPONSE: Yes, I will vigorously enforce all federal laws, including campaign finance laws, as appropriate based on the facts and circumstances of each case.

27) Social welfare groups, organized under section 501(c)(4) of the Tax Code, are required to report political spending to the Federal Election Commission (FEC). Social Welfare Organizations are also required to file reports with the Internal Revenue Service (IRS), detailing the groups' actual or expected political activity.

- **Question 15 on IRS Form 1024** (application for recognition of tax exemption) asks, "Has the organization spent or does it plan to spend any money attempting to influence the selection, nomination, election, or appointment of any person to any Federal, state, or local public office . . . ?"

- **Question 3 on IRS Form 990** (annual return of exempt organization) asks, "Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? If 'Yes,' complete Schedule C, Part I."

Both IRS Forms 1024 and 990 are signed under penalty of perjury. Section 1001 of the U.S. criminal code, makes it a criminal offense to make 'any materially false, fictitious or fraudulent statement or representation' in official business with the government; and section 7206 of the Internal Revenue Code, makes it a crime to willfully make a false material statement on a tax document filed under penalty of perjury.

a) ***In your view, if an organization files inconsistent statements regarding their political activity with the FEC and the IRS, can the group be liable under section 1101 or 7206?***
b) ***Will you commit to investigating any such inconsistent statements of which the Department of Justice becomes aware?***

RESPONSE to (a) – (b): The question posited is not one on which I have devoted any study, and would depend on a number of facts and specific circumstances which do not exist at this time. Therefore, I am not in a position to offer even an informal opinion on it. If I am confirmed as Attorney General, I would consult with career prosecutors at the Department before reaching a decision.

28) At your confirmation hearing, you stated "I would just say that every election needs to be

managed closely and we need to ensure that there is integrity in it. And I do believe we regularly have fraudulent activities occur during election cycles."

a) ***How did you reach the conclusion that "fraudulent activities" occur regularly during election cycles?***

b) ***What types of "fraudulent activities" occur during election cycles?***

c) ***Are you aware of any evidence of widespread voter fraud?***

RESPONSE to (a) – (c): As I testified before the Committee, I believe that fraudulent activities regularly occur during election cycles. There is no reason to believe that this election is any exception. I would also note that the bipartisan Carter-Baker Commission report, "Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform," found that "there is no doubt" that voter fraud occurs, that "a good ID system could deter, detect, or eliminate several potential avenues of fraud – such as multiple voting or voting by individuals using the identities of others or those who are deceased – and thus it can enhance confidence," and that "most advanced democracies have fraud-proof voting or national ID cards, and their democracies remain strong."

d) ***Does the Department of Justice have sufficient tools to combat voter fraud?***

RESPONSE: The Department of Justice has a number of important responsibilities in this area, including investigating and prosecuting election fraud that violates the federal criminal statutes, as well as investigating and bringing suit to prevent violations of the federal voting rights laws. If I am confirmed as Attorney General, I am committed to enforcing all of the federal laws within the Department's jurisdiction, including the laws regarding voting, in a fair and even-handed manner. Any specific enforcement decisions or actions would depend upon the facts and circumstances of each case.

29) As discussed at your confirmation hearing, the Department of Justice has, at various points and under both Democratic and Republican Administrations, adopted procedures governing communications between the White House and DOJ in order to prevent political interference. Such efforts were documented, in the Clinton Administration, in correspondence between the Reno Justice Department and Senator Hatch. Several years later, following the hiring and personnel scandals under Attorney General Gonzales, Attorney General Michael Mukasey wrote that, "Communications [between the White House and DOJ] with respect to pending criminal or civil-enforcement matters…must be limited" in order to ensure "that there is public confidence that the laws of the United States are administered and enforced in an impartial manner."

a) ***Will you commit to implementing a policy limiting contacts and channels of communication between the White House and the Department of Justice based on the principles articulated in correspondence between the Clinton DOJ and White House as well as in the Mukasey letter?***

b) ***If so, will you commit to making this policy available to the Senate Judiciary Committee?***

RESPONSE (a) – (b): As I testified before the Committee, I will maintain Department of Justice policies and procedures governing communications between the White House and the Department, including the Mukasey memorandum.

c) ***With respect to the Civil Rights Division, can you provide your assurances that you will follow the "Experienced Attorney and Attorney Manager Hiring Policy," which outlines a detailed and transparent process that minimizes undue political interference when new attorneys are hired?***

RESPONSE: The Hatch Act prohibits partisan politics from being considered in making career hires. Except for the very small number of political appointees in the Justice Department, partisan politics is irrelevant in hiring and I will ensure that all managers and supervisors are trained in these requirements when they are hired.

30) Subject to certain limitations, the United States Attorneys Manual authorizes the Deputy Assistant Attorneys General in the Environment and Natural Resources Division, with respect to matters assigned to the Environment and Natural Resources Division, the "authority to compromise, dismiss or close cases." ***Do you commit to report to this Committee every instance in which the ENRD Assistant Attorney General makes a determination to close or settle a case (i.e., in which such decisions are made without relying on the delegation authority outlined above and in USAM 5-5.220)?***

RESPONSE: It is important to have open channels of communication between the Department of Justice and Congress, particularly with respect to oversight. I am unfamiliar with the provision referenced in the question; however, if confirmed, I look forward to examining this issue more closely.

31) ***Do you commit to report to this Committee each instance in which DOJ declines to initiate a case referred by the Environmental Protection Agency?***

RESPONSE: I appreciate the important role Congress plays in conducting oversight of federal departments and agencies, including the Department of Justice, and the enforcement activities that are taken to execute our nation's environmental laws. If confirmed as Attorney General, I will follow applicable laws, regulations, and Department policies to ensure lawful and appropriate responses to congressional requests for this kind of information.

32) ***Do you commit to report to this Committee every instance in which the Civil Rights Division Assistant Attorney General makes a determination to close or settle a case?***

RESPONSE: If confirmed as Attorney General, I will follow applicable laws, regulations, and Department policies to ensure lawful and appropriate responses to congressional requests for this kind of information.

33) Should you be confirmed as the lead law enforcement official for the United States, you

would be responsible for the faithful execution of the Clean Air Act and other important environmental statutes. With respect to the Clean Air Act specifically, the Supreme Court found in its 2007 *Massachusetts v. Environmental Protection Agency* decision that there was insufficient uncertainty regarding the factual basis of manmade global climate change to permit the EPA to justify not regulating carbon dioxide (and greenhouse gas) as an air pollutant under the Clean Air Act. ***As Attorney General, would you ensure that EPA remains true to the letter of the law and that decision?***

RESPONSE: I understand the Supreme Court ruled in *Massachusetts v. Environmental Protection Agency* that greenhouse gases are considered "air pollutants" for purposes of the Clean Air Act. As Attorney General, my responsibility would be to enforce federal law as interpreted by the Supreme Court.

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

QUESTIONS FROM SENATOR KLOBUCHAR

Synthetic Drugs

Synthetic drugs continue to be a major nationwide problem. Part of the problem is that sellers of these dangerous drugs have managed to find loopholes in the law, often avoiding detection by disguising their products and labeling them as "not for human consumption."

- Can you comment on this issue, and will you commit to addressing the sale and distribution of synthetic drugs as Attorney General?

RESPONSE: You raise an important point about a very serious problem facing our country. Synthetic versions of illicit drugs are often used as a way to circumvent drug laws and enforcement efforts, and many of these synthetics are marketed directly to young people, sometimes in colorful packaging and offered for sale in legitimate businesses. Synthetic or not, the addiction and adverse health effects caused by these drugs are real. If I am fortunate enough to be confirmed as Attorney General, I will faithfully execute the laws of the United States, and I will work with Congress to find solutions to these problems and loopholes.

High Intensity Drug Trafficking Area (HIDTA) Designation for Five Minnesota Counties

The deadly opioid abuse and heroin epidemic has devastated communities in Minnesota and across the country. Until recently, Minnesota was one of the only states without a designated High Intensity Drug Trafficking Area (HIDTA). This program, which was established in 1988, is intended to reduce drug trafficking by facilitating cooperation and information sharing among federal, state, and local law enforcement agencies. Although the HIDTA program is administered by the Office of National Drug Control Policy (ONDCP), the Drug Enforcement Administration (DEA) plays an active role in supporting the program.

- As Attorney General, would you continue to support the important work being done by the HIDTA program?

RESPONSE: Yes.

- After I wrote a letter to the Office of National Drug Control Policy (ONDCP) in August 2016, five Minnesota counties (Hennepin, Ramsey, Anoka, Dakota, and Washington) were included in the Wisconsin HIDTA designation. It is important to me that the five Minnesota counties receive meaningful funding through this designation. If you are confirmed as Attorney General, will you commit to looking into this issue?

RESPONSE: Yes.

Drug Courts

Drug courts are a proven and effective tool to help non-violent offenders receive the treatment they need, while also saving taxpayers money and reducing crime. I have led efforts to advocate for funding for these important programs in the Senate. I understand that you brought the first expert on drug courts to Alabama in the early 1980s in an effort that led to the establishment of the Mobile County Drug Court.

- Will you commit to continuing your support of drug courts if you are confirmed as Attorney General?

RESPONSE: Drug courts can be a very effective tool for helping non-violent drug users receive treatment that they need, and I am proud of my work in this area. If I am fortunate enough to be confirmed as Attorney General, I will continue to support the appropriate use of drug courts.

Antitrust: Platform Competition

As Ranking Member of the Antitrust Subcommittee, I have heard complaints that the internet is now dominated by a small number of companies that serve as platforms for the digital economy – similar to the way railroads did a century ago. Others argue that these companies remain integral to creating opportunities for start-up businesses to grow and succeed.

- What should the Antitrust Division be doing to ensure that digital markets remain open and competitive?

RESPONSE: It is important that the Antitrust Division have a thorough understanding of emerging markets and new technologies. If I am confirmed as Attorney General, the Antitrust Division will not hesitate to enforce federal antitrust law to protect competition in these markets.

Antitrust: Anheuser-Busch InBev's Acquisition of SABMiller

Recently, the Department of Justice filed its consent decree regarding Anheuser-Busch's acquisition of SABMiller. Conditions that protect beer wholesaler independence and that require Anheuser-Busch to report its acquisitions of craft brewers are critical to protecting the vital competition and innovation that craft brewers have provided the market.

- Will you commit to vigorously enforcing the terms of the consent decree to protect competition and to carefully review any additional consolidation in the beer industry, including the acquisition of craft brewers by large national or international competitors?

RESPONSE: As I testified before the Committee, if I am confirmed, I would have no hesitation enforcing antitrust laws to protect against anti-competitive transactions. The Antitrust Division will look at all markets to ensure compliance with federal antitrust law. It will conduct a thorough evaluation of proposed mergers and acquisitions to determine

whether they violate federal antitrust law. I look forward to working with you and other members of Congress to learn more about these particular issues and to ensure that the Department has the information and tools it needs to carry out its duties in antitrust enforcement.

Antitrust: Agricultural Consolidation

Currently, both E. I. du Pont de Nemours and Company merger with the Dow Chemical Company and Bayer AG's acquisition of Monsanto Company, Inc., are under review by the Department of Justice. Minnesota is the nation's fifth-largest agricultural producing state, and our farmers contribute nearly $21 billion to Minnesota's economy each year. I have heard concerns that each merger could undermine incentives to develop new traits and to license technology, that the Dow-DuPont merger could increase prices for corn seeds and soybean seeds, and that Bayer's acquisition of Monsanto could excessively increase concentration for certain types of herbicides.

- Will you commit to closely examining these transactions to make sure they do not harm farmers, limit innovation, or increase seed prices?

RESPONSE: While it would be premature to comment or commit specifically on any matters currently being reviewed by the Department, if I am confirmed as Attorney General, the Antitrust Division will conduct a thorough evaluation, consistent with federal law, of all proposed mergers and acquisitions to determine whether they violate federal antitrust law and policies. The agricultural sector of our nation's economy is of vital importance, and I look forward to working with you and other members of Congress to learn more about these particular issues and to ensure that the Department has the information and tools it needs to carry out its duties in antitrust enforcement.

National Voter Registration Act (NVRA)

Another responsibility of DOJ's Voting Section is to enforce the National Voter Registration Act (NVRA), or the "motor voter law." Many states do not comply with the voter access provisions of the bipartisan NVRA, and, to date, DOJ has not been particularly active in enforcing these provisions.

- If you are confirmed as Attorney General, will you commit to active enforcement of Sections 5 and 7 of the NVRA, which, respectively, require states to provide voter registration opportunities at DMVs and at state public assistance and disability offices?

RESPONSE: If I am confirmed as Attorney General, I will enforce all federal laws, including the National Voter Registration Act.

- Another important section of the NVRA is Section 8, which sets requirements for how states maintain voter registration lists for federal elections. What role, if any, do you believe DOJ has in enforcing Section 8 of the NVRA, to purge duplicate registrations or

registrations of deceased voters from the rolls? What protections do you believe are required to ensure that legitimate voters are not inappropriately purged from the rolls?

RESPONSE: As I testified before the Committee, the intensity of every election must be monitored and it is a responsibility of the government to ensure its integrity. This includes the Department of Justice's responsibility to enforce all federal voting laws, including all sections of the national Voter Registration Act.

Freedom of the Press

In your hearing, I asked you if you would commit to following the standards now in place at the Justice Department to not put reporters in jail for doing their jobs. You responded that you did not know and "had not studied those regulations."

- Upon further consideration, will you commit to not putting reporters in jail for doing their jobs?

RESPONSE: I have not had the occasion to study the outgoing Administration's regulations on this matter. If I am confirmed as Attorney General, I would discuss this matter with the Justice Department's career experts before making any decision to maintain or modify the current regulations. I would note, however, that the existing regulations did not prevent the outgoing Administration from aggressively investigating and prosecuting a larger-than-normal number of leak cases. Leaks of classified information can be damaging to U.S. national security, and can also violate the federally-protected rights of other federal employees—for example, in cases where restricted information from an individual's personnel file is leaked to the press. In some cases, the only way to investigate wrongdoing is by subpoena. Such subpoenas to reporters, however, raise concerns about intimidation or restriction of the press. A free press plays a vital role in ensuring the accountability of powerful institutions in our society. For these reasons, I support Justice Department caution when contemplating the use of a subpoena to obtain material from a journalist.

Immigration

Research has shown that not only do immigrants already help grow the size of the economy for all Americans, but, according to one study, immigration reform would increase the wages of all Americans by $625 billion over a decade and create on average 145,000 new jobs each year. According to another recent study, immigrants contributed $22.4 billion to Minnesota's GDP, totaling 7.5 percent of the state's GDP in 2012. Immigrants also own 8.5 percent of businesses in the Minneapolis-St. Paul region alone.

- When I raised the issue of the economic benefits of immigration in your hearing, you said, "I think as a nation, we should evaluate immigration on whether or not it serves and advances the national interest, not the corporate interest." Can you elaborate on this statement? Do you believe that immigration benefits the U.S. economy?

RESPONSE: Immigration can benefit the U.S. economy; but excessive labor flow will depress wages and job prospects of U.S. workers.

National Security / Extremist Activities

Protecting national security should always be a top priority of the Justice Department. In the Twin Cities, extremist recruitment has been a particular challenge. I was pleased that, in 2014, the Twin Cities were among three metropolitan areas selected for a pilot program to counter violent extremism run by the Departments of Justice and Homeland Security. Our local community groups, faith leaders, U.S. Attorney, and law enforcement have partnered together to create a program called Building Community Resilience. I have repeatedly asked for the strongest possible level of funding for these efforts.

- While much of the funding made available to this program has been through the Department of Homeland Security (DHS), the Department of Justice (DOJ) has also provided funding in the past. Will you commit to supporting efforts like this to counter extremist recruitment as Attorney General?

RESPONSE: If I am confirmed as Attorney General, I would be pleased to receive and review information concerning efforts that are effective at steering individuals away from extremist ideologies that have led to acts of terrorism. It will ensure that the resources of the Department of Justice and our partnerships with state and local law enforcement are utilized in a way that will ensure public safety and full enforcement of the law while being effectively managed.

In Minnesota, we know that law enforcement must partner with community leaders to build trust and put in place the programs that can guard against extremist recruiting efforts. Our U.S. Attorney Andy Luger has prosecuted dozens of terrorism cases and brought together community leaders working to address extremism. In addition, community groups are engaging populations that ISIS seeks to exploit and providing much-needed social services to communities that are underserved.

- If you are confirmed, how would you work to support programs like the one in Minnesota that seek to strengthen trust between law enforcement and communities?

RESPONSE: Effective engagement of state and local law enforcement, and supporting their outreach efforts in communities, is absolutely critical to protecting all Americans. If I am fortunate enough to be confirmed as Attorney General, I will ensure that the resources of the Department of Justice and our partnerships with state and local law enforcement are utilized in a way that will ensure public safety and full enforcement of the law.

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

QUESTIONS FROM SENATOR FRANKEN

Question 1. During my time in the Senate, one of the issues I've focused on is advancing equality for the lesbian, gay, bisexual, and transgender (LGBT) community. For me, that means making sure that our federal civil rights laws protect LGBT kids from discrimination and harassment in school. It means making clear that in this country, no one should be fired because they're gay or transgender. And generally, it means making sure that LGBT people are treated with the same dignity and respect afforded to everyone else under the law. So I was heartened to see you acknowledge LGBT people in your hearing testimony, where you stated that you "understand the demands for justice and fairness made by the LGBT community."

However, I have trouble reconciling that claim with your record on LGBT issues. You voted against prohibiting job discrimination against LGBT people. You voted against ending "Don't Ask, Don't Tell." You argued that expanding our hate crimes law to protect LGBT people would "cheapen the civil rights movement." And you described the Supreme Court decision granting same-sex couples the right to marry as "part of a continuing effort to secularize, by force and intimidation, a society that would not exist but for the faith which inspired people to sail across unknown waters."

- Give your past record with regard to LGBT issues, how can you assure the LGBT community that you truly understand their demands for justice and, if confirmed, that you will work in their best interests?

RESPONSE: I firmly believe that all Americans are entitled to equal protection under the law, no matter their background, and if I am confirmed as Attorney General, I will work to ensure that our laws are enforced efficiently and effectively on behalf of all. While as Senators we may have disagreed about the most effective ways to address the challenges facing our country, my duty as Attorney General, if I am fortunate enough to be confirmed, would be to enforce the laws passed by Congress. I would endeavor to direct and utilize the resources of the Department in the most effective manner possible to ensure full enforcement of federal laws and the protections inherent in them. And I will work with our law enforcement professionals to tailor our efforts to ensure the safety of all of our communities.

- In your testimony, you stated that you "will ensure that the statutes protecting their rights and their safety are fully enforced." Under Attorneys General Holder and Lynch, the Department's work to protect and advance the rights of LGBT people was an integral part of DOJ's civil rights enforcement. If confirmed, can Americans expect the same from you?

RESPONSE: The Civil Rights Division has a historic and proud record of defending the civil rights of all Americans, particularly the most vulnerable. That will certainly continue under my leadership, if I am fortunate enough to be confirmed as Attorney General.

Question 2. For the majority of Americans, requiring that LGBT people are treated equally does not come at the expense of protecting other people's rights. Nor do most people believe that treating LGBT people equally is incompatible with respecting the religion of people who don't necessarily share our beliefs. However, you are a supporter of the deceptively named First Amendment Defense Act (FADA), a bill that would allow people and some institutions, even those that receive taxpayer dollars, to ignore laws that require them to recognize marriage equality if doing so is contrary to their religious beliefs. If enacted, this bill would prevent the federal government from enforcing laws and regulations that require federal benefits for same-sex spouses, and that prevent commercial landlords and even homeless shelters from turning away married same-sex couples, among other laws.

Some have argued that FADA is necessary to protect pastors, ministers, and churches who fear that they'll be forced to marry gay and lesbian couples. But the First Amendment already prevents clergy or churches from being forced to marry a couple if doing so is contrary to their beliefs. It always has. The Supreme Court's decision in *Obergefell v. Hodges*, which recognized that same-sex couples have the right to marry in all 50 states, did not change that.

- Why do you believe that a bill like FADA is necessary? And how do you reconcile your support for FADA, which would sanction discrimination against lawfully married gay and lesbian couples, with your claim to "understand the demands for justice and fairness made by the LGBT community?"

RESPONSE: First, I reject the characterization of the First Amendment Defense Act as "deceptively named." During the oral argument in *Obergefell*, Justice Alito asked former Solicitor General Donald Verrilli whether a private university or college could lose its tax-exempt status if it opposed same-sex marriage. General Verrilli responded: "it's certainly going to be an issue. I don't deny that." Thus, the purpose of the legislation was to prohibit the federal government from taking discriminatory actions against any person based on their belief or action in accordance with a religious or moral conviction. I supported this legislation because I believe that we can, and should, protect the rights of all citizens—including LGBT individuals and those with traditional views of marriage. I do not see freedom as a zero-sum game. I understand the critical and historic role of Department of Justice in upholding our nation's civil rights laws. If I am fortunate enough to be confirmed as Attorney General, I will enforce those laws to the letter.

Question 3. You strongly opposed the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, which extended federal hate crimes protections to victims who were targeted on the basis of their sexual orientation or gender identity. Such crimes have an especially pernicious impact on members of the LGBT community. As FBI Director Comey explained, "[h]ate crimes are different from other crimes. They strike at the heart of one's identity. They strike at our sense of self, our sense of belonging. The end result is loss: loss of trust, loss of dignity and, in the worst case, loss of life."

In November, the FBI released its annual report on hate crime statistics, which relies upon data gathered and reported by state and local law enforcement agencies. According to the report, 7,121 people were victims of hate crimes in 2015. Of those 7,121 victims, 17.7 percent were

targeted because of their sexual orientation and 1.7 percent were targeted because of their gender identity. However, during a 2009 hearing on the bill that extended protections to the LGBT community, you stated that "I'm not sure women or people with different sexual orientations face that kind of discrimination. I just don't see it."

- In light of the data gathered by the FBI, do you still hold the view that LGBT people do not experience that kind of discrimination? If so, why?

RESPONSE: Any statement I made during debate over the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009 reflected an opinion that I reached based on information available to me at the time. If I am fortunate enough to be confirmed as Attorney General, I will work diligently to ensure that all Americans receive equal protection under our laws.

Although the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act enables the Department to prosecute crimes motivated by the victim's actual or perceived sexual orientation or gender identity, and to provide assistance to state and local authorities in the investigation and prosecution of hate crimes, federal law does not require state or local law enforcement to report such incidents. As a result, Director Comey acknowledged, "[t]here are jurisdictions that fail to report hate crime statistics. Other jurisdictions claim there were no hate crimes in their community, a fact that would be welcome if true."

- In recognition of this fact, the FBI has worked with advocacy and law enforcement organizations to improve the investigation of hate crimes and to develop a standard for collecting, analyzing, and reporting hate crime incidents. Do you agree that underreporting of hate crime incidents by state and local law enforcement remains an obstacle to combatting hate crimes? If not, why?

RESPONSE: While I am generally familiar with Director Comey's concerns about underreporting, but am unable to thoroughly evaluate his assertion or offer an opinion as I have not been presented with information necessary to do so. However, if I am fortunate enough to be confirmed as Attorney General, I would expect to learn more about this issue and give it my careful consideration.

- What steps will you take to encourage greater participation in hate crimes reporting by state and local law enforcement agencies?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, the Department will be vigilant in the full enforcement of all federal laws. I will endeavor to direct and utilize the resources of the Department in the most effective manner possible to ensure the enforcement of federal law. The specific steps I will take to ensure the enforcement of any particular law will be decided after careful evaluation of any current practices of the Department and the effectiveness of those practices.

Question 4. A number of organizations and individuals have voiced support for your nomination or submitted letters praising your suitability for the post. On the day your nomination was

announced, the antiabortion group Operation Rescue issued a press release in which its president, Troy Newman wrote quote, "[w]e could not be happier about the selection of Sen. Jeff Sessions as the next Attorney General. I have worked on projects with Sen. Sessions in the past and know him to be an experienced prosecutor and principled pro-life advocate with a reputation for honesty."

- What projects did you work on with Mr. Newman? Please list each project separately and describe your level of involvement in each.

RESPONSE: I am unaware of any such projects.

The title of the above Operation Rescue press release is "We Stand Ready to Assist Attorney General-Designate Sessions in Prosecuting Planned Parenthood." In the release, Mr. Newman said "a new sheriff is coming to town" and that Planned Parenthood would no longer be protected.

- Have you made a commitment to Mr. Newman or to Operation Rescue to prosecute Planned Parenthood? If so, please describe any discussions you have had with Mr. Newman or his associates regarding the prosecution of Planned Parenthood or other reproductive health providers.

RESPONSE: I have made no commitments to any individual, including Mr. Newman, nor have I engaged in discussions about specific legal action the Department might take if I am fortunate enough to be confirmed as Attorney General. It would be highly inappropriate to do so.

In 1994, Congress passed the Freedom of Access to Clinic Entrances (FACE) Act. FACE prohibits threatening or intimidating women seeking reproductive health services and the doctors who provide them. It prohibits physically interfering with or injuring patients and clinicians. It prohibits damaging clinic property. And the Department of Justice enforces the FACE Act.

- It is critically important, especially in light of your support from radical elements within the antiabortion movement, that patients and women's health providers not doubt the Department's willingness to enforce the law and guard against threats. How can you reassure abortion providers and women seeking health care services that you will strictly enforce the FACE Act, if confirmed?

RESPONSE: As I testified before the Committee, these providers are entitled to the protection of relevant federal law. If I am fortunate enough to be confirmed as Attorney General, I will faithfully follow and enforce the law as defined by the courts, including the FACE Act and all other federal laws that the Attorney General is authorized to enforce.

Question 5. In September 2015, the Department of Justice released policy guidance on the use of cell-site simulators—portable surveillance devices that collect cell phone identification and location information by mimicking cellphone towers. The guidance was released after I wrote to the Department raising concerns about the use of these systems.

Cell-site simulators, known as International Mobile Subscriber Identity Catcher devices (IMSI-catchers), "DRTBoxes, "dirtboxes," or "Stingrays," have the ability to compel affected mobile phones to reveal their location and users' registration information. Recent complaints filed with the FCC have also alleged that cell-site simulators can disrupt cellular service and may interfere with calls for emergency assistance. As such, I believe that the devices must be used with great care and only in limited circumstances. In my view, the need for law enforcement to monitor and apprehend criminal suspects should not come at the expense of innocent Americans' privacy. In order to ensure that the Department uses cell-site simulators in a manner that is consistent with the Constitution, the Department's 2015 guidance provides that law enforcement agencies must first obtain a search warrant supported by probable cause before deploying cell-site simulators. However, this guidance could be repealed at any time.

- The 2015 policy provides a critical protection for Americans' privacy. If you are confirmed, will you continue to require a warrant before authorizing the use of cell-site simulators? If not, why?

RESPONSE: While I am generally familiar with this policy, I am not privy to any internal Department of Justice data regarding the effectiveness of the policy in balancing the interests of law enforcement and public safety with protection of civil liberties. If I am fortunate enough to be confirmed as Attorney General, I will carefully review and evaluate this policy, including any relevant data and how circumstances may have changed or how they may change in the future.

- The 2015 guidance also sets forth practices concerning the collection and retention of data. If confirmed, will you commit to keeping the guidance's data retention and transparency provisions in place? If not, why?

RESPONSE: While I am generally familiar with this policy, I am not privy to any internal Department of Justice data regarding the effectiveness of the policy in balancing the interests of law enforcement and public safety with protection of civil liberties. If I am fortunate enough to be confirmed as Attorney General, I will carefully review and evaluate this policy, including any relevant data and how circumstances may have changed or how they may change in the future.

- If confirmed, will you commit to preventing the Department from using cell-site simulators to surveil individuals participating in First Amendment-protected activities, such as attending political protests or religious ceremonies? If not, why?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will carry out my duty to enforce the laws and will do so with unreserved fidelity to the Constitution, including the First Amendment.

Question 6. As the ranking member of the Subcommittee on Privacy, Technology and the Law, I have watched the proliferation of body-worn cameras with cautious optimism. Body cameras have the potential to help build trust between law enforcement and the community, and reduce uncertainty in the courtroom. At the same time, body cameras collect incredibly sensitive

information, and it is essential that law enforcement agencies develop privacy and data protection policies to address how data captured by body cameras is collected and used. In September 2015, the Department of Justice awarded more than $23 million in grants to local and tribal law enforcement agencies to expand the use of body-worn cameras. The grants support the purchase of cameras, training and technical assistance, and efforts to catalog and examine the impact of their use. The Department also created a body-worn camera toolkit, which includes model policies that grantee agencies may reference in setting up their own programs. Under the current program, grantees are required to develop and articulate policies on privacy and data retention, but the Department does not require that grantee policies meet any one standard.

In my view, it's essential that the public and law enforcement have a clear understanding of how the sensitive information captured by body cameras is handled. So long as the Department of Justice is supporting the purchase of body-worn cameras by state and local law enforcement agencies, I think it's important that DOJ make sure departments who purchase body cameras with federal funds have a meaningful policy in place guiding their use, including a privacy policy.

- If confirmed, will you commit to working with me to ensure that grantees develop strong policies to protect the integrity of the data and the privacy of both police and the public? If not, why?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I would commit to working with you and any other member of Congress on policies to protect the integrity of the data and the privacy of both police and the public.

Question 7. Senator Hatch asked you about the Religious Land Use and Institutionalized Persons Act (RLUIPA), which is enforced by the Department of Justice's Civil Rights Division. You told Senator Hatch that "religious freedom is a great heritage of America. We respect people's religion…. It's mandated in the Constitution."

- In a 2016 report on the Department's RLUIPA work, the Department noted that the number of RLUIPA investigations involving mosques or Islamic schools had risen dramatically from 2000 to 2006. In December 2016, for example, the Department filed a lawsuit against Culpeper County, Virginia, alleging that the county violated RLUIPA when it denied a sewage permit application to the Islamic Center of Culpeper (ICC), effectively preventing the ICC from building a mosque. The complaint alleges that since 1992, the county had considered 26 applications and never denied the permit for a commercial or religious use prior to ICC's application. Do you agree that enforcement of RLUIPA—on behalf of all religious faiths—is critically important?

RESPONSE: Yes.

- Will you commit to defending the rights of Muslim Americans—as strenuously as those of any other faith—to be free from unduly burdensome, unreasonable or discriminatory zoning, landmarking, and other land use regulations?

RESPONSE: RLUIPA is federal law and, if I am fortunate enough to be confirmed as Attorney General, I would ensure its even-handed enforcement when the facts and circumstances of a case dictate Department action.

- The 2016 report by the Department also contained this finding: "Another troubling statistic that emerges from the last five-and-a-half years reinforces the conclusion that there is particularly severe discrimination faced by Muslims in land use: While 84% of non-Muslim investigations opened by the Department resulted in a positive resolution without the United States or private parties filing suit, in mosque and Islamic school cases, only 20% have resulted in a positive resolution without the filing of a RLUIPA suit." Will you commit that the Department will maintain the same resources for its RLUIPA work, including work on behalf of Muslim Americans?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will endeavor to direct and utilize the resources of the Department in the most effective manner possible to ensure the enforcement of federal law and the protections inherent therein. I will carefully evaluate any current departmental practices and the effectiveness of those practices to aid in the administration of justice.

- You are reported as having said, that the true threat confronting the United States is "the toxic ideology of Islam." How can you assure an asylum applicant claiming persecution based on their Islamic faith will receive a fair hearing in the immigration courts, if you are confirmed?

RESPONSE: If I am confirmed, asylum applicants claiming persecution in the immigration courts will have an equal opportunity to qualify for asylum consistent with the our duly-enacted immigration laws.

Question 8. I am concerned about further consolidation in the media and telecommunications markets because it often leads to higher prices, fewer choices, and even worse service for consumers. Furthermore, when you have a small group controlling what Americans can watch, the risk of private censorship over political content grows.

In a speech in October, President-elect Trump announced his opposition to AT&T's proposed acquisition of Time Warner, saying that his administration would not approve the deal. He also stated that his administration would revisit Comcast's acquisition of NBCUniversal, suggesting that it never should have been approved in the first place.

- At a time when a typical American household spends on average about $2,700 annually on telephone, video, and broadband services, do you agree with the president-elect that consolidation in the media and telecommunications industries is a problem?

RESPONSE: The antitrust division at the Department of Justice plays a vital role in keeping our markets competitive and protecting consumers. The media and telecommunications markets are no exception. If I am confirmed as Attorney General, the antitrust division will play a central role in protecting consumers in these particular markets and will not hesitate to

take action against violations of law. I look forward to working with you and other members of Congress to learn more about the specific issues facing the media and telecommunications marketplaces and to ensure that the Department has the information and tools it needs to carry out its duties in antitrust enforcement.

- Should you be confirmed as attorney general, how will an Antitrust Division under your supervision evaluate AT&T's proposed acquisition of Time Warner? Will it revisit Comcast's acquisition of NBCUniversal?

RESPONSE: If confirmed as Attorney General, the antitrust division will conduct a thorough evaluation, consistent with federal law, of all proposed mergers and acquisitions to determine whether they violate federal antitrust law and policies.

Question 9: In December, President-elect Trump met with Masayoshi Son, chief executive of Softbank, which owns Sprint. Mr. Son has allegedly long sought for his company to acquire T-Mobile, which would collapse the U.S. wireless market from four major nationwide carriers to three. Following the meeting, Mr. Son reportedly committed to investing $50 billion in the United States and creating 50,000 new jobs. What Mr. Son will receive in return for these investments is unclear.

- Have you discussed the meeting between Mr. Son and the president-elect with Mr. Trump? If so, what promises were made to Mr. Son in exchange for his commitments to invest in the United States?

RESPONSE: No.

- What role will an Antitrust Division under your supervision play in the new administration? Should companies seeking regulatory approval of their mergers and acquisitions plan to communicate with the president-elect directly prior to – or during – the Department of Justice review process? How will you ensure an impartial review?

RESPONSE: The antitrust policies of the United States must be consistent and as clear as possible, and if I am fortunate enough to be confirmed, I will not hesitate to enforce antitrust law to protect against anti-competitive transactions. Though I am not thoroughly familiar with the precise processes currently employed by the Department, antitrust review under my leadership will be consistent with federal antitrust law, objective, independent, and based on sound economic analysis.

Question 10: I am increasingly concerned about internet companies that can use their positions as dominant media platforms to stifle competition and inhibit the free flow of information. In recent years, we've heard allegations of online intermediaries leveraging their market dominance to the detriment of content creators and innovative startups. For example, Google has given preference to its own products and services in search results while downgrading competitors' products and services. I've also heard from photographers in my home state that Google is taking original content from photographers' distributors' websites without appropriate compensation or attribution. Apple is preventing its competitors in the music streaming market from promoting

lower prices to consumers on Apple iOS. And Amazon is using its dominance in the book market to impose unfair contractual terms on publishers and authors.

- What will an Antitrust Division under your supervision do to address allegations that these dominant platforms' unilateral behavior is anticompetitive and may ultimately harm the free flow of ideas and content?

RESPONSE: Ensuring competition on the internet is of vital importance in our modern, digital economy. If I am confirmed as Attorney General, the antitrust division will look at all markets to ensure compliance with federal antitrust law. It will conduct a thorough evaluation, consistent with federal law, of all proposed mergers and acquisitions to determine whether they violate federal antitrust law and policies. I look forward to working with you and other members of Congress to learn more about these particular issues and to ensure that the Department has the information and tools it needs to carry out its duties in antitrust enforcement.

In recent years, antitrust investigations against Google and Apple for alleged anti-competitive conduct have taken place at the Federal Trade Commission, which shares antitrust enforcement authority with the Department of Justice. However, this does not preclude the Justice Department from asserting jurisdiction over these issues in the new administration.

- As Attorney General, would you be open to examining allegations of anti-competitive conduct by some of these dominant platforms at the Department of Justice?

RESPONSE: As I testified before the Committee, the antitrust policies of the United States have to be as consistent and as clear as possible to protect against anti-competitive transactions in any industry or marketplace. If confirmed as Attorney General, I will not hesitate to enforce antitrust law to protect against anti-competitive transactions.

Question 11: As we saw following Comcast's acquisition of NBCUniversal, conditions that are placed on deals that are approved can be difficult to enforce and are not always reliable. Another major problem is that those conditions expire.

- How do you believe the Department of Justice can ensure that merger conditions actually have enough teeth to protect consumers in the long term?

RESPONSE: Federal antitrust laws are in place to protect consumers and to ensure a competitive marketplace. If I am confirmed as Attorney General, the antitrust division will not hesitate to enforce such laws and impose appropriate conditions to protect consumers, as necessary.

- There is increasing evidence that other types of merger remedies, including divestitures, aren't sufficient in protecting consumers from harm. Do you agree that in cases such as those, the DOJ should be more willing to challenge these deals in court, as it was slated to do in the case of Comcast-Time Warner Cable?

RESPONSE: If I am confirmed as Attorney General, the antitrust division will examine each transaction on the merits and will not hesitate to challenge transactions or impose conditions or other remedies as necessary to protect consumers.

Question 12: Four years ago, as the Supreme Court was considering *American Express v. Italian Colors*, I asked Assistant Attorney General William Baer about the importance of private antitrust enforcement. He has since told me that the Supreme Court's decision in that case made it much harder for small businesses to file private antitrust enforcement actions and instead they are forced to arbitrate their claims.

- Do you agree that antitrust enforcement has changed since that decision? Do you currently have concerns about small business' ability to bring antitrust claims to a public court of law? If not, why?

RESPONSE: I have not studied the Court's decision or its implications for small businesses. If I am fortunate enough to be confirmed as Attorney General, I expect to learn more about this issue.

Question 13: Since entering the Senate, I have made it a priority to combat the widespread and harmful impact of forced arbitration. These clauses restrict Americans' access to justice by stripping consumers and workers of their legal rights and insulating corporations from any accountability.

I have a letter that you sent on June 10, 1999 to one of your constituents. You write, "thank you for taking the time to contact me with your concerns about the Federal Arbitration Act and consumer transactions. I appreciate the reality that in many cases, arbitration clauses in contracts for sales of consumer goods limit a person's right to sue in state or federal court."

- Do you still believe that arbitration clauses often limit Americans' right to sue in a public court of law?

RESPONSE: I have no reason to disagree with the sentiment expressed in the letter.

I do not oppose the use of arbitration when it is voluntarily agreed to by both parties after a dispute has arisen. But consumers and workers have a right to a meaningful choice about where to enforce important state and federal laws. Forced arbitration clauses, by their very nature, effectively deny Americans of this choice. In 2012, in response to President Obama's weekly address, you stated that "before entering politics, I was a federal prosecutor. I tried many cases and spoke to many juries. The brilliance of our legal system is that it places judgment in the hands of everyday citizens. Twelve complete strangers, from all walks of life, sit in a jury box, carefully weigh the evidence, and then reach an impartial verdict." Despite the praise you have offered for our nation's public courts and justice system, you have consistently defended forced arbitration clauses in consumer and employment contracts.

- Why should any American be forcibly denied the fundamental rights and protections inherent in the "brilliance of our legal system" as you so aptly recognized in 2012?

RESPONSE: I do not believe any American should be forcibly denied the fundamental rights and protections inherent in the brilliance of our legal system.

One very public example of mandatory arbitration is former Fox News anchor Gretchen Carlson's lawsuit alleging that she'd been sexually harassed by her boss Roger Ailes, the founder, and former CEO and chairman of the network. Ailes' lawyers tried to force her case into private arbitration, arguing that Ms. Carlson had breached the terms of her employment contract, which included a forced arbitration clause. The arbitration clause in Ms. Carlson's contract also prohibited her from speaking out about the claims – as is the case in most forced arbitration agreements. Had Roger Ailes and Fox News been successful in forcing Ms. Carlson into arbitration and abiding by those terms, her colleagues at Fox News, many of whom were also victims of sexual harassment, would have been left in the dark about her case and may never have come forward with their own claims.

According to the Equal Employment Opportunity Commission, at least 25% of American women say they have experienced sexual harassment in the workplace.

- Do you agree that women with claims of sexual harassment and employment discrimination deserve access to the courts and an impartial jury verdict? If not, why?

RESPONSE: Yes. All victims of sexual harassment and employment discrimination should have the ability to obtain justice and seek appropriate recourse against the perpetrator.

- Do you believe it is it fair for corporations and employers to force consumers and workers to surrender their fundamental legal rights before a dispute has even arisen? If so, why?

RESPONSE: Arbitration in intended to avoid the formalities, expense, and delay of formal dispute resolution before courts. It is one of the most cost-effective means of resolving disputes. Unlike businesses, consumers and employees generally cannot afford a team of lawyers to represent them. Furthermore, consumers, employees, and small businesses that enter into contracts covered by the Federal Arbitration Act is entitled to have their disputes resolved in accordance with fundamental principles of due process, and in a speedy and cost-effective manner.

- In light of the fact that arbitration proceedings are shrouded in secrecy and have the ability to cover up discriminatory patterns and practices, why should they not be subject to the same transparency afforded participants in the civil justice system you praised in 2012?

RESPONSE: Consumers, employees, and small businesses that enter into contracts covered by the Federal Arbitration Act is entitled to have their disputes resolved in accordance with fundamental principles of due process, and in a speedy and cost-effective manner.

Forced arbitration also impacts servicemembers who are trying to enforce the legal rights they fight to protect. Take the case of Kevin Ziober, a Navy Reservist who, after informing his

company he was being deployed to fight for his country in Afghanistan, was thrown a farewell party with an American-flag shaped cake, and then summarily dismissed by his employer in violation of a federal law called the Uniformed Services Employment and Reemployment Rights Act. After returning from active duty, Kevin filed suit against his former employer, and has been fighting for years for the right to enforce congressionally mandated protections for servicemembers in a public court of law.

- Do you agree that we should afford the same protections inherent in our civil justice system to everyone, especially our men and women in uniform?

RESPONSE: I am not familiar with the above-mentioned case. Regardless, anyone, including our men and women in uniform, who enters into a contract covered by the Federal Arbitration Act is entitled to have their disputes resolved in accordance with fundamental principles of due process, and in a speedy and cost-effective manner.

Question 14: In recent years, the growing use of so-called stalking apps, which allow users to track someone's location – or even listen to their phone calls and read their text messages – without their knowledge or consent, has raised serious concerns. Federal law does not currently prohibit developers from creating apps that surreptitiously track geo-location data. This loophole in the law grants stalkers and domestic abusers access to a powerful tool enabling increased violence against women.

- Do you agree that location data can be highly personal information and is deserving of privacy protections?

RESPONSE: Your tireless efforts to shed light on this very important issue, particularly as it relates to victims of domestic violence, have been admirable. If I am fortunate enough to be confirmed as Attorney General, I will ensure that the Department continues to prosecute these matters, and will be happy to work with you and other members of Congress to advance policies that protect victims.

Last year, I reintroduced legislation – the Location Privacy Protection Act – that would, among other things, amend the federal wiretap statute to explicitly include the interception of location data and allow for the forfeiture of proceeds from the sale of smartphone tracking apps.

- Should you be confirmed as Attorney General, will you work with me on this legislation to ensure that the federal government has all the tools necessary to protect women from stalking apps and their attendant violence and abuse?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will be happy to work with you to ensure that federal prosecutors have all the tools needed to protect victims from stalking, violence, and abuse.

DOJ has the authority under existing wiretap laws to prosecute creators of apps that allow stalkers to listen to victims' phone calls, intercept text messages, or otherwise intercept content from victims' phones. In response to my request, which was joined by Senators Grassley,

Cornyn, and Graham, the DOJ exercised this authority and began taking criminal action against the creators of these stalking apps within the last few years. Although this is a positive development in the enforcement of our nation's laws, there is more that DOJ can do to protect the victims of stalking apps.

- What will you do to ensure DOJ continues taking such action against the creators of stalking apps?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I am happy to work with you and other members of Congress to advance policies that protect victims of domestic violence and stalking by pursuing appropriate criminal actions.

Question 15: In our courtesy visit, we discussed violence against Native women, and I told you how important the issue is to me. When I provided you with a statistic demonstrating just how prevalent violence against Native women is – and at the hands of non-Indians – you expressed shock and said that you didn't realize the extent of the problem.

Over 84% of Native women experience domestic or sexual violence. And over 97% of them are victimized by non-Indians. That's a recent stat. But in 2012, all you had to do was talk to one tribe, and you would have learned that women in Indian Country are regularly abused by non-Indians who go unprosecuted and unpunished.

During the hearing you told me you would spend a little time with the Poarch Band of Creek Indians in Alabama to better understand how the issue of domestic and sexual violence is affecting Indian Country. I also think it is necessary to visit at least one tribe where the special domestic violence jurisdiction is being exercised. Tribes are using that authority to secure long overdue justice for victims and are doing so with care and deliberation and in a manner that protects defendants' rights.

- During the hearing you also told Senator Hirono that you can't commit to not challenging VAWA on these grounds. But you also admitted to not understanding the gravity of the problem of violence against native women when you voted on it in 2013. Now that you are better informed on the issue, will you commit to enforcing and defending this very important provision?

RESPONSE: If I am confirmed as Attorney General, I will enforce all federal laws, including the 2013 reauthorization of VAWA. I understand that a pilot program has been initiated that seeks to conform tribes' exercise of criminal jurisdiction over non-Indians to the requirements of the Sixth Amendment. I will carefully study this program before reaching any legal conclusions about the VAWA tribal jurisdiction provision.

Sexual assault and other violent crime on Indian reservations are very serious problems—in some places, the problem has reached epidemic proportions. The Federal government exercises criminal jurisdiction over many Indian reservations. If I am confirmed as Attorney General, I will be committed to ensuring that federal law enforcement resources are fully deployed to investigate and prosecute crime on Federal reservations, and will request

additional resources where existing resources are inadequate. Finally, I would note that on many Indian reservations, state and local authorities exercise criminal jurisdiction. State and local law enforcement resources greatly exceed those of Federal and tribal governments combined. On the exclusively Federal reservations where federal law enforcement has proved to be inadequate to reduce high levels of violent crime, Congress may consider allowing state and local authorities to exercise criminal jurisdiction. State and local law enforcement has proven effective on many existing Indian reservations, and the extension of such criminal jurisdiction to both Indians and non-Indians in Indian country does not offend constitutional guarantees.

Question 16: In 2011, the Office for Victims of Crime established the National Coordination Committee on the American Indian/Alaska Native (AI/AN) Sexual Assault Nurse Examiner-Sexual Assault Response Team (SANE-SART) Initiative. The Committee has since issued a report with specific recommendations for the Department of Justice on improving the federal government's response to adult and child victims of sexual violence in tribal nations, and the Obama Administration has implemented many of these recommendations.

- As attorney general, will you commit to continuing these policies to further address sexual violence in Indian Country? If not, why?

RESPONSE: I am not familiar with this report, however, if I am confirmed as Attorney General I will certainly review it and its recommendations. I will implement recommendations that improve the Federal government's fulfillment of its role in enforcing criminal laws on Federal reservations. If confirmed, I will be committed to ensuring that federal law enforcement resources are fully deployed to investigate and prosecute crime on Federal reservations, and will request additional resources where existing resources are inadequate.

Question 17: The Department of Justice has the primary responsibility for investigating and prosecuting crime in much of Indian country. The rates of violent victimization on many Indian reservations are the highest in the nation, but crimes in Indian country still largely go unprosecuted and unpunished.

- What will be your approach to addressing crime in Indian country? What steps will you take to reduce crime in Indian country?

RESPONSE: If I am confirmed as Attorney General, I will be committed to ensuring that federal law enforcement resources are fully deployed to investigate and prosecute crime on Federal reservations, and will request additional resources where existing resources are inadequate.

Question 18: In recent years the media has increasingly highlighted the tragic prevalence of sexual assault in our country – whether it be on our military bases, on our college campuses, or at the hands of once-beloved public figures. In response, most of us in Congress have publicly committed to doing whatever is necessary to combat such violence and ensure that victims have

access to justice. But critical to that effort is also our willingness – as the nation's leaders – to speak openly and honestly about the systemic barriers to addressing the problem.

- As attorney general – and the nation's top victim advocate – what would you say to the hundreds of thousands of survivors of sexual violence who may be unwilling to report their abuse for fear of retaliation or concern that they will not be believed?

RESPONSE: I would urge victims to report all incidents of sexual assault to law enforcement authorities, and would assure them that federal authorities (which, for example, typically have jurisdiction over military bases) will take all reports seriously and will investigate and prosecute all appropriate cases to the fullest extent of the law.

- What steps do you think our law enforcement can take to address a culture that often fails to hold perpetrators accountable and instead blames the victims?

RESPONSE: Law enforcement authorities can best "address" such a culture by aggressively investigating sexual assault offenses and vigorously prosecuting them to the fullest extent of the law.

Question 19: As we've explored previously in the Judiciary Committee – and as research continues to demonstrate – runaway and homeless youth are particularly vulnerable to trafficking and exploitation. Covenant House New York's 2013 survey found that youth involved in commercial sexual activity frequently reported exchanging sexual acts for basic necessities like food or a place to sleep. And a more recent study by Covenant House New Orleans found that a quarter of the homeless youth they interviewed had been victims of trafficking or sexual labor. Finally, according to the Human Rights Campaign, of the nearly 2 million young people who are affected by homelessness each year, research shows that up to 40 percent of homeless youth identify as LGBT.

- You were one of three senators who opposed the effort to reauthorize the Runaway and Homeless Youth Act in the Judiciary Committee in the 113th Congress. Why exactly did you oppose?

RESPONSE: I was concerned with what I believed to be overly broad and vague language in the bill that could have discriminated against faith-based organizations that help form the fabric of the United States' social services, and would have undermined the goal of the bill by making it more difficult to protect and provide services for at-risk individuals.

- Should you be confirmed as attorney general, how can I trust that you will work to ensure that all kids, including LGBT youth and those that need it the most, have access to shelter and other necessary services to prevent them from becoming a victim of trafficking?

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 in my commitment to strongly address these types of terrible crimes, and to protect and ensure justice for their victims.

Question 20: As the Department of Housing and Urban Development has frequently recognized, survivors of domestic violence face unique challenges in securing and maintaining adequate housing. Indeed, according to the Department of Justice, one-in-four homeless women in the United States is a survivor of domestic violence. And not surprisingly, once a woman becomes homeless, she becomes more vulnerable to violence and exploitation. In fact, nine-in-ten homeless women have experienced severe physical or sexual abuse.

- The Department of Justice is charged with protecting Americans' right to access housing free from discrimination. Should you be confirmed as Attorney General, what will you do to address the link between homelessness and domestic violence? How will you work with the Department of Housing and Urban Development to accomplish these goals?

RESPONSE: If I am confirmed, I will fully enforce all existing laws relating to sexual assault, and all non-discrimination laws. I assume that the Department of Housing and Urban Development refers cases of potential violation of the laws to the Justice Department for prosecution, and I would expect to continue such cooperation.

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

QUESTIONS FROM SENATOR COONS

1. Evidence shows that solitary confinement has significant mental health consequences when used for extended periods of time.

    a. Do you believe solitary confinement should only be used as a last resort?

RESPONSE: It is vital that our prisons be able to secure prisoners and maintain order, but it is also important that they be a safe environment for those prisoners while they are incarcerated, as well as for those guarding them. I believe that we should closely evaluate the studies and evidence and make the best determination about how to handle what can be a dangerous prison population in a way that is both constitutional and effective.

    b. Do you believe solitary confinement should ever be used for juveniles?

RESPONSE: It is vital that our prisons be able to secure prisoners and maintain order, but it is also important that they be a safe environment for those prisoners while they are incarcerated, as well as for those guarding them. The need to maintain safety is especially true for juveniles, who often present unique correctional challenges. I believe that we should closely evaluate the studies and evidence and make the best determination about how to handle what can be a dangerous prison population in a way that is both constitutional and effective.

2. Individuals are being jailed throughout the country when they are unable to pay a variety of court fines and fees. There is often little or no attempt to learn whether these individuals can afford to pay the imposed fines and fees or to work out alternatives to incarceration.

    a. Under your leadership, will the Department of Justice work to end this practice?

RESPONSE: These are legitimate concerns, and if I am fortunate enough to be confirmed as Attorney General, I will make every effort to protect the constitutional rights of individuals in the federal criminal justice system.

    b. What is your position on the practice of imposing unaffordable money bail, which results in the pretrial incarceration of the poor who cannot afford to pay?

RESPONSE: There have been a number of concerns expressed by different groups, stakeholders, and officials regarding the use of money bail, and there is also ongoing litigation in various jurisdictions around the country regarding this practice. I believe that we should closely evaluate these concerns and the evidence to determine areas where pretrial incarceration practices can be improved, while also securing suspected criminals or providing adequate assurances that they will be present for court proceedings.

3. The Department of Justice established the Office for Access to Justice (ATJ) in March

2010 to address the access-to-justice crisis in the criminal and civil justice system. ATJ's mission is to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status. How will you improve access to justice for indigent criminal and civil defendants?

RESPONSE: Ensuring that individuals are aware of and able to exercise their rights is an important part of a fair justice system. If I am fortunate enough to be confirmed as Attorney General, I will work to ensure that the constitutional rights of defendants are protected.

4. In August of 2013, the Department of Justice released the Cole memorandum, providing that states could pursue their own marijuana policy as long as the policy does not violate certain federal priorities, such as selling to minors or transporting marijuana across state lines.

    a. Will you continue to follow the Cole memorandum?

RESPONSE: While I am generally familiar with the Cole memorandum, I am not privy to any internal Department of Justice data regarding the effectiveness and value of the policies contained within that memorandum. If I am fortunate enough to be confirmed as Attorney General, I will certainly review and evaluate those policies, including the original justifications for the memorandum, as well as any relevant data and how circumstances may have changed or how they may change in the future.

    b. Will you instruct Department of Justice prosecutors to bring actions against those who use state-sanctioned medical marijuana, provided they are using it in accordance with the guidance of the Cole memorandum?

RESPONSE: While I am generally familiar with the Cole memorandum, I am not privy to any internal Department of Justice data regarding the effectiveness and value of the policies contained within that memorandum. If I am fortunate enough to be confirmed as Attorney General, I will certainly review and evaluate those policies, including the original justifications for the memorandum, as well as any relevant data and how circumstances may have changed or how they may change in the future.

5. How will you implement and enforce the Death In Custody Reporting Act and the FBI National Use of Force database?

RESPONSE: It is my understanding that in December 2016, the Department of Justice issued a report on the progress of implementing the Death in Custody Reporting Act (DCRA), which requires federal, state, and local law enforcement agencies to report information regarding deaths of detainees, arrestees, or prisoners while they are in the custody of those agencies. The report indicated that guidelines for reporting that data will not be finalized before the second quarter of Fiscal Year 2017. It is also my understanding that the FBI is collaborating with major law enforcement organizations to develop a national use-of-force data collection effort, whereby law enforcement agencies may voluntarily collect and report data regarding the non-lethal use of force by their officers. If I am fortunate enough to be confirmed as Attorney General, I will support these efforts.

6. When you were the Alabama Attorney General, Alabama was the only state that handcuffed prisoners to "hitching posts" as punishment, cuffing them by both wrists to a pole at chest level with feet shackled for up to 10 hours at a time, unprotected from the sun, heat, or rain, and without access to water or even access to a bathroom. On March 27, 1995, the Department of Justice sent letters to you, as Alabama's Attorney General, along with the Governor and other state officials declaring Alabama's use of the hitching post unconstitutional and unjustified. However, the use of the hitching post continued. On June 27, 1995, the Justice Department sent a letter to the Alabama Department of Corrections stating, "We remain deeply concerned about your unwillingness to take any corrective action regarding the 'rail' or 'hitching post.' . . . [W]e have concluded that the use of the 'rail' is without penological justification." The Alabama Department of Corrections was sued over the use of the hitching post in 1995 but continued to defend its use. At the hearing and in our private meeting, I asked you about the use of the hitching post in Alabama prisons when you were the Alabama Attorney General. However, you indicated in our meeting that you did not remember the issue, and your response at the hearing only addressed the use of chain gangs. Do you believe that the use of hitching posts is acceptable?

RESPONSE: In a series of cases decided years after I was no longer the Attorney General for the State of Alabama, the Supreme Court held that the use of hitching posts for punitive reasons unrelated to safety issues or emergencies is prohibited under the Eighth Amendment. If I am fortunate enough to be confirmed as Attorney General, I will enforce federal law as interpreted by the Supreme Court.

7. In *Hope v. Pelzer*, 536 U.S. 730, 744 (2002), the Supreme Court ruled that prison officials "violated clearly established law" when they continued to use the hitching post. Why didn't you intervene to stop this unconstitutional practice when you were Alabama Attorney General?

RESPONSE: To my knowledge, in that case, the Supreme Court prohibited the use of the hitching post as applied in that case, due to the circumstances that case presented. The complaint in that case was not filed until after I was elected to the Senate, and the first filing by Alabama in that case was not until nearly two months after I had left the Alabama Attorney General's Office.

8. In 2014, the Department of Justice concluded its investigation of allegations of sexual abuse and sexual harassment at the Julia Tutwiler Prison for Women, finding that:

> For nearly two decades, Tutwiler staff have harmed women in their care with impunity by sexually abusing and sexually harassing them. Staff have raped, sodomized, fondled, and exposed themselves to prisoners. They have coerced prisoners to engage in oral sex. Staff engage in voyeurism, forcing women to disrobe and watching them while they use the shower and use the toilet. Staff sexually harass women, subjecting them to a daily barrage of sexually explicit verbal abuse.

Also, there are federal lawsuits pending against Alabama state prisons challenging unconstitutional conditions, including high rates of violence and inadequate medical and

mental health treatment. On October 6, 2016, the Justice Department announced that it had opened a statewide investigation into Alabama's prisons for men, which "will focus on whether prisoners are adequately protected from use of excessive force and staff sexual abuse by correctional officers, and whether the prisons provide sanitary, secure and safe living conditions."

a. Will you ensure that the Department of Justice continues all of these investigations into conditions in Alabama prisons?

RESPONSE: Safe and secure prison conditions are an essential part of our justice system. If I am fortunate enough to be confirmed as Attorney General, I will ensure that violations of federal law in prison facilities are investigated and remedied no matter the state, and that our justice system protects inmates and those guarding them.

b. As a public official in Alabama, what have you done to ensure that Alabama prison facilities comply with the Constitution?

RESPONSE: It is vital that our prisons be able to secure prisoners and maintain order, but it is also important that they be a safe environment for prisoners and those who guard them. That is why, in 2003, Senator Kennedy and I introduced the Prison Rape Elimination Act, which has been critical in making prisons a safer and more humane environment. If I am fortunate enough to be confirmed as Attorney General, I will continue to look for solutions like this to the challenges faced by correctional facilities.

9. The President-elect has claimed that millions of people voted illegally in the presidential election.

a. Do you agree, and if so, on what evidence do you rest your claim?

RESPONSE: As I testified before the Committee, I am not aware of the context or the basis for the President-elect's remarks and have conducted no research nor reviewed data on the issue.

b. If not, do you contend that there were instances of voter fraud in the 2016 presidential election, and on what evidence do you base your claim?

RESPONSE: As I testified before the Committee, I believe that fraudulent activities regularly occur during election cycles. There is no reason to believe that this election is any exception. I would also note that the bipartisan Carter-Baker Commission report, "Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform," found that "there is no doubt" that voter fraud occurs, that "a good ID system could deter, detect, or eliminate several potential avenues of fraud – such as multiple voting or voting by individuals using the identities of others or those who are deceased – and thus it can enhance confidence," and that "most advanced democracies have fraud-proof voting or national ID cards, and their democracies remain strong."

c. How do you plan on using the resources of the Department of Justice to investigate

alleged instances of voter fraud in the 2016 presidential election?

RESPONSE: The Department of Justice has a number of important responsibilities in this area, including investigating and prosecuting election fraud that violates federal criminal statutes, as well as investigating and bringing suit to prevent violations of federal voting rights laws. If I am confirmed as Attorney General, I am committed to enforcing all of the federal laws within the Department's jurisdiction, including the laws regarding voting, in a fair and even-handed manner. Any specific enforcement decisions or actions would depend upon the facts and circumstances of each case.

10. A 2014 study by Justin Levitt published in the *Washington Post* found that since 2000, there were only 31 credible allegations of voter impersonation, during a period in which there were 1 billion ballots cast. In light of this report, do you think it is justifiable for the Department of Justice to spend resources on combatting in-person voter fraud?

RESPONSE: Please see responses to 9(b) and (c).

11. Do you agree that certain photo ID laws can disenfranchise otherwise eligible voters and disproportionately and unreasonably burden African-American and Latino voters?

RESPONSE: As I testified at the hearing, government cannot create laws designed to improperly inhibit the right of any eligible citizens to vote. The voting rights of Americans are protected by federal law, including the Voting Rights Act. The Supreme Court held in *Crawford v. Marion County Election Board*, that voter identification laws are neither *per se* unconstitutional, nor do they necessarily violate the Voting Rights Act. The analysis of such laws are specific to the particular law, the jurisdiction, and a wide range of factors that Congress has identified as relevant in determining whether a particular voting practice comports with the Voting Rights Act. If I am confirmed as Attorney General, I am committed to enforcing all of the federal laws within the Department's jurisdiction, and particularly the laws regarding voting, in a fair and even-handed manner.

12. The FBI reported that hate crimes targeting Muslims increased by 67% in 2015. How do you believe the Department of Justice should use its resources to address rapid, documented increases in crimes such as this one?

RESPONSE: I believe that Americans of all backgrounds and religious faiths are entitled to equal protection of the law. I share your commitment to protecting all Americans and, if I am fortunate enough to be confirmed as Attorney General, I will work with our law enforcement professionals to enforce laws and to tailor enforcement efforts as necessary.

13. Would you ever rely on *Korematsu v. United States*, 323 U.S. 214 (1944), as precedent?

RESPONSE: I would not positively cite *Korematsu v. United States* as precedent.

14. Do you believe internment of American citizens or residents is lawful?

RESPONSE: I am unaware of any proposal for internment of American citizens or residents. The *Korematsu* lesson our nation learned in WWII from the unjustified internment of Japanese citizens and residents must never be forgotten. This was a national tragedy that cannot be allowed to happen again. No person or groups of persons should be interned without a clear legal basis.

15. Last year, without debate or congressional action, Rule 41 of the Federal Rules of Criminal Procedure was amended to expand the government's ability to obtain a warrant and remotely access electronic devices. The rules now allow federal prosecutors to seek a warrant in any district "where activities related to a crime may have occurred." Will you instruct the Department of Justice to issue guidance on how this should be interpreted?

RESPONSE: It is my understanding that the new version of Federal Rule of Criminal Procedure 41 regarding venue took effect less than two months ago, after Congress chose not to take action to disapprove of the changes adopted by the Supreme Court. As this change is relatively new and I have not had a chance to study its impact, I do not yet know whether additional guidance is necessary.

16. Do you believe that religious institutions, including mosques, should be targeted for warrantless surveillance?

RESPONSE: I do not believe that a building or organization should be targeted for surveillance because it is a religious institution.

17. What will you do to ensure vigorous enforcement of the Ethics in Government Act, bribery and honest services laws, and anti-nepotism laws?

RESPONSE: If confirmed as Attorney General, I will ensure that the Department of Justice properly and professionally enforces all federal laws within its jurisdiction, including those involving government ethics, bribery, and anti-nepotism. I will ensure that Department personnel comply with the financial disclosure requirements of the Ethics in Government Act, *see* 5 U.S.C. § 101, and follow the rules of the Office of Government Ethics, *see id.*, § 402, 404, in a just and proper manner.

18. What is your interpretation of the effect of the Emoluments Clause on the ability of President-elect Trump or his family members to continue doing business with foreign governments after inauguration?

RESPONSE: The question posited is not one on which I have devoted any study, and would depend on a number of facts and specific circumstances. Therefore, I am not in a position to offer even an informal opinion on it. If confirmed as Attorney General, I would provide legal advice on such matters only after examining the relevant facts and circumstances presented, and consulting with the Office of Legal Counsel and any other component of the Department having expertise bearing on such matters.

a. Do you understand the arrangements announced at the President-elect's press conference on January 11, 2017 to be sufficient to comply with the Emoluments

Clause?

RESPONSE: The question posited is not one on which I have devoted any study. Therefore, I am not in a position to offer even an informal opinion on it. However, President Trump has stated that he will comply with his obligations under the Foreign Emoluments Clause, and in fact, that he will take additional steps beyond what may be required under the Constitution.

b. If your answer is "yes," what is the basis for your understanding that the President-elect is not receiving monetary or other benefits from foreign entities through his continued ownership interests in the Trump Organization, even if he does not have day-to-day control?

RESPONSE: See response to 18(a).

19. President-elect Trump, through the Trump Organization, has a contract with the U.S. Government that allows the Trump International Hotel Washington, D.C. to lease the Old Post Office property. This contract, however, contains a clause stating that "No . . . elected official of the Government of the United States . . . shall be admitted to any share or part of this lease, or to any benefit that may arise therefrom." If President-elect Trump does not divest his interests in this hotel prior to inauguration, the question of whether this contract has been breached will need to be decided. As Attorney General, your responsibilities would include enforcement of government contracts like this one.

a. If President-elect Trump does not divest his interests in the Trump International Hotel Washington, D.C., will you enforce the contract?

RESPONSE: The question posited is not one on which I have devoted any study and would depend on a number of facts and specific circumstances with which I am not familiar. Therefore, I am not in a position to offer even an informal opinion on it.

b. What steps do you commit to taking to prove to the public that the Justice Department's actions and your own will not be influenced in any way by the President-elect's monetary interests?

RESPONSE: If it is determined that the President has a conflict with the potential to influence, or to appear to influence, the impartiality of the Department of Justice, I will take whatever steps are necessary to ensure that the Department of Justice represents the interests of the American people in the objective enforcement of the law. Any such decisions will depend on the specific facts and circumstances of the matter; therefore, it would be premature for me to announce how the Department might proceed.

20. The Office of Legal Counsel (OLC) supports the Attorney General in fulfilling his responsibility to provide legal advice to the President, heads of executive departments, and heads of military departments.

a. Do you agree that, as discussed in the Best Practices for OLC Legal Advice and Written Opinions (May 16, 2005 and July 16, 2010), the Attorney General and OLC

should provide "candid, independent, and principled advice—even when that advice may be inconsistent with the desires of policymakers" including the President?

RESPONSE: I believe that the Attorney General and the Office of Legal Counsel should always provide candid, independent, and principled advice.

b. What standard do you believe must be met before an Attorney General or OLC opinion is overturned?

RESPONSE: As I testified before the Committee, the Office of Legal Counsel is a vitally important office which opines on important legal issues facing the Executive Branch. The OLC should render objective decisions, and thus should overturn a previous OLC opinion only after the most careful study and reflection.

21. The total volume of worldwide piracy in counterfeit products is estimated to be 2.5% of world trade (USD $461 billion). Counterfeit products such as fake pharmaceutical drugs or faulty electronics can cause direct physical harm to Americans, and the profits from these illicit sales often go directly to the coffers of organized crime. How will you use Department of Justice resources to address this growing threat?

RESPONSE: Intellectual property crime is a serious problem that threatens the safety of American consumers, the success of American companies, and even our national security. If I am fortunate enough to be confirmed as Attorney General, I will ensure the Department of Justice investigates violations of federal law, and prosecutes whenever appropriate, to safeguard the American people and the American economy.

22. The Department of Justice has made substantial efforts to combat trade secret theft by foreign nationals. In 2009, only 45 percent of federal trade secret cases were against foreign companies; this number increased to over 83 percent by 2015.

a. Will you prioritize enforcement actions to combat trade secret theft by foreign nationals?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will devote the resources of the Department of Justice to achieving the Department's missions in many areas, and the priorities of each enforcement action will be an evolving decision based on the facts, the needs at the time, and the resources available to the Department, so that we can best ensure justice for the American people and entities, including those affected by trade secret theft.

b. How do you plan to continue the Department of Justice's efforts to successfully target criminal trade secret theft?

RESPONSE: The Department of Justice's efforts to combat trade secret theft involve coordination between multiple components that have jurisdiction and bring relevant expertise to these issues. If I am fortunate enough to be confirmed as Attorney General, I will ensure that the Department regularly reviews the allocation of resources and the results of these efforts to determine the right methods to improve the work to combat trade secret theft.

23. The United States' scientific and technological leadership is a prime reason for our economic advancement over many decades. Our innovation ecosystem is driven by the rewards of scientific innovation made possible by a vibrant capitalist economy. It relies on generous funding of scientific research and an educational system that is broad-based at the bottom and unparalleled in availability and quality at the top. It further relies on immigration, a commitment to sustained investment, and certainty provided by the rule of law. How will the Department of Justice, under your leadership, work to support components of the Executive Branch with missions focused on promoting scientific and technological progress, such as the National Institutes of Health, the National Institutes of Standards and Technology, the National Oceanic and Atmospheric Administration, and the United States Patent and Trademark Office?

RESPONSE: The U.S. Department of Justice defends these agencies, and others, before the courts. If I am fortunate enough to be confirmed as Attorney General, the Justice Department will properly and vigorously represent these agencies when they are sued, and ensure that their views on legal issues are taken into consideration in such matters.

24. Do you support the revocation or modification of the 14th Amendment's constitutional guarantee of birthright citizenship?

RESPONSE: I have not studied this issue in-depth. If I am confirmed, I will enforce the law and the Constitution, and recognize that Congress may determine whether to enact changes to the law.

25. You previously have expressed support for Arizona's SB 1070 and Alabama's HB 56, but both laws contained unconstitutional provisions.

    a. Would you have the Justice Department intervene if a state passes a law like Arizona's SB 1070 or Alabama's HB 56?
    b. Which portions of these laws do you understand to be constitutional, if any?

RESPONSE: The constitutionality of state laws is evaluated on a case-by-case basis before a determination is made by the Attorney General to intervene. Any specific decisions or actions would depend upon the facts and circumstances of each case and therefore I am unable to answer the hypothetical. I would defer to the Supreme Court's reasoning as to which portions of these laws were found to be constitutional.

26. The Victims of Child Abuse Act (VOCAA) authorizes funds to directly support establishment and operation of local and regional Children's Advocacy Centers (CACs), as well as training and technical assistance related to improving the investigation and prosecution of child abuse and neglect. These centers are intended to coordinate a multidisciplinary response to child abuse (e.g., law enforcement, child protection/social services, medical services, mental health) in a manner that ensures child abuse victims receive the support services they need and do not experience the investigation of child abuse as an added trauma. Close to 312,000 children were served at CACs in 2015. Will you include full funding for the Victims of Child Abuse Act in the Department of Justice's proposed budget?

RESPONSE: The aims of VOCAA are noble and critically important. I am grateful to have had the opportunity to work with you on this important legislation. I have been a long and vigorous supporter of CACs and served on the board of one in Mobile, Alabama. These centers have produced a positive sea change in the way children's cases have been handled. If I am fortunate enough to be confirmed as Attorney General, I will endeavor to utilize the resources of the Department in the most effective manner possible to ensure the enforcement of federal law and, in particular, protections for children in danger of abuse and neglect.

27. When the Justice Department decided not to defend the Defense of Marriage Act (DOMA), the Department "notif[ied] the courts of [the Department's] interest in providing Congress a full and fair opportunity to participate in the litigation in [the DOMA] cases." If the Department of Justice decides it cannot defend a law, will you take whatever steps are necessary to ensure that Congress or others can continue to defend the law?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will ensure that the Justice Department notifies the other branches of the government, as appropriate, on the rare occasion that such a decision is reached.

28. The Department of Justice established the Violence Reduction Network in 2014. VRN provides a comprehensive approach to reducing violent crime in communities around the country by deploying federal resources in a targeted, strategic, data-driven way to assist state and local law enforcement. Through its participation in the VRN, the Wilmington Police Department created a new homicide unit, and the homicide clearance rate rose from less than 10 percent to more than 50 percent on current-year cases.

    a. How will you support the sustainability of the Violence Reduction Network improvements in cities that have participated in the program?
    b. Will you expand the VRN to work with additional cities?

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will endeavor to utilize the resources of the Department in the most effective manner possible to ensure the enforcement of federal law. While I am not familiar with the details of the Violence Reduction Network, I will carefully evaluate any current departmental practices and the effectiveness of those practices to aid in the administration of justice. The positive results cited above are remarkable and could justify replication.

29. Studies show that 5 percent of gun dealers sell 90 percent of guns that are subsequently used in criminal activity. How will you direct the Department of Justice to instruct the Bureau of Alcohol, Tobacco, Firearms and Explosives to crack down on dealers that funnel thousands of crime guns to city streets?

RESPONSE: When I served as a United States Attorney, protecting the public from violent gun-related crime was among my top priorities. As I testified before the Committee, I will enforce federal background check laws. Properly enforced, the federal gun laws can reduce crime in our cities and communities. Those who deliberately violate federal gun laws should be investigated and prosecuted. If I am fortunate enough to be confirmed as Attorney General, I will support the continued enforcement of federal gun laws, as appropriate, and focus on

criminal offenders.

30. The Justice Department has supported the Youth Mentoring Program, which provides much needed funding to organizations like Boys & Girls Clubs of America. In my state of Delaware, those mentoring funds support programming to 44,100 young people between the ages of 5-18 years old. As Attorney General, will you ensure that the Youth Mentoring Program will be fully funded?

RESPONSE: While I am not familiar with the specifics of the funding associated with this particular program, if confirmed, I will make funding decisions only after a careful evaluation of any current practice or program administered by the Department and the effectiveness of those practices to aid in the administration of justice. I will endeavor to direct and utilize the resources of the Department in the most effective manner possible to ensure the enforcement of federal law. I will note that I have personally observed the work of the Boys and Girls Clubs and believe them to be important and cost-effective programs.

31. In May 2015, the President's Task Force on 21st Century Policing made a series of recommendations aimed at making communities safer, including developing lasting positive connections between law enforcement and the communities they serve and improving youth attitudes toward law enforcement. How will the Department of Justice promote and support partnerships between law enforcement and young people to promote stronger, safer communities?

RESPONSE: As I testified before the Committee, trust and partnerships between law enforcement and the communities they protect are essential to the ability of officers to keep those communities safe. If I am fortunate enough to be confirmed as Attorney General, working with and supporting State and local law enforcement in these efforts will be one of my top priorities.

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

QUESTIONS FROM SENATOR BLUMENTHAL

1. The Domestic Emoluments Clause of Article II of the United States Constitution specifically prohibits the President from receiving "any other emolument," meaning anything other than his salary from the federal government or state governments.

    a. **Will President-Elect Trump be bound by this clause?**

RESPONSE: Yes. The Constitution provides that "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them. *See* U.S. Const., Art. II, § 1, cl. 7.

    b. **Will the tax breaks and subsidies that President-Elect Trump's businesses receive from state and local governments place him in violation of this clause?**

RESPONSE: The question posited is not one on which I have devoted any study, and would depend on a number of facts and specific circumstances, which do not exist at this time. Therefore, I am not in a position to offer even an informal opinion on it. If confirmed as Attorney General, I would provide legal advice on such matters only after examining the relevant facts and circumstances presented, and consulting with the Office of Legal Counsel and any other component of the Department having expertise bearing on such matters.

    c. **Should you need to investigate whether President-Elect Trump has violated this clause, will you commit to recusing yourself from any such investigation and appointing a special counsel?**

RESPONSE: The President has a constitutional obligation to comply with the Emoluments Clause of Article II. If confirmed as Attorney General, I would provide the President with the best legal advice and assistance that he might require in that regard. I am not aware of a basis to recuse myself from such investigations. If a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

2. The Stop Insider Trading on Congressional Knowledge (STOCK) Act bars the President and other executive branch employees from using "nonpublic information derived from [or acquired through] their position as an executive branch employee as a means for making a private profit."

    a. **Would you agree that if a member of President-Elect Trump's family who**

is acting as an official or unofficial West Wing adviser uses private information they learn through government service for a business decision, they have violated the STOCK Act or other insider trading laws?

RESPONSE: While I have not thoroughly studied this issue, as you note, this provision of the STOCK Act covers "executive branch employee[s]." I am not aware of any guidance the Office of Government Ethics has provided on the definition of "executive branch employee." Any analysis of the STOCK Act's application would take into account a number of factors, including any applicable guidance from that Office, the specific circumstances of the family member's position and duties, and the nature of the information in question.

b. **Would you agree that if President-Elect Trump passes information he has learned from government service to a member of his family and that family member uses it for a business decision, this violates the STOCK Act or other insider trading laws?**

RESPONSE: While I have not thoroughly studied this issue, according to guidance from the Office of Government Ethics, the STOCK Act prohibits the same conduct as the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct). The Standards of Conduct prohibit "knowing unauthorized disclosure" of "nonpublic information" to further one's own private interest "or that of another." 5 U.S.C. § 2635.703(a), *cited in* OGE Advisory LA-16-10 (2016). Any analysis of the STOCK Act's application likely would take into account a number of factors, including the nature of the information in question, the knowledge of the person disclosing it, and whether he or she disclosed it to further the recipient's private interest.

3. It may be difficult to know whether a member of the President-Elect's family is using private information to make business decisions – particularly if the family members who are running his businesses participate in private meetings with other government officials or foreign leaders. These meetings would provide these family members with exactly the kind of advantage the STOCK Act was designed to protect against.

a. **If a member of the Trump family sits in on a private meeting that could discuss information related to the family member's business interests, will you commit to investigating whether there has been a violation of the STOCK Act?**

RESPONSE: The hypothetical question posited would depend on a number of facts and specific circumstances which do not exist at this time. If confirmed as Attorney General, I will ensure that the Department applies the same standards in deciding to initiate an investigation whether the subject of the investigation is a member of the President's family or not. In addition, the Department would carefully investigate any evidence of insider trading provided by the Securities and Exchange Commission.

b. **Will you commit to recusing yourself from any such investigation and appointing a special counsel?**

RESPONSE: I am not aware of a basis to recuse myself from such investigations. If a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

4. The Department of Justice (DOJ) recently announced that it has reached a settlement of claims with Deutsche Bank concerning sales of securities, and reports state that inquiries continue regarding allegations that Deutsche Bank helped launder money for Russian clients. It has been well publicized that Deutsche Bank is President-Elect Trump's biggest creditor. During your hearing, you stated that you didn't know if President-Elect Trump's interests would be implicated in this case due to his borrowing from Deutsche Bank.

    a. **Now that you have had a chance to study the matter, would you agree that this case presents the potential for a conflict of interest? Why or why not?**

RESPONSE: I am not privy to the details of the Department's settlement with Deutsche Bank, nor am I familiar with the President's interests as they relate to Deutsche Bank. Without all the facts and without the resources of the Department of Justice at my disposal, it would be premature for me to provide a legal opinion on the matter.

    b. **If the Deutsche Bank matter has the potential to impact President-Elect Trump's interests, will you commit to recusing yourself from this matter and appointing a special counsel?**

RESPONSE: I am not aware of a basis to recuse myself from such matters. If a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

    c. **What specific steps will you take to ensure that the President-Elect's interests do not affect the final settlement and the outcome of those inquiries?**

RESPONSE: If I am confirmed and it is determined that the President has a conflict arising from Deutsche Bank's status as his creditor, I will take whatever steps are necessary to ensure that the Department of Justice represents the interests of the American people in the impartial enforcement of the law. I am not privy to the details of the Department's settlement with Deutsche Bank, nor am I familiar with the President interests as they relate to Deutsche Bank. Without all the facts and without the resources of the Department of Justice at my disposal, it would be premature for me to announce how the Department would proceed.

    d. **Will you commit to setting up firewalls between the White House and DOJ to avoid conflicts of interest or the appearance of conflicts of interest?**

RESPONSE: As the nation's chief law enforcement officer, is important for the Attorney General to have an open line of communication to the President. In certain circumstances, it

may be appropriate to set up firewalls between the White House and the Department of Justice to avoid conflicts of interest or the appearance of conflicts of interest. Such determinations are fact-specific. If I am confirmed, I will endeavor to uphold the highest standards of ethical conduct and avoid conflicts of interest or the appearance of conflicts of interests at all times.

5. If President-Elect Trump continues to have a financial stake in the Trump organization after he becomes President, as he has indicated he will, he will face other situations in which companies or governments have economic leverage over him or the potential to affect his financial interests through their actions. The American public is unable to understand the full extent of this leverage because President-Elect Trump has not released his tax returns or other comprehensive accounting of his financial and business arrangements.

    a. **Have you seen President-Elect Trump's tax returns or any other comprehensive accounting of his financial and business arrangements?**
    b. **If you have, do you believe this information should be shared with the American people?**

RESPONSE: I have not seen President Trump's tax returns or any other comprehensive accounting of his financial and business arrangements. While he has a financial disclosure form that is available to the public, I have not studied it.

    c. **If you have not, how will you know whether President-Elect Trump may have a personal financial interest in a matter being pursued or investigated by DOJ? If you do not have that knowledge and President-Elect Trump weighs in on DOJ actions or policies, how will you ensure that this does not present the potential for a conflict of interest?**

RESPONSE: If I am confirmed as Attorney General, I will review any relevant information at my disposal to determine whether the President has a conflict of interest that could affect Department of Justice matters or investigations. I will also instruct the Office of Legal Counsel to provide the President with guidance on identifying and mitigating conflicts of interest.

6. America's intelligence agencies agree that Russia attempted to disrupt the 2016 presidential election in a manner that violates U.S. laws against hacking. During both of the last Democratic administrations, you demanded that the Attorney General recuse herself rather than participate in an investigation with potential political ramifications. During your nomination hearing, however, you would not commit to recusing yourself from an investigation of alleged Russian hacking.

    a. **Will you commit to recusing yourself from any case regarding the Trump campaign – and, specifically, the investigation of Russian interference with the election? If not, why not?**

RESPONSE: I am unaware of any investigations beyond what is contained in public reporting. As such, I am unable to comment on the status of any such investigations except to say that I believe that all investigations by the Department of Justice must be initiated and conducted in a

fair, professional, and impartial manner, without regard to politics or outside influence. The Department must follow the facts wherever they lead, and make decisions regarding any potential charges based upon the facts and the law, and consistent with established procedures of the Department. That is what I always did as a United States Attorney, and it is what I will insist upon if I am fortunate enough to be confirmed as Attorney General.

I am not aware of a basis to recuse myself from such investigations. However, if a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

7. DOJ is currently investigating Hapoalim Bank for helping wealthy Americans avoid paying taxes, and the bank could face hundreds of millions of dollars in penalties. Jared Kushner, President-Elect Trump's son-in-law, has received multiple loans from Hapoalim.

    a. **What specific steps will you take to ensure that Mr. Kushner's interests do not affect DOJ's investigation into Hapoalim?**

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will review any relevant information at my disposal to determine whether any such conflict of interest exists that could affect Department of Justice matters or investigations. I will also instruct the Office of Legal Counsel to provide guidance on identifying and mitigating conflicts of interest.

    b. **Will you commit to setting up firewalls between the White House and DOJ to avoid conflicts of interest or the appearance of conflicts of interest?**

RESPONSE: As the nation's chief law enforcement officer, is important for the Attorney General to have an open line of communication to the President. In certain circumstances, it may be appropriate to set up firewalls between the White House and the Department of Justice to avoid conflicts of interest or the appearance of conflicts of interest. Such determinations are fact-specific. If I am confirmed, I will endeavor to uphold the highest standards of ethical conduct and avoid conflicts of interest or the appearance of conflicts of interests at all times.

    c. **Will you recuse yourself and appoint a special counsel to handle the investigation and any future prosecution of Hapoalim?**

RESPONSE: I am not aware of a basis to recuse myself from such matters. If a specific matter arose where I believed my impartiality might reasonably be questioned, I would consult with Department ethics officials regarding the most appropriate way to proceed. As I made clear at my confirmation hearing, I will always be fair and work within the law and the established procedures of the Department.

8. Operation Rescue and associated anti-choice groups ran a publicity campaign in the 1990s that involved "wanted posters" for abortion providers. Some of these posters identified specific providers and provided personal information, such as license plate numbers and descriptions of cars. An *en banc* federal appeals court has held that these posters

constituted "true threats" and therefore fall outside of the First Amendment's protections. *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc).

a. **Do you agree that these posters are "true threats"?**

RESPONSE: As I testified before the Committee, these providers are entitled to the protection of relevant federal law. If I am fortunate enough to be confirmed as Attorney General, I will faithfully follow and enforce the law as defined by the courts, including the FACE Act and all other federal laws that the Attorney General is authorized to enforce.

9. In his statement of support for your nomination, Operation Rescue President Troy Newman said, "I have worked on projects with Sen. Sessions in the past."

a. **What projects have you worked on with Troy Newman?**

RESPONSE: I am unaware of any such projects.

10. Access to women's health clinics is protected under the federal Freedom of Access to Clinic Entrances (FACE) Act, which makes it a crime to use force or threat of force to interfere with a person obtaining or providing reproductive health services, or to damage a reproductive health facility.

a. **Will you commit to strong enforcement of the FACE Act?**

RESPONSE: As I testified before the Committee, if I am fortunate enough to be confirmed as Attorney General, I will faithfully follow and enforce federal laws as defined by the courts, including the FACE Act and all other federal laws that the Attorney General is authorized to enforce.

b. **Will you direct your staff to continue work that has been done under the Obama Administration and deliver trainings for local law enforcement in order to educate officers about what constitutes a violation of the FACE Act?**

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will review all Departmental practices to ensure the full and fair enforcement of federal laws.

c. **As your predecessors have, will you direct U.S. Marshals to protect abortion providers when extremists have made threats to their lives?**

RESPONSE: As I testified before the Committee, if I am fortunate enough to be confirmed as Attorney General, I would use the resources of the Department to ensure the full and fair enforcement of federal law. Any specific enforcement decisions or actions would depend upon the facts and circumstances of each case.

11. During the campaign, President-Elect Trump said that women who have abortions should be punished? After a significant backlash, he tried to reverse his position.

a. **Do you think that women who have abortions should be punished?**

RESPONSE: The Supreme Court has interpreted the Constitution to provide a right to an abortion. That right has been limited by various state and federal statutes restricting abortion, many of which have been upheld as constitutional. If I am fortunate enough to be confirmed as Attorney General, I will faithfully enforce all federal laws and do so consistently with the Constitution as interpreted by the Supreme Court.

b. **If you are opposed to punishing women for having an abortion, what steps will you take as Attorney General to discourage the use of the criminal legal system to deny pregnant women access to reproductive health services?**

RESPONSE: Rights that are expressly protected by the Constitution, or found to be implied by the Supreme Court, can only be abridged in limited circumstances. The Supreme Court has identified some such circumstances in regard to abortion rights. If I am fortunate enough to be confirmed as Attorney General, it will be my duty to ensure that these rights are not unconstitutionally restricted, but also, that lawful restrictions are not disregarded.

c. **What will you do to ensure that women who have abortions or whose pregnancy losses are perceived as abortions, as well as those who provide reproductive health services, will not be subjected to prosecution or criminal punishment?**

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will take no enforcement actions that are unauthorized by federal law. Individuals who seek abortions and abortion providers who comply with federal laws should not be subject to prosecution or criminal punishment.

12. The Affordable Care Act requires insurance plans to cover a full range of FDA-approved methods of birth control without charging patients co-pays. This benefit has made a tremendous difference for women's health and economic security. DOJ has defended this benefit from legal challenges by companies that do not want to comply with the requirement.

a. **If confirmed as Attorney General, will you direct DOJ to continue to defend this requirement in court?**

RESPONSE: I am fortunate enough to be confirmed as Attorney General, it will be my responsibility to conduct a thorough review of departmental matters pending in the courts to ensure the fair administration of justice. I have no specific knowledge of the case in question, but will follow the law and the Constitution without reservation.

b. **If a business owner believes it is his religious duty to discriminate based on race, religion, or sexual orientation, do you believe the business owner has a right to do so?**

RESPONSE: I disagree with the characterization of those who hold traditional or religious

values as believing in a "duty to discriminate" if they are asked to provide a service or take some other action that would conflict with their consciences. With respect to the Affordable Care Act's contraception mandate, the Supreme Court held that there are protections available under the Religious Freedom and Restoration Act for religious individuals and businesses. I have not personally studied the parameters of that decision or its impact. If I am confirmed, when such matters come before the Department of Justice, I will carefully and objectively evaluate the facts and circumstances of each case and endeavor to uphold and defend the Constitution in the pursuit of justice.

13. During your hearing, you agreed with Senator Leahy that acts that President-Elect Donald Trump has described performing – grabbing women by the genitals without their consent – would constitute sexual assault.

    a. Would you agree that a law enforcement official who hears that a woman has been grabbed by the genitals without her consent should investigate to determine whether prosecution for sexual assault is appropriate?

RESPONSE: Yes.

    b. Will you commit to encouraging and supporting vigorous investigation and prosecution of sexual assault by state and local as well as federal authorities?

RESPONSE: Yes.

14. On the subject of sexual assault in the military, President-Elect Trump has said, "What did these geniuses expect when they put men & women together?"

    a. **Do you agree with President-Elect Trump that sexual assault is the natural result of having male and female service members working together? Why or why not?**
    b. **What specific steps will you take to combat the problem of military sexual assault?**

RESPONSE: I do not believe that sexual assault, nor any criminal activity for that matter, is "inevitable," particularly among the members of our armed forces. If I am confirmed as Attorney General, I will support the enforcement of federal laws against sexual assault and all other violent crimes, in the military.

15. On your questionnaire for this committee, you list *Davis v. Board of School Commissioners of Mobile County* as one of the most significant litigated matters that you handled. You listed Joseph D. Rich, who then worked in the Educational Opportunities Litigation Section of DOJ's Civil Rights Division, as your co-counsel on that case. Mr. Rich has said that you had "no substantive involvement" in the case, and at your hearing you said, "I don't know Mr. Rich. Perhaps he handled a case that I never worked with."

    a. **Do you know Joseph D. Rich?**
    b. **Did you work with him on *Davis v. Board of School Commissioners of Mobile***

County?

c. **What specific work did you do on *Davis v. Board of School Commissioners of Mobile County*?**

RESPONSE: The Questionnaire requested the "ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

> a. the date of representation;
> b. the name of the court and the name of the judge or judges before whom the case was litigated; and
> c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties."

To be clear, *Davis v. Board of School Commissioner of Mobile County* was a case of historic significance with far-reaching impact. I was the attorney of record, along with five other co-counsel for the plaintiffs including Mr. Rich. I have no specific recollection of Mr. Rich in dealing with this litigation. In October 1981, after I was confirmed as the United States Attorney, I was listed as counsel for the United States' Response to Defendants' Objection to Exhibits of United States and Plaintiffs. In 1983, I co-filed the Revised Pretrial Brief of United States along with colleagues in the Civil Rights Division, and, in 1985, the United States supplemented that brief. This case was certainly one of the ten most significant matters during my time as a United States Attorney. It is true that every matter a United States Attorney handles is significant; however, very few have the historic impact as that of *Davis v. Board of School Commissioner of Mobile County*. I would not relegate the level or importance of this case to include another case—one more characteristic of a United States Attorney's caseload—simply because I may have had greater participation. I clarified the nature of my involvement as in a supportive role in supplemental responses to the Questionnaire.

16. Section 1557 of the Affordable Care Act prohibits health care programs or activities that receive HHS funding or are involved with the insurance marketplaces from discriminating on the basis of race, color, national origin, sex, age, or disability. In August 2016, five states and several private organizations filed a lawsuit challenging the final regulations implementing Section 1557.

    a. **If you are confirmed as Attorney General, will you direct DOJ to continue to defend these regulations in court?**

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, it will be my responsibility to conduct a thorough review of departmental matters pending in the courts to ensure the fair administration of justice. I have no specific knowledge of the case in question, but will follow the law and the Constitution without reservation.

17. Last November, Carl Higbie – spokesman for a Donald Trump Super PAC and a campaign

surrogate – cited the World War II-era Japanese internment camps as a precedent for a Muslim registry. The Supreme Court allowed the use of these camps in *Korematsu v. United States*, a case that has been called a "stain on American jurisprudence."

a. **If you are confirmed as Attorney General, will you agree not to positively cite *Korematsu* in briefs or other legal documents that you or your representatives file on behalf of the United States?**

RESPONSE: Yes.

18. You have objected to President Obama's efforts to admit refugees from areas where, in your words, "terrorists roam freely." These refugees are screened for 18 to 24 months by law enforcement, the military, and the intelligence communities. America has a history of admitting refugees in times of conflict – including, notably, refugees from Germany in the 1930s and 1940s and from Vietnam in the 1970s.

a. **Was America's system for screening refugees better in the 1930s and 1940s than it is today?**
b. **Was America's system for screening refugees better in the 1970s than it is today?**
c. **If today's screening is inadequate but still better than what existed previously, should America have refused entry to European refugees in the 1930s and 1940s and to Vietnamese refugees in the 1970s?**

RESPONSE: As I testified before the Committee, because of the circumstances involving these refugees, I believe that a thorough vetting is critical to ensure that those we admit are not national security risks to the United States. The comparative effectiveness of refugee screening processes from different decades, spanning 30 to 85 years ago, is an area of expertise best left to the departments primarily responsible for such tasks.

19. In your testimony, you said, "I understand the demands for justice and fairness made by our LGBT community. I will ensure that the statutes protecting their civil rights and their safety are fully enforced."

a. **What specifically do you understand about "the demands for justice and fairness made by our LGBT community"?**

RESPONSE: I firmly believe that all Americans are entitled to equal protection under the law, no matter their background. While as Senators we may have disagreed about the most effective ways to address the challenges facing our country, my duty as Attorney General, if I am fortunate enough to be confirmed, would be to enforce the laws passed by Congress. I would endeavor to direct and utilize the resources of the Department in the most effective manner possible to ensure full enforcement of all federal laws and the protections inherent in them.

b. **What statutes protecting LGBT safety and civil rights will you enforce?**

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will uphold and

enforce all federal laws and the Constitution.

20. Imagine that an employer fires an employee solely because the employee is gay.

    a. **Would such an action conflict with "the demands for justice and fairness made by our LGBT community?"**

RESPONSE: In general, such a firing would appear to be in violation of the law and would conflict with justice and fairness. Congress, within the bounds of the Constitution, determines the scope of the protections of such laws.

    b. **Would you support a law that would prohibit this kind of firing?**

RESPONSE: It is up to Congress to define the scope of federal law. The Justice Department's role is to faithfully enforce those laws, which I will do if I am fortunate enough to be confirmed as Attorney General.

    c. **If the employer maintains that his religion compels him to fire gay workers, is the employer's action protected by the Constitution?**

RESPONSE: The Supreme Court has ruled on similar questions in the past, at least in part. The Court's most recent holding on an issue of this kind reaffirmed that the Establishment Clause of the First Amendment protects religious entities from government interference with employment decisions. I have not thoroughly studied the holdings or reasoning and therefore am not in a position to offer an opinion on how the Court's interpretation would apply generally to such a situation.

21. In 2011, the Alabama legislature adopted H.B. 56. Major provisions of the law included requiring police to arrest anyone of whom they had a "reasonable suspicion" of being in the country illegally and denying public services, including public education, to undocumented immigrant children. DOJ's Civil Rights division closely monitored the implementation of the law to ensure that it did not result in illegal discrimination on the basis of race or ethnicity by public institutions or law enforcement agencies.

    a. **If confirmed as Attorney General, what steps would you take to ensure that H.B. 56 and similar legislation does not result in discrimination on the basis of race or ethnicity?**

RESPONSE: In 2013, the Department of Justice secured a permanent injunction against major provisions of H.B. 56 on grounds that the law was unconstitutional. If I am confirmed, I will enforce the injunction.

    b. **What actions would you take if investigation revealed that the implementation of such laws did, in fact, result in discrimination?**

RESPONSE: If I am confirmed, the Department of Justice will pursue declaratory judgments, injunctions, and other remedies against laws that result in discrimination.

22. Last year, during the presidential campaign, Donald Trump argued that it would not require a constitutional amendment to end birthright citizenship for children born to parents who are in the U.S. illegally. He argued that it would only require an act of Congress. You have said that this is not an extreme position. You have also repeatedly expressed skepticism that the drafters of the Fourteenth Amendment intended to grant citizenship to children born in the United States to parents who are not United States citizens.

    a. **In your opinion, does the Fourteenth Amendment guarantee citizenship to all children born on American soil?**

RESPONSE: As I testified before the Committee, under the current state of the law, children born in the United States become citizens.

    b. **If so, would a constitutional amendment be required to overturn this guarantee?**

RESPONSE: I have not reviewed the details of whether a constitutional amendment would be required.

    c. **If not, how would you determine clearly which children are American citizens and which are not?**

RESPONSE: I have not reviewed the details of this matter.

23. No Senator since at least 1900 has voted in favor of his or her own confirmation to a Cabinet position. At your hearing, you stated that you did not have plans to vote on your own nomination.

    a. **I interpreted your answer at your hearing as a commitment that you would not vote on your own nomination. Is that correct?**

RESPONSE: Yes.

    b. **If your answer was not intended as a commitment, will you commit now to not voting on your nomination? If not, why not?**

RESPONSE: See response to 23(a).

    c. **Will you commit to not voting on any other Trump Administration nominations while your nomination is pending? If not, how does that not present a conflict of interest?**

RESPONSE: As Senator Durbin has noted, unless or until I am fortunate enough to be confirmed as Attorney General, I am "still the Senator from Alabama."[1] As such, I have an

[1] Seung Min Kim, "Dems demand Sessions recuse himself on confirmation votes," *Politico*, Jan. 18, 2017.

obligation to faithfully represent my constituents for as long as I am their Senator. I do not believe that is a conflict of interest. To do otherwise would reduce the representation to which the State is constitutionally entitled. I would also note that other Senators in my situation have proceeded in the same manner.

24. After you submitted your initial questionnaire response to this committee, it quickly became clear that you had left out large amounts of significant material. In 2010, you asserted that Goodwin Liu, a nominee for the Ninth Circuit Court of Appeals, had omitted 117 items from his questionnaire. You said of Liu,

> "At best, this nominee's extraordinary disregard for the Committee's constitutional role demonstrates incompetence; at worst, it creates the impression that he knowingly attempted to hide his most controversial work from the Committee. Professor Liu's unwillingness to take seriously his obligation to complete these basic forms is potentially disqualifying and has placed his nomination in jeopardy."

You also suggested at Liu's hearing that he might be guilty of a felony for failing to provide every document called for by the questionnaire. Although you supplemented your initial questionnaire responses, it was revealed at your hearing that you failed to include numerous items responsive to the requests.

a. **If Goodwin Liu's omissions were inexcusable, why is that that yours are acceptable?**

RESPONSE: It is my recollection that Justice Liu withheld a substantial percentage of his records, which the Committee members did not have access to, and which prevented the members of the Committee from being able to fully review his record. On the other hand, I provided a more complete record in response to the Committee's Questionnaire than any nominee for the position of Attorney General in recent memory.[2] The records I submitted were voluminous, totaling more than 150,000 pages, including thousands of press releases, floor speeches, hearing statements, and other materials, and more than 2,000 television, radio, and print interviews. I also submitted more than 50 hours of video and audio clips of interviews, speeches, and press conferences. Additionally, I supplemented my Questionnaire responses three times. Despite all of my good faith efforts, with such an extensive career in public service, of course it is likely that there are an extremely small percentage of items that I was unable to locate, identify, or remember. Finally, my long record of public service was already well known to the members of the Committee and to my colleagues in the Senate, many of whom have served with me for more than 20 years.

25. In your initial questionnaire response, you repeatedly indicated that you relied on "searches of publicly available electronic databases" in order to gather all relevant information.

[2] *Letter from Ranking Member Dianne Feinstein to Chairman Charles E. Grassley*, Dec. 13, 2016 ("Senator Sessions' production is, as I understand it, in excess of 150,000 pages of material. This is more than 100 times what Attorney General Lynch produced (1500 pages) and more than 29 times what Attorney General Holder produced (5100 pages)).

a. **Did you search for information on your record on Google? For example, when looking for examples of speeches, did you search for "Jeff Sessions" and "speech"?**

RESPONSE: Yes, in assisting me with the preparation of my questionnaire responses, staff used Google for various searches.

b. **If so, why did you not include the first result from a Google search – your speech to the 2016 Republican National Convention?**

RESPONSE: Both speeches I gave at the 2016 Republican National Convention were, in fact, included as video attachments to my original response to the Committee's Questionnaire.

c. **In trying to find transcripts of your appearances on news shows, many of which you listed as unavailable, did you search the websites of the shows on which you appeared?**

RESPONSE: In assisting me with the preparation of my Questionnaire, staff searched many of the websites of shows on which I appeared, in addition to searching various transcript databases.

d. **If so, why did you not include transcripts that are readily available from searching the websites of those shows – for example, a transcript of your responses during an October 13, 2016 appearance on Breitbart Radio, which can be found simply by searching for your name on the Breitbart website?**

RESPONSE: I identified over 2,000 television, radio, and print interviews in my responses to the Committee. It appears that the partial transcript of the October 13, 2016 interview was inadvertently not included in the responses, although the interview itself was identified in my responses and is publicly available.

e. **When you saw that your initial questionnaire included only 134 speeches given over 35 years in public life, did that not suggest to you that the response was not comprehensive?**

RESPONSE: I submitted to the Committee all responsive items I was able to identify through extensive searches. These responses included more than 150,000 pages of materials, including more than 1,000 speeches from my time in the United States Senate alone—many on the Senate floor—and more than 250 speeches outside of the United States Senate.

f. **When you saw that your initial questionnaire did not include any print or radio interviews prior to September 2002, did that not suggest to you that the questionnaire was incomplete?**

RESPONSE: I submitted to the Committee all responsive items that I was able to identify through extensive searches, including more than 2,000 television, radio, and print interviews, including several from the late 1990s.

26. You have received awards from at least two organization designated by the Southern Poverty Law Center as extremist groups – the Federation for American Immigration Reform and the Center for Security Policy – but you only disclosed one of these on your questionnaire.

    a. **Have you received any other awards from SPLC-designated extremist groups that you have not yet reported to this Committee?**
    b. **Have you given any speeches to SPLC-designated extremist groups that you have not yet reported to this Committee?**

RESPONSE: I have submitted to the Committee all awards that I have received and speeches that I have given that I have been able to identify, locate, or recall. As I testified before the Committee, I, like all members of Congress, have received many awards from and given many speeches before many groups over my long career in public service. That does not mean that I am familiar with or agree with every position taken or statement made by every group or every member of every group, or would be influenced by the particular point of view espoused by every group or every member of every group. Furthermore, SPLC's opinion of an organization or individual is not universally accepted.

27. In a keynote address at the David Horowitz Freedom Center's 2013 West Coast Retreat, you said, "[David Horowitz has] written some papers. I've passed them around, the draft, to a bunch of senators, and shared these thoughts." At your hearing, you called David Horowitz a "brilliant writer."

    a. **Which papers did you circulate to your fellow Senators?**

RESPONSE: As I testified before the Committee, I believe I have read two of Mr. Horowitz's books. Further, he has been a prolific writer, authoring many books, articles, and papers, and I am unsure as to which particular papers I may have shared with colleagues.

    b. **Do you agree with Horowitz when he says – in the chapter title of one of his books – that "guns don't kill blacks, other black people do"?**

RESPONSE: I do not believe I have read that particular book, so I am unfamiliar with the subject matter in that chapter and what information the author might be referring to with that chapter title. It would be imprudent to judge a chapter by its title, particularly without having read additional information to know whether the chapter title is referring to something specific or is in a particular context.

    c. **Do you agree with Horowitz when he says it is "obvious" that "too many blacks are in prison because too many blacks commit crimes"?**

RESPONSE: I am unfamiliar with that quote. As I testified before the Committee, I am not familiar with everything Mr. Horowitz has ever said. I do not know the context of the quote referenced above, so I do not know what he meant. However, I strongly believe that too many crimes are committed in the United States in general. In an ideal world, there would be far

fewer people committing crimes and, as a result, there would be far fewer people in prison for those crimes, and far fewer victims of crimes.

d. **Do you agree with Horowitz when he says that the term "people of color" is "a racist phrase designed…to enforce the fascist hierarchy"?**

RESPONSE: I am unfamiliar with that quote. As I testified before the Committee, I am not familiar with everything Mr. Horowitz has ever said. I do not know the context of the quote referenced above, or the full quote, so I do not know what he meant.

e. **Do you agree with David Horowitz that Black Lives Matter is "a racist group" and "a roving lynch mob"?**

RESPONSE: I am unfamiliar with that quote. As I testified before the Committee, I am not familiar with everything Mr. Horowitz has ever said. I do not know the context of the quote referenced above, or the full quote, so I do not know what he meant.

f. **Do you agree with Horowitz that "there is no credible evidence [that] racism against blacks is still a prevalent and systemic problem"?**

RESPONSE: I am unfamiliar with that quote. As I testified before the Committee, I am not familiar with everything Mr. Horowitz has ever said. I do not know the context of the quote referenced above, so I do not know what he meant.

28. In your questionnaire, you did not disclose that you received the Franklin Society Award from the Federation for American Immigration Reform, which was founded by John Tanton.

a. **Do you agree with Tanton when he says, "Migrants are usually selfish in their motivation"?**
b. **Do you agree with Tanton that he says, "Too much diversity leads to divisiveness and conflict"?**

RESPONSE: On page 1 of the Supplemental Questionnaire I submitted to the Committee on December 23, 2016, I disclosed that I received the Franklin Society Award from the Federation for American Immigration Reform. As I testified before the Committee, I, like all members of Congress, have received many awards from and given many speeches before many groups over my long career in public service. That does not mean that I am familiar with or agree with every position taken or statement made by every group or every member of every group, or would be influenced by the particular point of view espoused by every group or every member of every group. As I also testified, I believe the United States should have a lawful system of immigration that is fair and objective and gives people from all over the world the right to apply for admission in order to prosper and to improve their lives and our country.

29. As a former prosecutor, I am disturbed that President-Elect Trump's continued insistence that the five black and Latino men known as the Central Park 5 are guilty – despite their

exoneration by DNA evidence. During the campaign, you said that President-Elect Trump's 1989 campaign to reinstate the death penalty for the Central Park 5 showed his dedication to "law and order."

a. **Do you believe that the Central Park 5 are innocent? If not, why not?**

RESPONSE: First, I reject the characterization of my comments. My actual comments were in reference to an advertisement the President published over 20 years ago calling for a restoration of the rule of law, particularly in New York City. That advertisement does not mention the Central Park Five or any other case—rather, it was a general commentary on the deterioration of the rule of law, which had led to an epidemic of violent crime and murders and made many residents of New York City, including African-American, Hispanic, and other minority families, afraid to go out at night. My comments referred to the general notion that the President has long been in favor of restoring the rule of law and deterring serious crime, which is something that the Department of Justice will be committed to doing if I am fortunate enough to be confirmed as Attorney General. With respect to the above-referenced case, it is my understanding that the defendants' convictions were vacated.

b. **If you do believe that the Central Park 5 are innocent, will you say unequivocally that President-Elect Trump was wrong to call for them to be killed and wrong to double down on his position after they were exonerated?**

RESPONSE: I have not discussed the case with the President, so I cannot say whether any statements he may have made about the case were inaccurate or were supported by relevant information.

c. **Does Donald Trump's approach to the Central Park 5 case reflect the approach that you will take to similar cases if confirmed as Attorney General?**

RESPONSE: I have not discussed this case with the President, and I am unsure as to what is meant by his "approach" to the case. Certainly, a politician on the campaign trail is likely to "approach" criminal cases differently than would a prosecutor involved in or overseeing an investigation or prosecution.

d. **Do you agree that failing to pursue all possible methods of exonerating an innocent defendant, including DNA evidence, leaves open the possibility that the real criminal will go free and commit additional crimes?**

RESPONSE: I agree that it is of the utmost importance that only those who commit crimes be prosecuted and convicted. Certainly, whenever an innocent defendant is convicted of a crime they did not commit, that means the real criminal has gone free and will likely commit additional crimes.

30. At your hearing, you said, "Congress has taken an action now that makes it absolutely improper and illegal to use waterboarding or any other form of torture in the United States by our military and by all our other departments and agencies."

a. **Are stress positions designed to inflict pain torture?**
b. **Is forced nudity torture?**
c. **Is slamming individuals into walls torture?**
d. **Is slapping or hitting detainees torture?**
e. **Is depriving detainees of sleep for prolonged periods torture?**

RESPONSE: Federal law is clear that it is unlawful for either the military or our intelligence agencies to subject detainees to cruel, inhuman, or degrading treatment, or to use interrogation techniques that are not prescribed by the Army Field Manual. Thus, both our military and intelligence agencies are permitted to employ only those interrogation techniques authorized by the Army Field Manual.

f. **What actions would you take if the Trump Administration attempted to change the rules governing use of these techniques without seeking Congressional approval?**

RESPONSE: The rules governing these and other techniques are now set by federal statute and cannot be unilaterally altered by the executive branch. The President has a duty to faithfully execute all federal laws—even those that he disagrees with, and even if he is frustrated that Congress will not enact his agenda. If the President claimed the authority to nullify federal laws, or to refuse to enforce valid federal laws, I would inform him that such action is illegal and insist that he follow the law.

31.

a. If an individual detained at Guantanamo Bay Cuba can show that they were detained based on faulty intelligence or mistaken identity, should they be released?
b. Should Guantanamo detainees be given the chance to prove that they were detained based on faulty intelligence or mistaken identity?

RESPONSE: It is ultimately up to Congress to determine the scope of such policies. However, the U.S. Supreme Court has held that detainees held at the Guantanamo Bay detention facility may challenge their detention via a writ of *habeas corpus*.

c. How long can an individual be detained – at Guantanamo or anywhere else – before they are given a chance to show that their detention was wrongful?

RESPONSE: Under the law, the United States can detain an active member of al Qaeda or other enemy combatants for as long as the conflict persists and as long as the person continues to pose a threat to others. While it is proper to periodically reevaluate the status of detainees and to release and repatriate those who no longer pose a threat, a number of detainees who have been released from the Guantanamo Bay detention facility have returned to waging war against the United States and its allies. Some have killed innocent people, including Americans.

32. When passing the USA FREEDOM Act, Congress made bulk collection under section 215 of the USA PATRIOT Act illegal. In a *National Review* op-ed, you argued that law

enforcement can still use a subpoena to collect all of the information that used to be collected under section 215. During your hearing, you were asked if you agreed that the executive branch cannot reinstate the bulk collection of America's phone records without amending federal statutes. You responded, "That appears to be so and I can't swear that that's absolutely, totally, always true, but it appears to be so."

a. **Please detail the situations where the principle would not hold true.**

RESPONSE: In a May 20, 2015 op-ed titled "Why Should Terrorists Be Harder to Investigate than Routine Criminals?," I noted that section 215 is a type of subpoena authority, and that, even as originally enacted, section 215 requests for business records are subject to restrictions that are not applied to other types of subpoena authorities that are routinely used by criminal investigators. For example, I noted that unlike subpoenas used by the Drug Enforcement Administration, section 215 requests require pre-approval by a federal judge. In the op-ed, I criticized the then-pending USA Freedom Act and its further restrictions on the use of section 215 to obtain bulk telephone records data, noting that the Act "would prevent our intelligence officers from obtaining information in this manner *at all.*" (Emphasis in original.) I continue to believe that this is true and am not aware of any interpretation of the USA Freedom Act that would allow the bulk collection of telephone records under section 215, absent further amendments by Congress to the Foreign Intelligence Surveillance Act.

33. Using a device called a stingray, law enforcement can scan a crowd and identify every cell phone within the specified area. Without clear rules governing the use of stingrays, these devices give law enforcement the ability to create massive databases of individuals who have protested against the government, individuals who belong to a minority or unpopular religion, or simply Americans who have assembled to express views that the government does not like.

a. **Will you commit to not tracking Americans' location in order to target and catalog individuals' exercise of First Amendment activities, such as religious activities, protests, and political rallies?**

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will carry out my duty to enforce the laws and will do so with unreserved fidelity to the Constitution, including the First Amendment.

b. **Will you commit not to use stingrays to identify every American who has chosen to attend a particular political rally or worship service, unless you have probable cause to believe that a specific criminal or dangerous individual is in attendance?**

RESPONSE: Without having studied this issue in depth, I cannot comment on what federal law or the Constitution allows in these circumstances. It is my understanding that this is an unsettled question amongst the federal courts of appeal. If I am fortunate enough to be confirmed as Attorney General, I will carry out my duty to enforce the laws and will do so with unreserved fidelity to the Constitution, including the First Amendment.

c. **If you do collect information on all of the attendees at a rally or worship service – for example, because you believed a criminal would attend – will you commit to purge the information of any innocent American whose information was captured inadvertently?**

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will carry out my duty to enforce the laws and will do so with unreserved fidelity to the Constitution, including the First Amendment.

34. The American people want to know that you will take white collar crime as seriously as you will take other crimes.

    a. **Will you commit to zealously investigating white collar crimes?**

RESPONSE: Yes.

    b. **Will you commit to leaving in place, and considering expanding upon, the Yates Memo, which established Justice Department procedures that encourage prosecutors to actively investigate and prosecute individual criminal liability for corporate crimes?**

RESPONSE: I have reviewed the Yates memo and generally agree with it. However, I have not made any decisions with respect to whether I would change that policy if confirmed.

35. DOJ has initiated or considered initiating a number of investigations in recent years that are particularly important to me. Will you commit to continue actively pursuing the following investigations and prosecutions:

    a. **Takata and Takata executives**

RESPONSE: It is my understanding that Takata Corp. pled guilty on January 13, 2017, and has agreed to pay $1 billion to resolve the case referenced in the above question. It is also my understanding that three Takata executives have been indicted. If I am fortunate enough to be confirmed as Attorney General, I will conduct a thorough review of all departmental matters pending in the courts to ensure the fair administration of justice. I have no specific knowledge of the case in question, but will follow the law and the Constitution without reservation.

    b. **Price collusion by United States airlines**

RESPONSE: The goal of United States antitrust law is to protect American consumers. If companies collude in setting prices, Americans suffer from price-gouging and lack of competition in the marketplace. If I am fortunate enough to be confirmed as Attorney General, the Antitrust Division of the Justice Department would be focused on the core mission of protecting the integrity of the markets in which American consumers participate, and will do whatever is necessary, within the bounds of the law, to ensure that those markets function fairly and efficiently.

c. **The merger of Anthem with Cigna and of Aetna with Humana**

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, the Department would analyze merger challenges in the same manner it always has: by evaluating whether the merger is likely to reduce competition in the relevant market, and by extension, whether that merger will negatively impact consumer welfare. Under my leadership, the Department would conduct a full and fair economic analysis of the likely effects of this merger on American consumers. We would determine, based on the results of that analysis, whether to challenge the deal.

36. In 2014, I was proud to lead an effort to successfully amend the Animal Welfare Act to prohibit attendance at a cockfight universally and without qualification in Puerto Rico and all other U.S. jurisdictions. Before these 2014 amendments became law, the longstanding prohibition on sponsoring or exhibiting an animal in a cockfight only applied in Puerto Rico to the extent a defendant knew that a bird was bought, sold, delivered, transported or received in interstate commerce for the purpose of participating in the fight. There is still much work to be done in ensuring that the law's protections are fully implemented.

    a. **Will you develop a plan to ensure that federal animal fighting laws are enforced in Puerto Rico, and to begin the process of shutting down the dozens of arenas in Puerto Rico in which animal fights are conducted in contravention of federal law?**

RESPONSE: While I have not studied this issue in depth, if I am fortunate enough to be confirmed as Attorney General, I expect to learn more about it and will ensure that federal law is being enforced to the fullest extent.

37. In recent years, there have been hundreds of cases in which individuals were exonerated based on faulty forensic evidence. This has long been an issue of bipartisan concern.

    a. **Will you continue to work with Members of this Committee and the Commerce Committee to ensure that law enforcement and criminal justice stakeholders have the strongest and most reliable forensic tools possible to ensure that crimes are solved, public safety is protected, and wrongful convictions are avoided?**

RESPONSE: Yes.

    b. **As you know, the FBI has been working to review thousands of cases involving erroneous hair analysis testimony, resulting in the exoneration of innocent people and, in many cases, the identification of the true perpetrators of crimes. Will you work with the FBI and others to ensure that this review is completed, and that this type of error is not repeated going forward in this or other forensic disciplines?**

RESPONSE: If I am fortunate enough to be confirmed as Attorney General, I will endeavor to direct and utilize the resources of the Department in the most effective manner possible to

ensure the enforcement of federal law and the protections inherent therein. I will carefully evaluate any current departmental practices and the effectiveness of those practices to aid in the administration of justice.

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

QUESTIONS FROM SENATOR HIRONO

1. During the hearing I asked Senator Sessions whether he would implement the Freedom of Access to Clinic Entrances act. He said, "I don't know exactly how threats are worded but if it is improperly done, they can be subject to criminal prosecutions and they would be evaluated properly in my administration."

a. The Ninth Circuit Court of Appeals ruled in 2002 that WANTED posters targeting abortion providers, as well as websites listing the addresses and telephone numbers of abortion providers and declaring them guilty of crimes against humanity, constitute actionable threats under the FACE Act. Do you agree with this ruling by the Ninth Circuit?

RESPONSE: As I testified before the Committee, these providers are entitled to the protection of relevant federal law. If I am fortunate enough to be confirmed as Attorney General, I will faithfully follow and enforce the law as defined by the courts, including the FACE Act and all other federal laws that the Attorney General is authorized to enforce.

2. During the hearing I asked Senator Sessions whether he supported "enhanced vetting" of people with "extreme views."

a. How would you characterize what constitutes an extreme view?

RESPONSE: An example of an extreme view would include those that call for the harming or killing those who do not share your religious beliefs.

b. Do you believe certain religions are more prone to extreme views than others? And if so, which ones?

RESPONSE: It is my understanding that individuals across the world in every religion have adopted views that could be described as extreme and there are periods in which some religions exhibit more extreme and dangerous views than others.

3. At the hearing I asked if Senator Sessions would commit to maintaining and enforcing the consent decrees that the Justice Department has negotiated during the Obama administration. You said "those consent decrees remain in force until and if they are changed." You also stated "…I just wouldn't commit that there would never be any changes in them. And if departments have complied or reached other developments that could justify the withdrawal or modification of the consent decree, of course I would do that."

a. In light of ample empirical evidence showing that consent decrees have been an effective tool in addressing police misconduct, do you plan to instruct the Civil Rights Division of the U.S. Department of Justice to continue issuing them?'

RESPONSE: As I testified before the Committee, consent decrees themselves are not necessarily bad things, but there are also concerns with the use or overuse of them, and the ramifications are deserving of caution. If I am fortunate enough to be confirmed as Attorney General, I will exercise caution and my best judgment in determining how and when to use that tool.

b. Absent a showing that a police department has actually achieved full compliance with specific provisions of a consent decree or the entirety of a previously-negotiated consent decree, will the Department of Justice under your leadership maintain, enforce, and defend against proposed changes to that consent decree?

RESPONSE: As I testified before the Committee, I would not pre-judge a specific case, nor would I commit that there would never be any changes to consent decrees that have been entered into, particularly if departments have either complied or have made other improvements that might justify the withdrawal or modification of the consent decree.

c. If your answer to the prior question was anything other than yes, please identify all criteria you will use to determine whether to maintain, enforce, and defend against changes to an existing consent decree entered into between a police department and the Justice Department.

RESPONSE: As I testified before the Committee, I would not pre-judge a specific case. If departments have either complied or have made other improvements that might justify the withdrawal or modification of the consent decree, then I would carefully evaluate all of the relevant facts and circumstances to determine whether action needs to be taken.

d. What did you mean by "And if departments have… reached other developments that could justify the withdrawal or modification of the consent decree, of course I would do that"? What "other developments could justify the withdrawal or modification" of a consent decree?

RESPONSE: As I testified before the Committee, I would not pre-judge a specific case. Just as each consent decree is unique to each jurisdiction, each case necessarily differs in what developments or improvements might justify withdrawal or modification of the consent decree.

4. During the hearing I cited the current Wells Fargo investigation and asked whether Senator Sessions would instruct the Department of Justice to pursue and hold accountable individual and corporate wrongdoers who defraud the American consumer.

a. Do you believe that any financial institutions have a large enough financial impact that the Department of Justice would be hindered in any way from holding those institutions and/or their executives fully accountable in any case of lawbreaking?

RESPONSE: As I testified before the Committee, the duty of the Attorney General is to ensure that the law is properly and fairly enforced. No matter how wealthy or well-connected, no individual or institution is above the law.

b. If confirmed, if you determine that the size or interconnectedness of any financial institution hinders the Department of Justice's ability to hold a bank or its executives accountable, will you work with banking regulators to take any necessary remedial action, including requiring the institution to divest assets, to ensure that the institution and its executives can be held accountable to the full extent of the law?

RESPONSE: Yes.

c. As you know, many of Wells Fargo's consumer contracts contain provisions that require consumers to adjudicate disputes through arbitration, rather than in the court system. Wells Fargo has argued for dismissal of numerous consumer lawsuits over the fake account scandal based on these provisions. You have strongly defended the use of "forced arbitration" clauses during your time in the Senate.[1] If confirmed, will you defend rules enacted by banking regulators that limit the use of forced arbitration in consumer banking contracts to the full extent of the law?

RESPONSE: I have not devoted significant study to this issue. However, if I am confirmed, if such matters come before the Department of Justice, I will carefully and objectively evaluate the facts and circumstances of each case and endeavor to uphold and defend the Constitution in the pursuit of justice.

[1] See e.g., https://www.congress.gov/congressional-record/2000/3/28/senate-section/article/s1810-2?q=%7B%22search%22%3A%5B%22financial%22%5D%7D&r=5, https://www.cuna.org/uploadedFiles/CUNA/Legislative_And_Regulatory_Advocacy/Track_Regulatory_Issues/Pending_Regulatory_Changes/2016/Congressional%20Letter%20to%20Cordray%20re%20arbitration5b25d%20(1).pdf

QUESTIONS FOR THE RECORD
ROD J. ROSENSTEIN
NOMINEE TO BE DEPUTY ATTORNEY GENERAL
SUBMITTED MARCH 14, 2017

SENATOR DIANNE FEINSTEIN, RANKING MEMBER

1. Russian Interference with Elections

At your confirmation hearing, I asked you about the U.S. intelligence community's assessment that Vladimir Putin ordered a Russian influence campaign designed to interfere with the 2016 presidential election. During your hearing, you committed reading this report (titled "Assessing Russian Activities and Intentions in Recent U.S. Elections and released on January 6, 2017.

a. Do you believe Russia interfered in our election?

b. If not, why not?

c. Prior to your hearing, did anyone suggest or advise you not to read the public, unclassified report? If so, who gave you that suggestion or advice, and why?

2. Appointment of Special Counsel

Attached are two letters (dated December 30, 2003 and February 6, 2004) that then-Deputy Attorney General Comey wrote to Patrick Fitzgerald regarding his appointment as "special counsel" to investigate and prosecute the disclosure of Valerie Plame's covert identity.

a. Was Deputy Attorney General Comey's appointment of Mr. Fitzgerald lawful?

b. Was Deputy Attorney General Comey correct that a delegation of the authority of the Attorney General to investigate a matter is not necessarily defined and limited by 28 CFR Part 600?

c. If confirmed, would you have the same authority to delegate the authority of the

Attorney General to investigate any matter from which the Attorney General is recused? Do you believe that the position and

authorities of any such delegation would be defined and limited by 28 CFR Part 600?

d. If confirmed, will you undertake an assessment of whether to appoint a special counsel to handle any pending or contemplated investigations into Russian interference in the 2016 election, including any investigations that involve contacts between the Trump campaign, transition team, or administration and Russia? What factors will you consider?

- **Will you commit to making a decision only after a thorough and careful review of all relevant facts, as well as consultation with career ethics professionals within the Justice Department?**

- **Will you also commit to informing the Committee of your decision, and the basis for your decision, within a month of taking office?**

3. Attorney General Recusal from Investigations into Russian Election Interference

On March 2, Attorney General Sessions issued a public statement saying "I have decided to recuse myself from any existing or future investigations of any matters related in any way to the campaigns for President of the United States." In his March 6 letter to the Committee, Attorney General Sessions acknowledged our concerns as to "why [he] had not recused [himself] from 'Russian contacts with the Trump transition team and administration.'" He then wrote "I understand the
scope of the recusal described in the Department's press release would include any such matters." At your hearing you were asked to clarify your understanding of the scope of this recusal statement.

a. Can you confirm that Attorney General Sessions has recused himself from any existing or future investigations of any matters related in any way to Russian contacts with the Trump campaign, transition team, and administration?

b. If you cannot confirm this now, will you commit, if confirmed, to obtaining the information that you need and advising the Committee,

within two weeks of your confirmation, as to the scope of the Attorney General's recusal?

c. In particular, will you commit that, if confirmed, you will confirm for the Committee that Attorney General Sessions has recused himself from any existing or future investigations of any matters related in any way to Russian contacts with the Trump campaign, transition team, and administration and, if that is not the case, explain the Attorney General's ongoing involvement?

4. Politicization of Justice Department / Communications with the White House

During your confirmation hearing, Senator Whitehouse asked about policies restricting communications between the White House and Justice Department as a means of protecting the Department of Justice from political interference. You responded: "I believe the department's policy is and will be, that communications with the White House concerning cases, that's the most sensitive matter . . . need to be cleared through the office of the deputy attorney general."

While you focused on cases, the Justice Department's longstanding policy has been broader in scope, restricting communications concerning "pending or contemplated criminal or civil investigations or cases."

a. Do the same restrictions that apply to cases apply to pending or contemplated investigations? If not, what is the policy regarding investigations and why are investigations and cases treated differently, particularly if one goal of these policies is to defend the Department against political interference?

b. Would direct contact between a White House adviser and the U.S. Attorney handling a case comply with Justice Department policy regarding communications between the White House and Justice Department? If there are circumstances when this would comply with policy, please explain those circumstances. Please also explain the possible remedies where such contact does not comply with policy.

c. What would you do, as a U.S. Attorney, if you were contacted directly about a pending case by a White House adviser?

d. Who, if anyone, in the White House can be granted access to investigative materials, including warrant applications or interview records?

e. What steps would you take if you were asked, as Deputy Attorney General, to grant someone in the White House access to materials related to a pending or contemplated investigation or case, including warrant applications or interview records?

f. If you are confirmed as Deputy Attorney General, what will <u>you</u> do to protect the Justice Department – at every level – from political interference or influence?

5. <u>Responsiveness to Congress</u>

During Attorney General Sessions' confirmation hearing, Chairman Grassley asked the Attorney General to commit to responding to requests for information from the Chairman. He also asked the Attorney General to make the same promise to answer my requests as the Ranking Member. I thank Chairman Grassley for that courtesy.

The Attorney General assured us that he would respond promptly to the Chairman's **<u>and</u>** to my requests.

- **Will you commit to doing the same?**

6. Torture / Enhanced Interrogation

During Attorney General Jeff Sessions' confirmation hearing he stated that it would be "absolutely improper and illegal" for any U.S. government department or agency "to use waterboarding or any other form of torture." Attorney General Sessions also assured the Senate Judiciary Committee that he and other appropriate officials would be fully briefed on the contents of the full 6,700 page Senate Intelligence Committee (SSCI) report on the CIA's detention and interrogation program to the extent that it is pertinent to the operations and mission of the Department of Justice.

a. Do you agree that waterboarding is torture, and that it is illegal?

b. If confirmed, will you read the full SSCI report on the CIA's detention and interrogation program to ensure we do not repeat the mistakes of the past?

c. Do you agree that Federal law is clear that it is unlawful for either the military or our intelligence agencies to subject detainees to cruel, inhuman, or degrading treatment, or to use interrogation techniques that are not prescribed by the Army Field Manual?

7. Protecting Whistleblowers

Whistleblowers play an important role in identifying waste, fraud, abuse, and mismanagement in the federal government. During Attorney General Sessions's nomination hearing, Chairman Grassley – a longtime champion of whistleblower protections and rights – called whistleblowers "patriotic people that want the government to do what the government is supposed to do."

a. Will you commit to protect and encourage whistleblowers in the Justice Department?

b. What steps will you take to confirm and convey these protections to Department employees?

8. Sally Yates

When the last nominee for Deputy Attorney General, Sally Yates, came before this Committee, Senator Sessions—who, as you know, is now the Attorney General— asked her whether she would stand up to the President if she believed his actions were unlawful. She responded: "I believe the attorney general or the deputy attorney general has an obligation to the law and the Constitution, and to give their independent legal advice to the president."

a. Do you agree with Sally Yates that the Attorney General and the Deputy Attorney General have an obligation to the law and the Constitution and to give independent legal advice to the President?

b. Will you make the same commitment to this Committee that Sally Yates made—that you will stand up to the President if you believe his actions are ever unlawful?

In your written statement, you noted that the first question for the Justice Department is "What can we do?" and the second is "What should we do?" In announcing her decision that the Department would not defend Executive Order 13769 under her tenure, Sally Yates explained that it was her responsibility as the Acting Attorney General to consider whether the order was "not only legally defensible" (i.e., what can we do) but consistent with "this institution's solemn obligation to always seek justice and stand for what is right" (i.e., what should we do).

c. Setting aside whether you agree or disagree with her decision, was she wrong to consider the Justice Department's "solemn obligation to always seek justice and to stand for what is right"?

d. In your view, is that a legitimate consideration? If not, why not and how does that differ from determining, in your words, "what should [the Justice Department] do"?

e. What factors do you consider in determining "what should we do"?

9. Preservation of Records

a. In your experience, how do prosecutors and investigators usually ensure that a business or non-governmental organization preserves documents that might be relevant to a criminal investigation?

b. At what point in an investigation would you typically send a request or order to preserve records?

c. Does the Department take different or additional steps to ensure that materials are being preserved once an investigation becomes publicly known or discussed through, for example, media reports?

10. Duty of Candor

In an exchange with Senator Whitehouse during your confirmation hearing, you acknowledged that "the duty of candor is not just an internal department policy, it's an ethical rule governing lawyers so I would certainly enforce that rule."

a. Please explain your understanding of what the duty of candor requires with regards to statements of fact presented by Justice Department attorneys to a court?

b. Are Justice Department attorneys under an obligation to disclose factual information that may not support the Department's legal arguments? What if that information is known to the executive branch (including the Justice Department attorneys handling a case) but is not otherwise publicly available or obtained through discovery?

c. What would you do – as a U.S. Attorney or as the Deputy Attorney General – if you were given an agency memorandum that did not support the legal arguments that you were seeking to advance in court? If you would not disclose that memorandum (or the information it contains), why not? And if not, do you believe this serves the public interest and if so, please explain?

11. Voting Rights / Voter Fraud

In January 2017, just days after being sworn in, President Trump wrote on Twitter that he would "be asking for a major investigation into VOTER FRAUD". Attorney General Sessions has echoed that belief that voter fraud is a major problem threatening the integrity of our elections. But the fact of the matter is that there is simply no evidence showing wide scale voter fraud.

The Justice Department needs to be bringing cases to protect against voter intimidation and systemic voter suppression against minorities. Unfortunately, the Justice Department recently took a step in the wrong direction when it reversed its position in the Texas voter ID case in the Fifth Circuit. The Justice Department's move to withdraw its claim that the Texas ID was enacted with discriminatory intent was wrong, and it sends absolutely the wrong message. The Justice Department should be doing everything it can to protect the right to vote, not suppressing it.

a. Do you believe there is credible evidence that over 2.5 million people voted illegally in the last election?

b. What steps will you take to ensure strong voting rights enforcement continues?

12. Hate Crimes

Since the 2016 election, there has been an alarming rise in hate crimes against Muslims, LGBTQ individuals, Jews, and other minorities. These heinous crimes— targeting individuals because of their faith, race, nationality, sexual orientation, or gender identity— have no place in a society built upon the principles of tolerance and inclusion.

According to some estimates, since November 9, 2016, there have been over 250 incidents of assault, harassment, vandalism, and bomb threats against religious, racial and other minorities across the country. More than 100 of these acts were allegedly perpetrated by individuals who specifically invoked President Trump and his election victory while committing the crime. In just the last two months, there have been more than 100 bomb threats against Jewish community centers, schools and institutions across the country. Four mosques have been set on fire. On February 23rd, a man of Indian descent was brutally shot and killed by

a Kansas native who reportedly screamed "get out of my country" before he opened fire. And this month, a Sikh-American man was shot in his driveway in a Seattle, Washington suburb by an assailant who allegedly told him to "go back to your own country."

a. As Deputy Attorney General, will you commit to investigating and prosecuting hate crimes to the fullest extent of the law?

b. As Deputy Attorney General, you will have a significant influence over decisions made by the Attorney General, and by extension, the President. If Attorney General Sessions decides not to prosecute a clear violation of federal hate crime laws, would you be willing and able to convince him otherwise?

c. On February 23rd, two men of Indian descent were shot by a man who screamed "get out of my country" before he opened fired and subsequently bragged about shooting foreigners. This incident is being investigated as a potential hate crime. Do you believe this murder should be prosecuted as a federal hate crime? If not, why not?

13. Guns and Assault Weapons

Last month, the Fourth Circuit upheld Maryland's ban on **assault weapons and large-capacity magazines** in a **10-4** decision. The Court held that the ban is constitutional under the Supreme Court decision in D.C. v. Heller and that that the banned assault weapons and large-capacity magazines were not protected by the Second Amendment, because they are "like . . . weapons that are most useful in military service." (Kolbe v. Hogan)

To date, five separate Courts of Appeals have ruled to uphold an assault weapons bans and/or large capacity magazine ban under the Second Amendment.

- **Will the Department of Justice support these decisions and not file briefs to ask the Supreme Court to rule against these cases?**

14. Travel Ban / Muslim Ban

In January, the President signed an executive order that banned people from seven Muslim-majority countries, including legal permanent residents and people with valid visas, from entering the country. As a result, scores of people were wrongfully turned away, in some cases children were separated from their parents, and chaos erupted at airports around the United States. Shortly after that, the Ninth Circuit Court of Appeals upheld a temporary injunction against the order, explaining that it did not believe the government would be able to prove that the executive order was lawful.

As you know, the President recently signed a revised executive order that he says fixes the flaws in the original order. Among other changes, the revised order explicitly states that it does not apply to legal permanent residents or valid visa holders – a sign the Administration actually understands the legal problems posed by the overbreadth of the first executive order – but still prohibits people from several Muslim-majority countries from entering the United States.

a. Did you have any role in drafting or advising on the original Muslim ban executive order? Did you have any role in drafting or advising on the revised executive order?

b. Do you believe that it is lawful to discriminate against immigrants based on their religion?

c. It's my understanding that the Trump administration continues to believe the original executive order, even as applied to legal permanent residents and valid visa holders, was lawful. Do you agree?

15. Office of Legal Counsel / Executive Orders

I understand that the Office of Legal Counsel ("OLC") reviewed the travel ban executive order for "form and legality" before it was signed. Because the Deputy Attorney General oversees OLC, I would like more information about that process.

a. First, generally, what is your understanding of OLC's role in ensuring that executive orders are legal?

b. If OLC signs off on an executive order for form and legality, does that necessarily mean that the way the administration implements the order will be legal? Or might that be a different analysis in some cases?

It is my understanding that, in the ordinary course, a proposed executive order must be sent to the Office of Management and Budget and to any interested agencies for review. This process—which is required by an executive order that has been in place since 1962—helps make sure that the agencies that will be implementing the order will have input and a full understanding of what is expected of them once the order is in place. The Washington Post reported that, in the case of the travel ban order, it appears that this process was not followed.

c. Do you think the interagency process that I just described is important to ensuring the legality and integrity of all executive orders that come out of the White House?

d. Will you commit to ensuring that the interagency process is followed for executive orders in the future, as required by the 1962 executive order?

More generally, OLC's role is to provide binding legal advice to the Executive Branch based on the best view of the law. In that capacity, it serves as a check on the White House and acts as a neutral arbiter in disputes between agencies. It's my understanding, though, that the Attorney General can decide to overrule OLC if he believes it's warranted.

e. What considerations should the Attorney General take into account when deciding whether to overrule OLC?

f. Do you agree that a decision to overrule OLC should never be made for political reasons?

16.VAWA

As a prosecutor with decades of experience, you know first-hand that ensuring justice is done is not just about criminal prosecution, but also protecting victims and responding to their needs.

That is why the Violence Against Women Act is such an important law. It provides critical resources for federal, state, and local law enforcement, but it also provides grant resources to service providers working directly with women to help them safely rebuild their lives.

I recently joined a letter with the Chairman urging the President to support funding for VAWA programs in this year's budget process. It is amongst my highest priorities to fight to ensure we fund these vital services that protect all victims – including LGBT individuals, Native Americans, and immigrants.

a. In your role as Deputy Attorney General, how will you support the enforcement of the Violence Against Women Act?

b. Will you work to ensure that the President and his advisors understand the importance of this law?

17.Incomplete Information for NICS

The National Instant Criminal Background Check System (NICS) received more than 22.2 million background check requests in 2015, 35 percent more than just six years ago.

Following the murders of nine churchgoers at Emanuel AME church in Charleston, South Carolina in June 2015, FBI Director Comey announced that NICS did not get information regarding the gunman's drug arrest record within three days -- a key fact that would have prevented him from obtaining a gun.

The issue of incomplete records in the FBI's NICS database is a significant problem for law enforcement. This is because without complete records, even when a background check is done, law enforcement do not uncover that the person seeking to buy the gun should not be

able to do so.

In fact, I was deeply disappointed several weeks ago when President Trump signed a law to repeal a rule that allowed the Social Security Administration to share information regarding those with severe mental illnesses with the FBI's NICS database. The rule was simply implementing the law that was passed after the Virginia Tech shooting to shore up deficient records in FBI NICS.

- **What steps do you propose to ensure that the FBI NICS database is as accurate and complete as possible?**

18. Protecting Victims of Sex Abuse

Your office recently prosecuted a 57 year old youth gymnastics coach who was convicted and sentenced just last week of child pornography offenses. Prior to his arrest, this man had worked as a youth gymnastics coach in Maryland for over 30 years, during which he amassed a vast collection of videos and images of children being sexually abused. According to his plea agreement, this man admitted that he has a sexual preference for girls aged 8 to 12 years, the same age group he coached at the gym. In fact, he also admitted that he was attracted to the "body type" of many of the girls he coached. Disturbingly, investigators found pictures displaying young girls in gymnastics leotards throughout his home along with digital media containing over 40,000 images and over 100 videos of child pornography.

This is not the only youth gymnastics coach your office has prosecuted. In 2007, your office prosecuted a 41 year old youth gymnastics teacher who was convicted and sentenced for possession of child pornography. According to press releases, 21 pairs of girls' underpants were recovered from his bedroom along with hundreds if not thousands of videos and photographs depicting the sexual abuse of children that he had collected over a period of 20 years. At the time, you stated that this case was a "top priority" for your office precisely because "he worked with so many children in his job as a gymnastics instructor."

a. **Would you agree that had there been any reason to suspect that these coaches that you prosecuted were sexually abusing children at their gyms, you would have wanted those with information to come forward immediately to law enforcement authorities?**

b. **Would you support legislation that would require adults who work with young children, and who are affiliated with national sports organizations like USA Gymnastics, to immediately report to law**

enforcement or other authorities when they learn of facts indicating that sexual abuse is being committed against a minor?

I am deeply concerned that both of these men coached young children at gyms overseen by USA Gymnastics, the national governing body for the sport of Gymnastics in the United States which sets rules and policies for more than 3,000 gyms across the country with 125,000 athletes in its membership. Just last year, the Indianapolis Star reported that top officials at USA Gymnastics had failed to disclose to law enforcement allegations of sexual abuse at their member gyms.

They also revealed that USA Gymnastics makes no effort to track coaches who have had allegations made against them. In fact, Indianapolis Star uncovered many instances in which coaches had been removed from one gym for sexual abuse allegations only to apply for a job at another and begin abusing children again.

c. Do you agree that as the national governing body of Gymnastics, an organization like USA Gymnastics should develop and enforce policies, mechanisms, and procedures to prevent the abuse of minors in their facilities?

d. In particular, where predators can escape accountability by simply moving from one gym to another, do you agree that a national governing body should provide notice to all member gyms once a sexual abuse allegation has been made?

e. Would you support a bill that would require such organizations to take these important, affirmative steps as well as to report suspected child abuse to law enforcement agencies?

19. Enforcement of Federal Marijuana Laws

Currently, twenty-eight states and the District of Colombia have legalized medical or recreational marijuana, or both. This includes Colorado, Washington, and most recently, California. An additional 14 states have laws in place related to cannabidiol, a non-psychoactive component of marijuana. Seventeen more states will consider legislation to legalize marijuana this year.

Despite these state laws, under the federal Controlled Substances Act, marijuana is still considered a Schedule I drug, making it illegal to possess or distribute.

Given the disparity between these state and federal law, the Department of Justice must determine how it will use scarce federal enforcement resources in marijuana cases.

a. How do you intend to balance federal marijuana enforcement with other enforcement priorities, given the number of states that have legalized recreational or medical marijuana under their own laws?

b. If confirmed, do you plan to continue the policies contained in the "Cole Memo", which set forth eight enforcement priorities for federal marijuana enforcement? If you do intend to change the Cole Memo, how do you intend to change it?

20. Enforcement of Federal Marijuana Laws (cont'd)

In December 2014, Congress passed an appropriations bill that prohibited the Department of Justice from using federal funds to interfere with a state's implementation of medical marijuana laws. Subsequently, the Ninth Circuit Court concluded that this language, "at a minimum, . . . prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws."

a. **What is your interpretation of this ruling?**

b. **If confirmed, under your leadership, would the Department pursue those individuals who use medical marijuana or medical marijuana businesses operating in compliance with their state laws?**

21. Marijuana Research

The National Academy of Sciences recently released a report entitled "The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research." According to the press release issued with the report, this report was "an in-depth and broad review of the most recent research to establish firmly what the science says and to highlight areas that still need further examination."

The report found that cannabis or cannabinoids may be helpful in treating certain medical conditions. However, the overwhelming conclusion was that more research is needed to definitively determine the potential beneficial and harmful effects of marijuana, but existing regulatory barriers make this research difficult to complete.

During the last session of Congress, Senators Grassley, Leahy, Tillis and I introduced legislation to reduce these barriers. This legislation would expedite the Drug Enforcement Administration registration process to research marijuana, and allow doctors to use their existing registrations to conduct research and clinical trials on cannabidiol, rather than the Schedule I registration that is currently needed. It would also increase the scientific research base for marijuana by authorizing medical and osteopathic schools, as well as research universities and pharmaceutical companies, to conduct research using their own strains of marijuana and cannabidiol. The goal, if the science shows that marijuana or its components are helpful in treating certain medical conditions, is to develop medicines that can be brought to the market with FDA-approval, just like any other medicine. I believe this is important legislation and plan to reintroduce it again this session.

a. Given the number of states that have legalized recreational and medical marijuana under their own laws, do you agree that it is important that we know as much as possible about the health-related and other impacts of marijuana use?

b. If confirmed, what do you intend to do to advance our knowledge in that area? Are there specific regulations that you would ease related to marijuana research? If so, which ones?

22. Prescriber Education

As you are aware, our country is in the midst of an opioid epidemic. Every 16 minutes someone dies from an overdose involving opioids. Often, people move from abusing prescription opioids to abusing heroin. And, in 2015 alone, 13,000 Americans died from heroin overdoses.

You noted in your testimony that opioids has been a "real priority for us in Maryland because we've seen an explosion of overdose deaths that are attributed to opioid drugs throughout the entire society and I think it's critically important for us to address that. Law enforcement is one part of it, but it's a very good example of where it's not just a law enforcement problem…"

I agree with you that the opioid epidemic is not just a law enforcement problem. It is my belief that members of the medical profession can and should play a critical role in addressing the opioid epidemic. However, many are not sufficiently trained in proper prescribing practices, how to recognize signs and symptoms of substance abuse, or how to treat substance use disorders.

The Department of Justice, through the Drug Enforcement Administration, has the ability to require those who dispense narcotics to demonstrate that they have received adequate training in these areas as a condition of receiving their registration to do so.

- **Given the epidemic we are currently facing, if confirmed, would you support efforts to change existing regulations to require members of the medical profession to demonstrate that they have received training on proper prescribing practices, how to recognize signs and symptoms of substance abuse, and how to treat substance use disorders as a condition of receiving their Drug Enforcement Administration registration that allows them to dispense powerful, potentially addictive controlled substances?**

23. Increase in Methamphetamine Seizures at the California-Mexico Border

In 2006, the Combat Meth Epidemic Act, which I introduced, became law. This legislation requires precursor chemicals used to make methamphetamine, such as pseudoephedrine, to be sold behind the counter.

As a result of this law, production of methamphetamine in the United States has decreased. Unfortunately, production has shifted to Mexico, where transnational criminal organizations are producing increasing amounts of methamphetamine and smuggling it into our country.

It is my understanding that between 2009 and 2016, there was a 631 percent increase in methamphetamine seizures at the Southwest Border. The vast majority of these seizures occurred in California. And, between 2011 and 2015 in San Diego, there was an 82 percent increase in methamphetamine-related deaths.

- **Under your leadership, what steps would the Department take to counteract the increase in methamphetamine smuggling from Mexico? Are there additional tools or resources that Congress can provide to ensure these dangerous substances don't continue to cross our borders?**

24. Mexico and Heroin

As you likely know, heroin overdose deaths now outnumber shooting deaths. In 2015 alone, 13,000 U.S. citizens died from heroin overdoses.

According to the Drug Enforcement Administration, the majority of heroin in the United States originates in Mexico.

In order to combat Mexican drug trafficking organization that peddle these deadly substances, Congress has provided more than $2.6 billion in assistance through the Mérida Initiative since 2008. Much of this assistance has supported the kingpin strategy of pursuing high ranking drug traffickers. While this strategy has resulted in the capture of numerous drug traffickers, it has not reduced the flow of narcotics, including heroin, into the United States.

a. **What more can the United States, in coordination with our Mexican partners, do to reduce the amount of heroin and other illegal drugs trafficked into our country?**

b. **Are there new strategies or actions that you believe would be more effective in disrupting these drug flows?**

25. Increase in Fentanyl Seizures and International Cooperation

It is my understanding that the vast majority of synthetic drugs, including fentanyl, are produced in China. Illicit chemists produce the drugs in labs there and then ship them in small quantities to the United States directly, or to Mexico or Canada where they are then smuggled into the United States.

Between 2009 and 2016, there was a 561 percent increase in fentanyl crossing our Northern and Southern borders. Fentanyl, which is 50 times stronger than morphine, and carfentanil, which is 100 times stronger than fentanyl, are being laced into heroin and cocaine with increasing frequency. These synthetic opioids have contributed to increases in drug overdose deaths.

- **If confirmed, what steps will the Justice Department take under your leadership to better work with China, Mexico, and Canada to prevent fentanyl, its analogues, and other synthetic drugs from being smuggled into the United States and to prosecute those responsible for manufacturing and trafficking these dangerous substances?**

26. A Public Health Approach to Drug Use

In recent years, the United States has taken a more comprehensive and public health approach to addressing drug use.

In many states, non-violent drug offenders can participate in a drug court rather than serve a traditional jail sentence. Seventy-five percent of those who complete these programs remain arrest-free at least two years following their graduation.

Nationally, at least 53 police departments allow drug users to turn in their drugs and drug paraphernalia without fear of arrest or incarceration. Instead, the user is

immediately connected to treatment. In Gloucester, Massachusetts, 95 percent of those who asked for help entered treatment.

Through its 360 Initiative, the Drug Enforcement Administration has also begun to combine enforcement efforts with community-based prevention.

Despite the success of these initiatives, you have stated that the primary job of police and law enforcement is to send people to jail.

a. Given the success of these initiatives, if confirmed, would you support treatment alternatives to incarceration? If so, which specific models do you support and why? If not, why not?

b. Recognizing that incarceration alone will not address the root cause of addiction, which causes many to reoffend, if confirmed, what additional steps will you take to curb the use of illicit drugs in our country?

27. <u>Emoluments</u>

The Foreign and Domestic Emoluments Clauses of the Constitution prohibit those holding federal office – including the President – from accepting gifts or items of value from a foreign state or from the United States. These provisions embody the fundamental principle that the President must not use the office to enrich himself. They guard against officeholders putting their interests above those of the nation or being corrupted. You have personally warned about the danger of individuals who view government service as "an opportunity to enrich themselves at the expense of the public." (Interview on *Politics Hour with Kojo Nnamdi*, NPR, Jan. 13, 2012)

After fighting for a decade, the Trump Organization was granted a trademark for construction services by China on the heels of President Trump's announcement that he would honor the "One China Policy." The Trump Organization continues to lease the Old Post Office despite terms that prevent elected officials from receiving any benefit from the lease agreement.

- **If confirmed as Deputy Attorney General, what steps would you take to**

investigate and enforce the Emoluments Clauses as to all government officials?

28. Conflicts of Interest – Foreign Corrupt Practices - Azerbaijan Hotel Deal

A lengthy story in the March 13, 2017 issue of the *New Yorker* contains allegations that the Trump Organization signed multiple contracts to develop an "ultra-luxury property" in the capital of Azerbaijan.

The article goes on to say that the people behind the project were close relatives of the country's Transportation Minister--the minister's son and the minister's brother, who also was a member of parliament.

The article says that the Trump Organization's oversight of the project was extensive. It contains allegations that contractors were paid in cash.

It quotes the Assistant Dean at George Washington University Law School, Jessica Tillipman, who specializes in the Foreign Corrupt Practices Act. She states: "The entire Baku deal is a giant red flag—the direct involvement of foreign government officials and their relatives in Azerbaijan with ties to the Iranian Revolutionary Guard. Corruption warning signs are rarely more obvious."

If confirmed as Deputy Attorney General, you will have oversight over the Criminal Division's Fraud Section—which enforces this law.

a. If there are credible allegations that the Trump Organization has violated foreign corruption laws, will you ensure that those allegations are investigated thoroughly and fairly?

b. Can you guarantee that no political consideration will affect any investigation into foreign corruption relating to the Trump Organization?

c. Can you guarantee that the Trump Organization will not receive any treatment from the Department of Justice that is more favorable than any other company would receive?

QUESTIONS FOR THE RECORD
ROD J. ROSENSTEIN
NOMINEE TO BE DEPUTY ATTORNEY GENERAL

SENATOR PATRICK J. LEAHY

1. The Foreign Corrupt Practices Act (FCPA), as amended by the International Anti-Bribery Act of 1998, is the cornerstone of federal efforts to prevent and prosecute bribery of foreign officials by U.S. corporations, and to maintain a fair and level playing field for small and mid-size corporations doing business overseas. Since 2008, the Federal government—the Department of Justice, the Securities and Exchange Commission, and the Federal Bureau of Investigation—have maintained about 150 active investigations at any given time, resulting in $1.56 billion in fines in 2014. In 2015, your office secured the conviction of Vadim Mikerin, a Russian government official and uranium supplier who accepted payments in exchange for the favorable treatment of United States companies.

I am concerned that FCPA enforcement will not be a priority of this administration. President Trump has said the FCPA is "a horrible law and it should be changed."[1]

Will you commit to continue vigorous enforcement of the FCPA and the International Anti-Bribery Act of 1998?

2. As United States Attorney, you made prosecution of terrorism a top priority. Since 2001, the FCPA has played a key role in counterterrorism policy, as it helps stop the flow of money to terrorist organizations and those who would fund them.

Do you agree that vigorous FCPA enforcement is a critical piece of our nation's counterterrorism efforts? If confirmed, will you ensure that the Department of Justice continues to use the FCPA as a tool to combat terrorism?

3. President Trump has said of bribing foreign government officials, "There is one answer—go to your room, close the door, go to sleep, and don't do any deals, because that's the only way."[2] His business interests around the world have been linked to corrupt foreign officials and practices. For instance, the *New Yorker* reported recently that the Trump Organization licensed its name and provided extensive oversight and advice to a holding company for the Azerbaijani Transportation Minister for a hotel project in Baku, Azerbaijan. That holding company is supported by investments from members of the Iranian Revolutionary Guard. The reported facts raise concerns that the Trump Organization has violated the FCPA or sanctions against the Revolutionary Guard.

a. If confirmed as the Deputy Attorney General, and the reported facts meet the Department's standards for opening an investigation, will you ensure that the

Trump Tower Baku deal is investigated?

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1 https://www.bna.com/trump-enforcement-foreign-n73014449002/

2 http://www.newyorker.com/magazine/2017/03/13/donald-trumps-worst-deal

b. Can you assure this Committee that, if no investigation is opened, it will be only because career attorneys at the Department do not recommend it, and that political pressure will in no way shape the Department's decision-making process?

c. If a Department investigation reveals likely violations, will you prosecute, or refrain from stifling the prosecution, of President Trump, his family, and/or his business associates to the fullest extent of the law?

d. If presented with additional evidence or allegations linking President Trump, his family, or his business associates to any foreign corruption, will you ensure that the Department investigates and prosecutes them to the fullest extent of the law?

4. Financial supporters of President Trump have previously admitted to violations of the FCPA. For example, Sheldon Adelson, who spent at least $25 million in support of President Trump's election,[3] runs a business that was fined for violations of the FCPA committed in China.[4]

a. If there is evidence that meets the Department's standards, will you investigate and, if warranted by Department standards, prosecute any foreign bribery by President Trump's financial supporters?

b. Do you commit that, if confirmed, President Trump's political supporters will not receive any special treatment?

5. At your hearing, you committed to finally reading the Intelligence Community's joint assessment on Russian interference in the 2016 presidential election.[5] I was surprised that you had not read this assessment, which has been publicly available since January. During Attorney General Sessions' confirmation hearing, he too testified that he had not read the Intelligence Community's publicly available report, but in his first written responses he stated: "I have no reason not to accept the intelligence community's conclusion(s) as contained in the report."[6] Since then, Attorney General Sessions has consistently refused to unequivocally denounce Russia's confirmed meddling in our electoral process. For instance, when recently pressed on whether the Trump campaign believed Russia favored candidate Trump over others, Attorney General Sessions said, "I have never been told that."[7] And when pressed if he thought Russia favored candidate Trump, Attorney General Sessions responded, "I don't have any idea," and he then refused to comment on existing evidence. If confirmed, you would be working directly under an Attorney General who does not appear to take evidence of threats from Russia as a serious threat to our national security.

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3 http://www.foxnews.com/politics/2016/10/31/adelson-pours-25-million-into-white-house-race-more-may-be- coming html

4 https://www.justice.gov/opa/pr/las-vegas-sands-corporation-agrees-pay-nearly-7-million-penalty-resolve-fcpa- charges-related

5 https://www.intelligence.senate.gov/sites/default/files/documents/ICA_2017_01.pdf

6 https://www.judiciary.senate.gov/download/sessions-responses-to-leahy-questions-for-the-record-01-10-17

7 http://www.foxnews.com/on-air/tucker-carlson-tonight/index html#/v/5346017322001

a. Since your hearing, have you read the Intelligence Community's joint assessment on Russian interference in the 2016 U.S. presidential election? If you have not read the report, was it so that you could avoid directly answering questions about it during the confirmation process?

b. Do you accept the Intelligence Community's findings as contained in that assessment?

c. If confirmed, do you commit to seriously investigating interference in U.S. elections from Russia or any other foreign government?

6. At your hearing, you stated that you had read Attorney General Elliot Richardson's 1973 testimony before the Senate Judiciary Committee, and specifically his testimony regarding the appointment of Archibald Cox as an independent prosecutor to investigate the unfolding Watergate scandal.

a. Can you please explain what Attorney General Richardson's testimony means to you?

b. Do you believe that Mr. Richardson set a standard that other Department officials should uphold? If not, why not?

7. You and others supporting your nomination have said that it would be premature for you to commit to appointing an independent Special Counsel to investigate the Russian interference in the 2016 election. I disagree. The situation clearly meets the standards in 28 C.F.R. § 600.1, which state that a Special Counsel is warranted where the investigation presents a conflict of interest or "other extraordinary circumstance," and where it would be in the public interest.

In 1973, Elliot Richardson, who like you was not yet confirmed to his position at the Department of Justice when he appeared before this Committee, promised that he would appoint a special prosecutor to investigate the "break-in at Democratic National Headquarters, [and] all alleged offenses rising out of the 1972 presidential campaign and any other allegations involving President Nixon, his White House employees or appointees."[8]

a. Do you believe Mr. Richardson's promise to this Committee was appropriate given the facts as they were known in May 1973?

b. If so, please explain why Mr. Richardson's promise to this Committee was appropriate, but a similar one from you would not be, given the broad similarities between the fact patterns (*i.e.* criminal breaches at the DNC, and potential connections to the President's campaign).

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8 http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/051973-1__htm.

c. If, after considering all available facts, you determine that appointing a Special Counsel is not necessary to investigate Russia's meddling in the 2016 presidential election, do you commit to publicly disclosing the full process that you and the Department undertook to reach this decision, so that all Americans can understand why a Trump political appointee will remain in charge of this serious investigation?

8. Following several court rulings against President Trump's first attempt to implement his proposed Muslim ban, a White House staffer declared that "that the powers of the president to protect our country are very substantial and will not be questioned."[9] This attitude and disdain for constitutional checks and balances is alarming. Even more alarming is that the Department of Justice attempted to assert this position before the Ninth Circuit, arguing that any type of judicial review of the President's national security determination "in itself imposes substantial harm on the federal government and the nation at large."[10] Of course, the Ninth Circuit readily rejected that argument, as has the Supreme Court in landmark cases from *Youngstown* to *Boumedienne*.

a. Do you agree that the President's national security determinations are "supreme" and "unreviewable"?

b. If confirmed, will the Department continue to argue before the courts that judicial review of the President's national security decisions is "in itself" harmful?

9. In a 2010 speech, you made it clear that addressing violence against women is one of the Justice Department's highest priorities. As the co-author of the 2013 Leahy-Crapo Violence Against Women Act reauthorization, I could not agree more. That is why I was so disturbed earlier this year when it was reported that the far-right Heritage Foundation's budget blueprint, which may be relied on by the new administration, called for eliminating all VAWA grants.[11] The Office of Violence Against Women provides 24 separate grant programs that support law enforcement, state and tribal coalitions, non-profit organizations, and institutions of higher education to serve survivors and hold offenders accountable.

a. If confirmed, will you commit to doing everything you can to preserve these critical grant programs and to ensure they receive the funding they need so that the Office can effectively carry out its mission?

10. Since 2013, you have been a member of the Justice Department's Marijuana Enforcement Working Group. That same year, the Department issued the Cole Memo, which outlines the Department's marijuana enforcement priorities. The memo provides that in states that have legalized medical marijuana, "enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity."

9 http://www.cbsnews.com/news/face-the-nation-transcript-february-12-2017-schumer-flake-miller/

10 http://cdn.ca9.uscourts.gov/datastore/general/2017/02/04/17-35105%20motion.pdf

11 http://thf-reports.s3.amazonaws.com/2016/BlueprintforBalance.pdf

a. If confirmed, would you maintain those priorities?

b. Would you ever use our limited federal resources to investigate and prosecute sick people who are using marijuana for medicinal purposes in accordance with their states' laws?

Congress, through appropriations, has decided the federal government should not dismantle state medical marijuana programs. Since 2014, the Justice Department cannot "prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."

Would this congressional prohibition prevent the DEA from raiding medical marijuana dispensaries that are compliant with state law, or from shutting down banks or other businesses that work with dispensaries?

11. Many minorities in this country are fearful of being targeted by government surveillance due to their religion or ethnicity. These fears are not baseless. On the campaign trail, Mr. Trump called for indiscriminate surveillance of mosques and indicated that he favored creating a registry of Muslims in this country.[12] His campaign surrogates, some of whom are now in the White House and in senior positions across the government, have said worse.

a. If confirmed, if requested by the President, would you direct investigators to indiscriminately surveil mosques or other religious institutions?

b. Do you believe the government's surveillance laws allow for surveillance of anyone who ascribes to a particular religious faith?

12 https://www.nytimes.com/2015/11/22/us/politics/donald-trump-syrian-muslims-surveillance.html? r=1

NOMINATIONS OF ROD J. ROSENSTEIN AND RACHEL L. BRAND
QUESTIONS FOR THE RECORD FROM SENATOR DICK DURBIN
MARCH 14, 2017

For any questions with subparts, please respond to each subpart separately.

Questions for Rod J. Rosenstein

1. Acting Attorney General Sally Yates said the Justice Department could not defend the President's original travel ban because she was not convinced it was lawful. She was promptly fired by the President.

   To explain this unprecedented action, the White House issued a statement claiming: "Ms. Yates is an Obama Administration appointee who is weak on borders and very weak on illegal immigration." The reality is that Sally Yates served for nearly three decades as a career federal prosecutor before becoming U.S. Attorney and then Deputy Attorney General. She was confirmed on an 84-12 vote. And it was President Trump who asked her to serve as Acting Attorney General.

   You served with Sally Yates when she was U.S. Attorney and Deputy Attorney General. **Do you think she is "weak on borders and very weak on illegal immigration"?**

2. At her confirmation hearing, then-Senator Sessions asked Ms. Yates: "Do you think the Attorney General has the responsibility to say no to the President if he asks for something that's improper?....If the views that the President wants to execute are unlawful, should the Attorney General or the Deputy Attorney General say no?" She responded: "The Attorney General or the Deputy Attorney General has an obligation to follow the law and the Constitution and to give their independent legal advice to the President."

   a. **Do you agree with Ms. Yates' response?**

   b. **What will you do if the President or the Attorney General asks you to do something that you believe is illegal?**

   c. **What will you do if the President or the Attorney General asks you to defend a statement or tweet that you believe is false?**

3. On January 6, the Intelligence Community issued its assessment titled "Assessing Russian Activities and Intentions in Recent U.S. Elections."

    a. **Have you now read either the classified or unclassified version of the assessment?**

    b. **Do you accept the "Key Judgments" presented in the assessment?**

    c. **Do you accept the Intelligence Community's judgment that Russia interfered with our election?**

    d. **Do you know if Attorney General Sessions has read the assessment yet?**

4.

    a. **In your opinion, has President Trump divested himself of his ownership interests in the Trump Organization?**

    b. **If you lack sufficient information to form an opinion on this matter, please describe what information you would need to review in order to form an opinion.**

5.

    a. **Do you know how much of the Trump Organization's assets or debts are held or owned by Russian individuals, businesses, or government officials?**

    b. **If you lack sufficient information to answer this question, please describe what information you would need to review in order to provide an answer.**

6. **Do you believe the American people would benefit from full transparency of the Trump Organization's assets, debts, and foreign entanglements, in order to ensure there are no Russian entanglements or unconstitutional emoluments?**

7. Senator Leahy sent Attorney General Sessions the following written question for the record during his confirmation process: "Have you been in contact with anyone connected to any part of the Russian government about the 2016 election, either before or after election day?" Attorney General Sessions' answer was one word: "No."

    But on the March 2 "Tucker Carlson Tonight" show, he answered differently. When asked if he had spoken with the Russian Ambassador about the campaign during their September 8 meeting, the Attorney General said "I do not recall any discussion of the campaign in any significant way."

If Attorney General Sessions spoke with the Russian Ambassador about the campaign in any way, whether significant or insignificant, during the September 2016 meeting, do you believe his answer to Senator Leahy's question was accurate?

8. On March 2, Attorney General Sessions issued a public statement saying "I have decided to recuse myself from any existing or future investigations of any matters related in any way to the campaigns for President of the United States." In his March 6 letter to the Committee, Attorney General Sessions acknowledged the Committee's concerns as to "why [he] had not recused [himself] from 'Russian contacts with the Trump transition team and administration.'" He then wrote "I understand the scope of the recusal described in the Department's press release would include any such matters."

   At your hearing I asked you to clarify your understanding of the scope of the Attorney General's recusal based on his plain language. **Do you agree with Attorney General Sessions that he has recused himself from any existing or future investigations of any matters related in any way to Russian contacts with the Trump campaign, transition team and administration?**

9. **Have you communicated with anyone in the White House or Justice Department regarding Attorney General Sessions' recusal decision? If so, please identify the individuals with whom you communicated and what was discussed.**

10. **If you are confirmed, do you agree that the decision would fall to you whether or not to appoint a special counsel to investigate Russian efforts to interfere with the 2016 presidential election?**

11. **If you decide not to appoint a special counsel, will you commit to publicly explain to the American people the grounds for not making this appointment?**

12. Some say that the way to reduce gun violence is simply to bring more federal prosecutions against those who carry guns during the commission of crimes. While federal prosecutions of gun crimes may be important tools, they clearly are not enough on their own to solve the public health crisis of gun violence. For example, *The Chicago-Sun Times* reported that Baltimore had significantly more federal gun prosecutions than Chicago over the past five years (810 to 477), but Baltimore's per-capita homicide rate is still higher than Chicago's.

    a. **Do you agree that simply bringing more federal gun prosecutions isn't enough to stop gun violence?**

    b. **Do you agree that an effective strategy to reduce gun violence would benefit from Justice Department investments in violence prevention efforts like the COPS program, the programs administered under the Second Chance Act, and the programs administered by the Office of Juvenile Justice and Delinquency Prevention?**

c. **Will you commit not to request cuts in Justice Department budget requests to violence prevention programs that are vitally important to Chicago including programs administered by the COPS Office, the Office of Juvenile Justice and Delinquency Prevention and the Office of Violence Against Women?**

13. When we met prior to your hearing, we discussed the Fair Sentencing Act, legislation that I authored with then-Senator Sessions that reduced the 100-to-1 sentencing disparity between crack and powder cocaine. The bipartisan Sentencing Commission unanimously decided to retroactively apply changes in the crack cocaine sentencing guidelines that resulted from the Fair Sentencing Act. This led to the early release of approximately 13,000 crack offenders who were serving draconian sentences under pre-Fair Sentencing Act guidelines; 80 percent of these offenders are African-American.

    a. **I want to make sure that I am clear on your position, so, for the record, did you support the Durbin-Sessions Fair Sentencing Act?**

    b. **Did you support the retroactive application of crack sentencing guidelines?**

14. If you are confirmed, you will become the chair of a Task Force on Crime Reduction and Public Safety that the President established by executive order. The task force is charged with developing strategies to reduce crime and improve public safety.

    One issue you will need to address is the federal prison budget crisis. Our federal prison population has grown by 750% since 1980, and our federal prisons are about 30% over capacity. Federal prisons now consume one quarter of the Justice Department's discretionary budget. These runaway expenditures are undermining other important priorities, like funding for crime prevention, drug courts, and addiction treatment.

    The largest increase in the federal prison population is nonviolent drug offenders, and this problem has been made worse by inflexible mandatory minimum sentences.

    a. **What is your plan to address BOP's budget?**

    b. **Should a part of this plan involve giving judges more flexibility to sentence nonviolent drug offenders below the mandatory minimum on a case-by-case basis?**

    c. **If confirmed, will you direct federal prosecutors to utilize the Department's limited resources to focus prosecutions on the most dangerous violent offenders, rather than low-level non-violent drug offenders?**

15. When you served as an attorney in the Justice Department's Public Integrity Section, you prosecuted two African-American men in a case involving allegations

of absentee ballot fraud in Phillips County, Arkansas. The defendants in the case argued that they had been selectively prosecuted.

At trial, the defendants were acquitted of all but one charge, and they appealed their convictions for conspiracy to commit acts of multiple voting and conspiracy to provide false information in voting. The convictions were ultimately affirmed by the Eighth Circuit on a 2-1 vote.

However, in its opinion, the court discussed a number of "serious and pervasive" voting irregularities that prosecutors did not target in the area where Phillips County is located, including:

> [R]ejection of black absentee ballots by white clerks… challenge of black absentee ballots because the ballots had been sent to the same address, while white absentee ballots sent to the same address were not questioned… casting of absentee ballots by non-resident whites or by parents for grown children… allowing white candidates to stay in [a] polling place while black candidates were asked to leave… and harassment and intimidation of black voters, including armed intimidation.

The Eighth Circuit remanded for resentencing and held that the district court had discretion to depart from the Sentencing Guidelines. They also noted that the district court may "consider the government's conduct in a decision to grant a downward departure."

The dissenting judge in the case noted that there was little difference between the actions of the defendants and the actions of white individuals, who were not prosecuted. Specifically, the judge noted that "the Department of Justice… failed to prosecute white political rivals who violated the same section of the Voting Rights Act in the same county and in the same election."

Why did the Justice Department choose to prosecute the black defendants in this case, but not white individuals who allegedly committed similar acts of voter fraud?

16. As we discussed in our meeting, if you are confirmed, you will oversee the federal Bureau of Prisons (BOP) and be responsible for ensuring that almost 200,000 federal inmates are treated in a humane fashion.

    When I was Chairman of the Subcommittee on the Constitution, Civil Rights, and Human Rights, I held two hearings on the human rights, fiscal, and public safety consequences of solitary confinement. Anyone who heard the chilling testimony of Anthony Graves and Damon Thibodeaux—exonerated inmates who each spent more than a decade in solitary confinement—knows that this is a critical human rights issue that we must address.

    In light of the mounting evidence of the harmful—even dangerous—impacts of solitary confinement, states around the country have led the way in reassessing the

practice. Progress has been made at the federal level as well. Last year, the Justice Department issued a report on the use of restricted housing in the federal prison system, and BOP has begun to implement a number of the report's recommendations for reform. However, there are still approximately 10,000 federal inmates in segregation.

a. **Do you believe that long-term solitary confinement can have a dangerous impact on inmates?**

b. **Will you commit that, if you are confirmed, you will examine the evidence and work with BOP to make further improvements in the area of restricted housing?**

17. Deputy Attorney General Sally Yates issued a memo in August 2016 to begin the process of phasing out BOP's use of private prisons. In the memo, she cited an August 2016 DOJ Inspector General (IG) report that found that private contract facilities used by BOP do not maintain the same level of safety and security as BOP-run facilities (https://oig.justice.gov/reports/2016/e1606.pdf). Specifically, the IG noted that private facilities "had more frequent incidents per capita of contraband finds, assaults, uses of force, lockdowns, guilty findings on inmate discipline charges, and selected categories of grievances." The IG also found that some of the facilities improperly housed new inmates in solitary confinement. Despite this evidence, the Attorney General recently issued a memo that directed BOP to "return to its previous approach."

a. **Do you accept the IG's findings?**

b. **Do you believe that there is a need for private prisons in the federal prison system?**

c. **If confirmed, what steps will you take to ensure that these problematic facilities operate in a manner that ensures the safety and security of all inmates and staff?**

18. If confirmed, you will oversee the immigration courts, which face a nationwide backlog of more than 540,000 cases. Addressing this backlog in a manner that protects the rights of individuals seeking relief, including vulnerable women and children fleeing brutal persecution, will be a major challenge.

a. **Will you commit to seeking to maintain or increase the number of immigration judges and courts nationwide?**

b. **Will you commit to not removing any currently serving immigration judges or BIA members, except for cause?**

19. DHS Secretary Kelly's February 20 Memo implementing the President's Border Security Executive Order states:

> In some immigration courts, aliens who are not detained will not have their cases heard by an immigration judge for as long as five years. This unacceptable delay affords removable aliens with no plausible claim for relief to remain unlawfully in the United States for many years.

The DHS implementation memo suggests that the solution to the backlog in the immigration courts is to greatly expand the use of expedited removal.

Troubling due process concerns have been raised about expedited removal procedures, including incidents of erroneous deportations and inadequate protection of vulnerable individuals seeking asylum.

a. **Are you aware that there have been cases of U.S. citizens with mental disabilities who have been wrongfully deported using expedited removal? See, for example, https://www.aclu.org/report/american-exile-rapid-deportations-bypass-courtroom.**

b. **Do you believe that expanding expedited removal, which provides no judicial review prior to an individual's rapid deportation, is a just solution to the immigration court backlog? Or is increasing the number of immigration judges a more appropriate response to the immigration court backlog?**

20. One study found that between Fiscal Year 2012 and Fiscal Year 2014, unaccompanied children represented by lawyers had a 73 percent success rate in immigration court, allowing them to stay in the U.S, while only 15 percent of unrepresented children succeeded in their cases and the rest were ordered deported (http://trac.syr.edu/immigration/reports/371/).

Legal representation also dramatically boosts appearance rates for court proceedings. An analysis found that over more than a decade, more than 95 percent of children represented by lawyers appeared for their immigration court proceedings, whereas for children without counsel the appearance rate was 33 percent (https://www.americanimmigrationcouncil.org/research/children-immigration-court-over-95-percent-represented-attorney-appear-court).

a. **Do you believe that a child can represent herself fairly in immigration court?**

b. **If you are confirmed, do you plan to support programs to increase access to counsel in the immigration courts?**

21. When we met prior to your confirmation hearing, I asked you about federal funding for so-called sanctuary cities. In response, you referenced a 2016 Office of Inspector General

(OIG) Report and suggested that certain jurisdictions have not complied with federal law, specifically 8 U.S.C. Section 1373.

The goal of policies limiting local police departments' role in enforcing immigration laws is to promote effective community policing by encouraging immigrant communities to trust local police. Threatening communities across the country with the loss of millions of dollars in critical funding will diminish, not enhance, public safety. It also ignores the reality that the vast majority of immigrants in our country are law-abiding individuals with strong family values and deep roots in their communities.

Section 1373 bars the restriction of information sharing by government entities and officials with federal immigration authorities regarding an individual's citizenship and immigration status. It does not prohibit jurisdictions from limiting their police department's role in enforcing immigration laws by, for example, refusing to detain immigrants on behalf of the federal government or refusing to notify the federal government before releasing immigrants from their custody.

Although it raises questions about the language of specific ordinances, the OIG report you mentioned does not conclude that any jurisdiction receiving federal funds is in violation of federal law.

a. **Do you agree that the OIG report does not conclude that specific jurisdictions have failed to comply with federal law?**

b. **Do you agree that under current law the Administration cannot bar federal funding for jurisdictions that refuse to detain immigrants on behalf of the federal government or refuse to notify the federal government before releasing immigrants from their custody?**

22. On February 23, Chairman Grassley sent a letter to Attorney General Sessions asking him to supply to the Committee records of all communications involving Acting Attorney General Sally Yates from January 20 through January 31. Specifically, the letter requested that the Attorney General provide "All emails to, from, copying, or blind-copying Ms. Yates…from both her classified and unclassified accounts" "[r]ecords of all calls Ms. Yates had," "[r]ecords of all meetings Ms. Yates had," and "[r]ecords of all correspondence Ms. Yates sent" from January 20 through January 31.

a. **In your view, is it appropriate for the Department of Justice to supply the Committee with all of the information requested in the February 23 letter?**

b. **If there is information that the Chairman requested in his February 23 letter that you believe to be inappropriate for the Justice Department to supply to the Committee, please describe such information and the reason why supplying it would be inappropriate.**

c. **Will you commit, if you are confirmed, to supply the Committee with all information requested by the Committee regarding your own emails and records of your calls, meetings, and correspondence?**

23. **Have you communicated with anyone in the White House or Justice Department regarding the decision to ask for the resignation of 46 U.S. Attorneys on March 10, 2017? If so, please identify the individuals with whom you communicated and what was discussed.**

24. **Do you believe Zach Fardon, the U.S. Attorney for the Northern District of Illinois who was asked on March 10 to resign, served the U.S. Attorney's Office and the people of Illinois well during his tenure as U.S. Attorney?**

QUESTIONS FOR THE RECORD
ROD J. ROSENSTEIN
NOMINEE TO BE DEPUTY ATTORNEY GENERAL

QUESTIONS FROM SENATOR AMY KLOBUCHAR

Need for Special Prosecutor

[*To Mr. Rosenstein*]: As I stated at the hearing, I have called on Attorney General Sessions to come before this Committee immediately to provide critical information following recent reports that he met with the Russian Ambassador last fall and misled this Committee – and the American people – regarding those meetings. I have also called for the appointment of a special prosecutor, so that this investigation can proceed without political influence.

- According to rule 28 CFR § 600.4, the scope of any special counsel's investigation will likely be determined by the Acting Attorney General for the purposes of the investigation. In light of Attorney General Sessions' recusal, that task of defining the scope of the investigation would be yours. If called upon to do so, how would you define the scope of a special counsel's investigation into communication between Russian officials and the President's campaign, transition, and Administration?

- According to rule 28 CFR § 600.7, the Attorney General or Deputy Attorney General would still retain significant authority to overrule a special counsel's decisions. If you are serving as the Acting Attorney General for purposes of this investigation, would you be willing to overrule the special counsel's decision?

- According to rule 28 CFR § 600.3, an appointed special counsel "shall be a lawyer with a reputation for integrity and impartial decision making." In the event that you are responsible for appointing a special counsel to investigate contacts between Russian officials and the President's campaign, transition, or Administration, can you describe how you would find a lawyer who satisfied these criteria?

- Rule 28 CFR § 600.3 requires that an appointed special counsel ensure that "the investigation will be conducted ably, expeditious, and thoroughly." If you are responsible for appointing a special prosecutor to investigate contacts between Russian officials and the President's campaign, transition, or Administration, what would you view as an "expeditious" timeline?

    - Still referring to rule 28 CFR § 600.3, what you would view as "appropriate experience" for a special counsel?

    - Still referring to rule 28 CFR § 600.3, what would you view as a "thorough" investigation into relevant contacts with Russian officials?

- If no charges are brought, the public may never learn the contents of the special prosecutor's investigation. In such circumstances, do you believe that there is a need for an external body—such as an independent commission—to investigate and produce a public report of the President's campaign and its contacts with Russia?

Opioid Abuse

[To Mr. Rosenstein]: As U.S. Attorney, your office has worked to shut down so-called "pain clinics" that illegally give out prescriptions for powerful drugs like oxycodone. Last Congress, I helped lead the passage of the Comprehensive Addiction and Recovery Act (CARA) in the Senate, and I have also introduced legislation requiring states to have stronger prescription drug monitoring programs (PDMPs) to prevent the kind of "doctor shopping" that facilitates addiction.

- As Deputy Attorney General, would confronting the opioid crisis be a priority of yours? Are there specific measures you believe the Justice Department should take in this area?

QUESTIONS FOR THE RECORD
ROD J. ROSENSTEIN
NOMINEE TO BE DEPUTY ATTORNEY GENERAL

QUESTIONS FROM SENATOR WHITEHOUSE

(1) In January 2010, DOJ attorney David Margolis issued a memorandum suggesting that attorneys in the Office of Legal Counsel may owe a duty of candor to their clients that is less than the duty owed by workaday litigators to their clients. Based on my understanding, under Attorney General Eric Holder, the Department stopped relying on that rule in the ethical guidance it provided its attorneys. What is your view with respect to the duty of candor that DOJ attorneys owe their client, particularly those attorneys in OLC who are charged with giving advice to the Administration outside of an adversarial process?

(2) If you have not yet reviewed currently operative policies between DOJ and the White House governing contacts about ongoing investigations and prosecutions, will you commit to doing so before you are confirmed? If confirmed, will you provide the Committee any updates to those policies on timely basis?

(3) What specific factors will you take into account when considering whether it would be appropriate to appoint a special prosecutor to investigate potential ties between the Trump Administration and Russian interference in the 2016 presidential election?

(4) Is it Department of Justice policy that waterboarding constitutes torture?

(5) Is it your expectation that career DOJ prosecutors currently investigating or otherwise pursuing terrorism-related cases under federal criminal statutes will be able to pursue those cases in Article III courts? Would you recommend that they be able to do so?

(6) Due to lax incorporation registration requirements, drug traffickers, terror groups, and other criminal enterprises have been able to hide assets and launder money through shell companies in the United States. In his written questions for the record, Attorney General Sessions committed to working with Congress to provide law enforcement with the tools to detangle complex network of shell companies in order to uncover criminal activity and recover assets.

   a. Based on your experience in law enforcement, are you familiar with the challenges investigators face trying to determine the beneficial owner of shell corporations?

b. Do you agree that making it easier law enforcement to identify the true beneficial owners of shell companies would assist them in trying to identify and investigate criminal activity?

c. Will you commit to working with Congress to address this issue?

QUESTIONS FOR THE RECORD
ROD J. ROSENSTEIN
NOMINEE TO BE DEPUTY ATTORNEY GENERAL

QUESTIONS FROM SENATOR COONS

1. What is your general approach to deciding how to focus prosecutorial resources?

2. Is it ever appropriate, in the interest of justice or to avoid a mandatory minimum, to charge a criminal defendant with a lesser offense than the one you believe the facts support?

3. Public reports indicate that in targeting known violent offenders, you have at times charged offenders with low-level offenses that are easier to prove in order to secure convictions without the investment of time and resources necessary to prove a more serious charge. Why have you taken this approach, and why do you believe it is preferable to building cases and securing convictions for more serious felonies?

4. It is critical that police departments establish strong, trusting relationships with the communities they serve. Officers who abuse their authority, either through corruption, excessive force, or patterns of constitutional violations, erode these police-community relationships.
    a. Recently, Attorney General Sessions indicated a shift away from the Department of Justice's use of consent decrees when working with local law enforcement to resolve pattern or practice investigations. When are consent decrees appropriate to achieve reforms?
    b. Do you believe the Department of Justice should continue to follow the provisions outlined in the Baltimore consent decree?
    c. In your view, should the Department of Justice continue to work with state and local law enforcement to enter into consent decrees?

5. On March 10, 2017, President Trump requested the resignations of 46 U.S. Attorneys appointed by President Obama.
    a. Were you aware of the administration's intention to ask for these resignations before the request was formally issued to U.S. Attorneys?
    b. Did you provide your opinion regarding this decision to request resignations?
    c. Do you agree with the President's decision to make these resignations effective immediately, rather than effective upon filling each position?
    d. Public reports indicate that your resignation will not be accepted. If you have been informed that your resignation will not be accepted, when did you receive that information, what were you told, and who conveyed this message to you?

6. If confirmed, will you ensure that all investigations into Russian interference with the presidential election and the Trump administration are completed in a thorough and independent fashion?

7. If confirmed, how will you ensure that there is not political interference with the intelligence agencies and U.S. Attorneys' offices, with regard to any investigation into Russian interference with the presidential election and the Trump administration or any other issue?

8. During his confirmation hearing, Attorney General Sessions stated that he did not have communications with the Russians, even though he had met with the Russian Ambassador on at least two separate occasions.
    a. Do you agree with Attorney General Sessions' decision to recuse himself from any current or future inquiry into the Trump campaign and administration's interaction with the Russian government?
    b. How will you ensure, to the best of your ability, that the Attorney General honors his recusal commitment and is not involved in investigations concerning the Trump campaign and administration's interaction with the Russian government?

9. Evidence shows that solitary confinement has significant mental health consequences when used for extended periods of time.
    a. Do you believe solitary confinement should only be used as a last resort?
    b. Do you believe solitary confinement should ever be used for juveniles?

10. Individuals are being jailed throughout the country when they are unable to pay a variety of court fines and fees. There is often little or no attempt to learn whether these individuals can afford to pay the imposed fines and fees or to work out alternatives to incarceration.
    a. Under your leadership, will the Department of Justice work to help state and local municipalities end this practice?
    b. What is your position on the practice of imposing unaffordable money bail, which results in the pretrial incarceration of the poor who cannot afford to pay?
    c. Should parents pay the cost of housing their child if that child has been detained in a juvenile detention facility?

11. The Department of Justice established the Office for Access to Justice (ATJ) in March 2010 to address the access-to-justice crisis in the criminal and civil justice system. ATJ's mission is to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status.
    a. How will you improve access to justice for indigent criminal and civil defendants?
    b. What affirmative steps will you take to improve access to justice?
    c. How will you support the work of the Department of Justice Office for Access to Justice?

12. How will you implement and enforce the Death in Custody Reporting Act and the FBI National Use of Force database?

13. President Trump claimed that millions of people voted illegally in the presidential election.

a. Do you believe three to five million individuals illegally voted during the 2016 U.S. election?
b. If so, what evidence are you relying upon?
c. Do you believe there should be an investigation into alleged instances of voter fraud in the 2016 presidential election?

14. A 2014 report by Justin Levitt published in the *Washington Post* (available at https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.dc645a28fb6b) found that since 2000, there were only 31 credible allegations of voter impersonation, during a period in which there were 1 billion ballots cast. In light of this report, do you think it is justifiable for the Department of Justice to spend resources on combatting in-person voter fraud?

15. Do you agree that certain photo ID laws can disenfranchise otherwise eligible voters and disproportionately and unreasonably burden African-American and Latino voters?

16. Do you agree with the Department's recent motion for voluntary dismissal of the discriminatory purpose claim asserted in the ongoing *Veasey v. Abbott* litigation over Texas Senate Bill 14?

17. The FBI reported that hate crimes targeting Muslims increased by 67% in 2015. How do you believe the Department of Justice should use its resources to address rapid, documented increases in crimes such as this one?

18. Do you believe internment of American citizens or residents is lawful?

19. Would you ever rely on *Korematsu v. United States*, 323 U.S. 214 (1944), as precedent?

20. Last year, without debate or congressional action, Rule 41 of the Federal Rules of Criminal Procedure was amended to expand the government's ability to obtain a warrant and remotely access electronic devices. The rules now allow federal prosecutors to seek a warrant in any district "where activities related to a crime may have occurred." Will you instruct the Department of Justice to issue guidance on how this should be interpreted?

21. Do you believe that religious institutions, including mosques, should be targeted for warrantless surveillance?

22. Do you believe that a religious institution should be targeted because it is of a particular

faith, *i.e.*, should a religious institution be targeted because it is a Muslim institution?

23. Will you commit to instructing the FBI that the agency should not surveil a house of worship unless there is probable cause of criminal activity?

24. What will you do to ensure vigorous enforcement of the Ethics in Government Act, bribery and honest services laws, and anti-nepotism laws?

25. You have overseen many public corruption cases during your career.
    a. Does the President of the United States have a duty to serve with integrity and always pursue the public interest, not personal profit?
    b. Do you believe that President Trump has sufficiently distanced himself from his private, for-profit enterprises?
    c. How do you intend to ensure that conflicts of interest of the President and administration officials will be eliminated?

26. What is your interpretation of the effect of the Emoluments Clause on the ability of President Trump or his family members to continue doing business with foreign governments after inauguration?

27. The plan then-President-elect Trump outlined on January 11, 2017 to address his potential conflicts and violation of the Emoluments Clause did not require President Trump to relinquish ownership of his business or to establish a blind trust. The plan also did not indicate that President Trump would seek the consent of Congress to keep the benefits he receives from foreign entities through his businesses. The Director of the Office of Government Ethics has stated that this plan breaks with the practice of past presidents.
    a. Based on these facts, has President Trump, in your view, complied with the requirements of the Emoluments Clause?
    b. If your answer is "yes," what is the basis for your understanding that the President is not receiving monetary or other benefits from foreign entities through his continued ownership interests in the Trump Organization, even if he does not have day-to-day control?

28. The Office of Legal Counsel (OLC) supports the Attorney General in fulfilling his responsibility to provide legal advice to the President, heads of executive departments, and heads of military departments.
    a. Do you agree that, as discussed in the Best Practices for OLC Legal Advice and Written Opinions (May 16, 2005 and July 16, 2010), the Attorney General and OLC should provide "candid, independent, and principled advice—even when that advice may be inconsistent with the desires of policymakers" including the President?
    b. What standard do you believe must be met before an Attorney General or OLC opinion is overturned?

29. How would you ensure that hirings and dismissals of Department of Justice employees are not politicized?

30. Do you believe that there are clear instances when an investigation should be turned over to an independent or special counsel?

31. What factors would you use to evaluate when an independent or special counsel is appropriate?

32. In your hearing, I asked you if it is ever appropriate for the President or another White House official to contact the Department of Justice or the FBI with instructions on how to conduct an ongoing criminal investigation. You said that the presumption is that there should not be contacts but that there may be limited exceptions.
    a. What, in your view, are the circumstances when it is appropriate for the President or another White House official to contact the Department of Justice or the FBI with instructions on how to conduct an ongoing criminal investigation?
    b. What factors or criteria would you examine to determine if contacts were appropriate?
    c. What would you do if there were inappropriate communications between the White House and the Department of Justice regarding an investigation?
    d. Is it ever appropriate for the President or another White House official to contact the Department of Justice or the FBI to recommend or request that they open a new investigation?
    e. Is it ever appropriate for the President or another White House official to contact the Department of Justice or the FBI to recommend or request suspending or closing an ongoing investigation?
    f. Is it ever appropriate for the President or another White House official to ask the Department of Justice or the FBI about an ongoing investigation that potentially implicates the President and/or other White House officials?

33. It was recently reported that FBI Director James Comey asked the Justice Department to publicly reject President Trump's March 4 assertion on Twitter in which he wrote, "Terrible! Just found out that Obama had my 'wires tapped' in Trump Tower just before the victory. Nothing found. This is McCarthyism!"
    a. Do you agree that if the President's statement is false, the Department of Justice should correct it?
    b. Why or why not?

34. President Trump's recent tweets regarding the alleged tapping of his phone suggest he may not appreciate how provisions of Section 702 or Title III probable cause warrants function and are carried out.
    a. In your view, can President Trump direct the Department of Justice to target Americans for wire taps?
    b. Can any President petition U.S. courts to obtain surveillance for political purposes?

35. The total volume of worldwide piracy in counterfeit products is estimated to be 2.5% of world trade (USD $461 billion). Counterfeit products such as fake pharmaceutical drugs or faulty electronics can cause direct physical harm to Americans, and the profits from these illicit sales often go directly to the coffers of organized crime. How will you use Department of Justice resources to address this growing threat?

36. The Department of Justice has made substantial efforts to combat trade secret theft by foreign nationals. In 2009, only 45 percent of federal trade secret cases were against foreign companies; this number increased to over 83 percent by 2015.
    a. Will you prioritize enforcement actions to combat trade secret theft by foreign nationals?
    b. How do you plan to continue the Department of Justice's efforts to successfully target criminal trade secret theft?

37. In an op-ed commemorating World Intellectual Property Day, you wrote that "[i]ntellectual property fraud is theft," and that "[t]he Internet greatly enhances opportunities for criminals to sell products that do not belong to them." How do you plan on directing the resources of the Department of Justice to address this significant and growing problem?

38. The Victims of Child Abuse Act (VOCAA) authorizes funds to directly support establishment and operation of local and regional Children's Advocacy Centers (CACs), as well as training and technical assistance related to improving the investigation and prosecution of child abuse and neglect. These centers are intended to coordinate a multidisciplinary response to child abuse (e.g., law enforcement, child protection/social services, medical services, mental health) in a manner that ensures child abuse victims receive the support services they need and do not experience the investigation of child abuse as an added trauma. Close to 312,000 children were served at CACs in 2015. Will you include full funding for the Victims of Child Abuse Act in the Department of Justice's proposed budget?

39. As a Justice Department lawyer, when is it appropriate to refuse to follow a directive of the President?

40. How would you respond if your role at the Department of Justice required you to follow a policy directive that was unconstitutional?

41. Do you agree that the Department of Justice has an independent obligation to evaluate the legality of the President's policy proposals?

42. Do you agree that even in the areas of immigration and national security, the executive's exercise of prosecutorial discretion and other policies must be constitutional?

43. When is it appropriate for the Department of Justice to decide not to defend a federal law?

44. The President issued a revised Executive Order banning the admission of travelers from

six countries and halting the admission of refugees, with narrow exceptions. In your view, should the Department of Justice continue to defend this Executive Order?

45. Do you believe it was proper for the Obama administration to decide not to continue to defend the Defense of Marriage Act (DOMA)?

46. When the Justice Department decided not to defend DOMA, the Department "notif[ied] the courts of [the Department's] interest in providing Congress a full and fair opportunity to participate in the litigation in [the DOMA] cases." If the Department of Justice decides it cannot defend a law, will you take whatever steps are necessary to ensure that Congress or others can continue to defend the law?

47. The Department of Justice established the Violence Reduction Network in 2014. VRN provides a comprehensive approach to reducing violent crime in communities around the country by deploying federal resources in a targeted, strategic, data-driven way to assist state and local law enforcement. Through its participation in the VRN, the Wilmington Police Department created a new homicide unit, and the homicide clearance rate rose from less than 10 percent to more than 50 percent on current-year cases.
    a. How will you support the sustainability of the Violence Reduction Network improvements in cities that have participated in the program?
    b. Will you expand the VRN to work with additional cities?

48. Studies show that 5 percent of gun dealers sell 90 percent of guns that are subsequently used in criminal activity. How will you direct the Department of Justice to instruct the Bureau of Alcohol, Tobacco, Firearms and Explosives to crack down on dealers that funnel thousands of crime guns to city streets?

49. The Justice Department has supported the Youth Mentoring Program, which provides much needed funding to organizations like Boys & Girls Clubs of America. In my state of Delaware, those mentoring funds support programming to 44,100 young people between the ages of 5-18 years old. As Deputy Attorney General, will you ensure that the Youth Mentoring Program will be fully funded?

50. The Antitrust Division of the Department of Justice is routinely tasked with reviewing many proposed merger transactions, which often involve consideration of complex economic and legal issues. While it is critical that these reviews are thorough in the interest of maintaining competitive markets, delays can create uncertainty for potentially merging parties and have associated negative economic impacts. Under your leadership, how will you work to ensure that the Antitrust Division is able to conduct merger reviews in a timely and thorough manner?

From: Flores, Sarah Isgur (OPA)
Subject: FW: Transcript from yesterday's Senate hearing on 702
To: Terwilliger, Zachary (ODAG); Crowell, James (ODAG)
Sent: June 8, 2017 7:27 PM (UTC-04:00)
Attached: Final Transcript.SSCI 702 Hearing.6-7-17.docx, ATT00001.txt

Sent from my iPhone

Senate Select Intelligence Committee Holds Hearing on the Foreign Intelligence Surveillance Act
June 7, 2017

BURR:
I'd like to thank our witnesses today: Director of National Intelligence Dan Coats -- Dan, welcome back to your family here in the United States Senate -- Department of Justice Deputy Attorney General Rod Rosenstein, Director of National Security Agency Admiral Mike Rogers and Acting Director of the Federal Bureau of Investigation Andrew McCabe. Welcome to all four of you.

BURR:
I appreciate you coming today to discuss one of our most critical and publicly debated foreign intelligence tools. Title VII of the Foreign Intelligence Surveillance Act, commonly known as FISA, is set to expire on December 31, 2017.

Title VII includes several crucial foreign intelligence collection tools including one known primarily as Section 702. Section 702 provides the capability to target foreigners who are located outside the United States, but whose foreign communications happen to be routed to and acquired inside the United States.

Section 0702 (sic) collection is exceptionally critical to protecting Americans both at home and abroad. It is integral to our foreign intelligence reporting on terrorist threats, leadership plans, intentions, counterproliferation, counterintelligence, and many other issues that affect us.

It is subject to multiple layers of oversight and reporting requirements from the executive, the judicial and the legislative branches. The Foreign Intelligence Surveillance Court must all -- must approve minimization procedures for each relevant I.C. agency before the agency can review collected information.

At the end of the day, FISA collection provides our government with the foreign intelligence that our nation needs to protect Americans at home and abroad, and in many cases, our allies.

I understand there is an ongoing debate pitting privacy against national security. And there are arguments within the debate that have merit. As we all too painfully know, the intelligence community's valuable FISA collection was thrust into the public spotlight following the illegal and unauthorized disclosures by former NSA analyst Edward Snowden.

BURR:
As a result, the United States government and this committee redoubled its efforts to oversee FISA collection authorities, which already were subject to historical robust oversight.

But I also think it's fair to say that some entities overreacted following Snowden's disclosures. And now Congress must justify what courts repeatedly have upheld as a -- constitutional and lawful authorities.

And also think that it's fair to say that nothing regarding this lawful status has changed since Director Clapper and Attorney General Holder wrote to Congress in February 2012 to urge us to pass a straight reauthorization of FISA, and since the Obama administration followed suit in September 2012.

What has changed, however, is the intensity, scale and scope of the threats that face our nation. This is not the time to needlessly roll back and handicap our capabilities. I know a lot of people will use this hearing as an opportunity to talk about the committee's Russian investigation.

I'd like to remind everyone that 702 is one of our most effective tools against terrorism and foreign intelligence targets. I hope my colleagues and those closely watching this hearing realize that, at the end of the day, our constitutional obligation is to keep America and our citizens safe.

The intelligence community needs Section 702 collection to successfully carry out its mission. And it is this committee's obligation to ensure that the I.C. has the authorities and the tools it needs to keep us safe at home and abroad.

Gentlemen, I look forward to your testimony and continued efforts to maintain the integrity of this vital collection tool.

I now turn to the vice chairman for any comments he might have.

WARNER:
Thank you, Mr. Chairman. And thank you for hosting this hearing on the very important 702 program and ways that we might ensure its effectiveness, and I will get to that in a moment.

However, given the panel of witnesses here, and given the recent news about ongoing investigations into Russian interference in our 2016 elections, I'm going to have to take at least part of my time to pose some questions during my question time.

Each of you here today, we all know, have taken oath to defend the Constitution. As leaders of the intelligence community, you've also committed to act and to provide advice and counsel in a way that is unbiased, impartial, and devoid of any political considerations (ph).

This is the essence, quite honestly, of what makes our intelligence community and all the men and women who work for you so impressive. You tell it straight, no matter which political party is in charge.

And that's why it's so jarring to hear recent reports of White House officials, perhaps even the president himself, attempting to interfere and enlist our intelligence community leaders in any attempt to undermine the ongoing FBI investigation.

WARNER:
Obviously, tomorrow, there's another big hearing. We'll be hearing former FBI Director Comey. I imagine he'll have something to say about the circumstances surrounding his dismissal. We have now heard the president himself say that he was thinking about the Russia investigation when he fired Director Comey, the very individual who was overseeing that same investigation.

Today, we'll have an opportunity to ask Deputy Attorney General Rosenstein about his role in the Comey firings as well. Additionally, we've seen reports, some as recently as yesterday, that the president asked at least two of the leaders of our nation's intelligence agencies to publicly downplay the Russian investigation.

The president is alleged to have also personally asked Director Coats and CIA Director Pompeo to intervene directly with then Director Comey to pull back on his investigation.

I'll be asking, as I've told them, DNI Director Coats and NSA Director Admiral Rogers about those reports today, because if any of this is true, it would be an appalling and improper use of our intelligence professionals, an act, if true, that could erode the public's trust in our intelligence institutions.

The I.C., as I've grown to know over the last seven and a half years I've been on this committee, prides itself, appropriately, on its fierce independence. Any attempt by the White House or even the president himself, to exploit this community as a tool for political purposes is deeply, deeply troubling.

I respect all of your service to the nation. I understand that answering some of the questions that the panel will pose today may be difficult or uncomfortable, given your positions in the administration.

But this issue is of such great importance, the stakes are so high. I hope you will also consider all of our obligation to the American people, to make sure that they get the answers they deserve to so many questions that are being asked. Now, may we turn (ph) to the subject of our hearing?

Mr. Chairman, I agree that the reauthorization of Section 702 is terribly important. As the attacks in London, Paris, Manchester, Melbourne -- and the list unfortunately goes on and on -- all those attacks have demonstrated, terrorists continue to plot attacks that target innocent civilians. Section 702, under court order, collects intelligence about these potential terrorist plots.

It authorizes law enforcement and the intelligence community to collect intelligence on non-U.S. persons outside the United States, where there is reasonable suspicion that they seek to do us harm.

I've been a supporter of reauthorizing Section 702 to protect Americans from terrorist attacks. And I'm eager to work with my colleagues on both sides of the aisle to make sure that we reauthorize it before the end of this year.

A reauthorization of Section 702 should ensure also that there is robust oversight and restrictions to protect the privacy and civil liberties of Americans. Those protections remain in place, and if there are areas where those protections can be strengthened, we ought to look at those, as well.

So thank you, Mr. Chairman. I look forward to our hearing.

BURR:
Thank you, Vice Chairman. Let me say, for all members, votes are no longer scheduled for 10:30, if you've not gotten that word. Votes have been moved to 1:45.

When this hearing adjourns, we will reconvene at 2:00 PM for a closed-door session on Section 702. I intend to start that hearing promptly at 2:00. Today, members will be recognized by seniority for questions up to five minutes.

With that, gentlemen, thank you for being here today. Director Coats, you are recognized to give testimony on behalf of all four of you. The floor is yours.

COATS:
Thank you, Mr. Chairman -- Chairman Burr, Chairman Warner, members of the committee. We are pleased to be here today, at your request, to talk about an important and perhaps the most important piece of legislation that affects the intelligence community.

I'm here with my colleagues. I would like to take the opportunity to explain in some detail Section 702, given this -- as a public hearing, and hopefully, the public will be watching.

Our efforts to provide transparency in terms of how we protect the privacy and civil liberties of our American citizens and needs to be explained. The program needs to be understood, and so I appreciate your patience as I talk through in my opening statement the value of 702 to our intelligence community and to keeping Americans safe.

Intelligence collection under Section 702 of FISA Amendments has produced and continues to produce significant intelligence that is vital to protect the nation against international terrorism, against cyber threats, weapons proliferators and other threats. At the same time, Section 702 provides strong protections for the privacy and civil liberties of our citizens.

Today, the horrific attacks that recently have occurred in Europe are still at the top of my mind. I was just in Europe days before the first attack in Manchester, followed by other attacks that have subsequently taken place.

I was in discussion with my British colleagues through -- through this, as well as colleagues in other European nations. And my sympathies go out to the victims and families of those that have received these heinous attacks, and to the incredible resilience that these communities affected by this violence have shown.

Having just returned from Europe less than three weeks ago, I'm reminded of why Section 702 is so important to our mission of not only protecting American lives, but the lives of our friends and allies around the world.

And although the many successes enabled by 702 are highly classified, the purpose of the authority is to give the United States intelligence community the upper hand in trying to avert these types of attacks before they transpire, which is why permanent reauthorization of the FISA Amendments Act without further amendment is the intelligence community's top legislative priority.

And based on the long history of oversight and transparency of this authority, I would urge the Congress to enact this legislation at the earliest possible date, to give our intelligence professionals the consistency they need to maintain our capability.

Let me begin today by giving an example of the impact of Section 702 of FISA. It's been cited before, but I think it is worth mentioning again.

An NSA FISA Section 02 (sic) collection against an e-mail address used by an Al Qaida courier in Pakistan revealed communications with an unknown individual located within the United States. The U.S.- based person was urgently seeking advice on how to make explosives.

NSA passed this information on to the FBI, which in turn was able to quickly identify the individual as Najibullah Zazi. And as you know, Zazi and his associates in fact had imminent plans to detonate explosives on Manhattan's subway lines.

After Zazi and his coconspirators were arrested, the Privacy and Civil Liberties Oversight Board stated in its report, and I quote, "without the initial tipoff about Zazi and his plans, which came about by monitoring an overseas foreigner under Section 702, the subway bombing plot might have -- have succeeded."

This is just one example out of many of the impacts this authority has had on the I.C.'s ability to thwart imminent threats and plots against United States citizens and our friends and allies overseas.

Since it was enacted nearly 10 years ago, FISA has -- the FISA act has been subject to rigorous and constant oversight by all three branches of government.

Indeed, we regularly report to the intelligence and judiciary committees of both the House and the Senate how we have implemented the statute, the operational value it has afforded and the extensive measures we take to ensure that the government's use of these authorities complies with the Constitution and the laws of the United States.

Further, over the past few years we have engaged in an unprecedented amount of public transparency on the -- on the use of these authorities. In the interest of transparency, and because this is a public hearing, allow me to provide an overview of the framework for Section 702 and the reasons why the Congress amended FISA in 2008.

I will then briefly address why 702 needs to be reauthorized. And finally, I will discuss oversight and compliance, and how we are -- are ensuring, and continue to ensure, the rights of U.S. citizens, rights that need to be protected.

At the outset, I want to stress three things as a backdrop to everything else that my colleagues and I are presenting today. First, as I mentioned at the outset, collection under 702 has produced and continues to produce intelligence that is vital to protect the nation against international terrorism and other threats.

Secondly, there are important legal limitations found within section 702 of FISA. And let me note four of these legal limitations. First, the authorities granted under section 702 may only be used to target foreign persons located abroad for foreign intelligence purposes.

Secondly, they may not be used to target U.S. persons anywhere in the world. Third, they may not be used to target anyone located inside the United States, regardless of their nationality.

And fourth, they may not be used to target a foreign person when the intent is to acquire the communications of a U.S. person with whom a foreign person is communicating. This is generally referred to as the prohibition against reverse targeting.

The third item I would like to stress is that we are committed to ensuring that the intelligence community's use of 702 is consistent with the law and the protection of the privacy and civil liberties of Americans.

And to that end, in the nearly 10 years since Congress enacted the FAA, there have been no instances of intentional violations of Section 702. I'd like to repeat that. In the nearly 10 years since Congress enacted the amendments to the Freedom Act, the act that established FISA, there have been no instances of intentional violations of Section 702.

COATS:
With those points as a backdrop, now let me turn to a discussion of why it became necessary for Congress to enact Section 702. I do this so that the American public can hopefully better understand the basis for this important law.

The Foreign Intelligence and Surveillance Act was first passed in 1978, creating a way for the federal government to obtain court orders for electronic surveillance of suspected spies, terrorists and foreign diplomats located inside the United States.

When originally enacting FISA, Congress decided that collection against targets located abroad would generally be outside of their regime -- FISA's regime. That decision reflected the fact that people in the United States are protected by the Fourth Amendment, while foreigners located abroad are not.

Congress accomplished this in large part by defining electronic surveillance based on the technology of the time. In the -- in the 1970s, overseas communication were predominantly carried by satellite. FISA, as passed in 1978, did not require a court order for the collection of these overseas satellite communications.

So, for example, if, in 1980, NASA intercepted a satellite communication of a foreign terrorist abroad, no court order was required. However, by 2008, technology had changed considerably. First, U.S.-based e-mail services were being used by people all over the world.

Second, the overseas communications that in 1978 were typically carried by satellite were now being carried by fiber optic cables, often running through the United States. So, to continue the same example, if, in 2008, a foreign terrorist was communicating by using a U.S.-based e-mail service, a traditional FISA court order was required to compel a U.S.-based company to help with that collection.

Under traditional FISA, a court order can only be obtained on an individual basis by demonstrating to a federal judge that there is probable cause to believe that the target of the proposed surveillance is a foreign power or an agent of a foreign power. This had become an ever more difficult and extremely resource-intensive process.

And therefore, due to these changes in technology, the same resource-intensive legal process was being used to conduct surveillance on terrorists located abroad, who are not protected by the Fourth Amendment, as was being used to conduct surveillance on U.S. persons inside the United States, who are protected by the Fourth Amendment.

By enacting 702 in 2008 and renewing it in 2012, both times with significant bipartisan support, Congress corrected this anomaly, restoring the balance of protections established by the original FISA statute. And although I will not go into great detail here regarding the legal framework for FISA's Section 702, I will simply note a few key items.

First, the statute requires annual certifications by the attorney general and by the director of national intelligence regarding the categories of foreign intelligence that the intelligence community will acquire under this authority.

Second, the statute requires targeting procedures that set forth the rules by which the intelligence community ensures that only foreign persons abroad are targeted for collection.

Thirdly, the statute requires minimization procedures protecting U.S. persons' information that may be incidentally acquired while targeting foreign persons.

And finally, each year, the FISA court reviews this entire package of material to make sure the government's program is consistent with both the statute and with the Fourth Amendment of the Constitution.

We have publicly released lightly redacted versions of all these documents, including the most recent FISC opinion, to ensure the public has a good understanding of how we use this authority. The government's Section 702 program, as we have said, is subject to rigorous and frequent oversight by all three branches of government.

The first line of oversight and compliance is within the agencies themselves, whose offices of general counsel, privacy and civil liberties offices and inspectors general all have a role in FISA 702 program oversight. The majority of the incidents of noncompliance that are reported to my office and to the Department of Justice are self-reported by the participating agencies.

In addition, the office of the DNI and Department of Justice conduct regular audits, focusing on compliance with the targeting procedures, as well as on curing -- querying of collected data and on dissemination of information under the minimization procedures. Also, we have regular engagements with an extensive reporting to Congress about the FISA 702 program.

For example, the judiciary and intelligence committees receive relevant orders of the FISA Court and associated pleadings, descriptions and analysis of every compliance incident, and certain statistical information, such as the number of intelligence reports in which a known (ph) U.S. person was identified.

And finally, of course, the FISA Court regularly checks our work, both through the annual recertification process and through regular interactions on particular incidents of noncompliance.

Members of the FISA Court, who are all appointed by the chief justice of the Supreme Court, represent the best of the best of our judicial community. They have vast judicial experience, and are committed to the constitutional responsibilities of protecting the privacy of U.S. persons.

We are particularly proud of our oversight and compliance track record. The audits of the program conducted by the ODNI and DOJ have shown that unintended error rates are extremely low, substantially -- substantially less than 1 percent.

Further, and I want to emphasize this, we have never -- not once -- found an intentional violation of this program. There have been unintended mistakes, but I would note that any system with zero compliance incidents is a broken compliance system, because human beings make mistakes.

The difference here is that these -- none of these mistakes has been intentional. When do we -- and when we do find unintentional errors and compliance incidents, we ensure that they are reported and corrected.

This is an extraordinary record of success for the diligent men and women -- women of the intelligence community, who are committed to ensuring that our -- their neighbors' privacy is protected in the course of their national security work.

And with that, I'd like to turn to the most recent compliant (sic) incident, which resulted in a significant change in how the National Security Agency conducts as -- a portion of its FISA 702 collection. A recent example of the oversight process at work -- as a recent example, NASA identified a compliance incident involving queries of U.S. persons' identifiers into Section 702-acquired upstream data.

Upstream data refers to when NASA receives communications directly from the internet, with the assistance of companies that maintain these backbone networks. The FISC, FISA Court, was promptly notified, and DOJ and ODNI worked with NSA to understand the scope and causes of the problem, as well as to identify potential solutions to prevent the problem from reoccurring.

The details of the incident are publicly available, and Admiral Rogers will go or can go into more detail during the question-and- answer session, if you would like. But just allow me briefly to state what happened. NASA identified and researched a compliance issue.

NASA -- excuse me, NSA reported that issue to DOJ, ODNI and, ultimately, the FISA Court. The court delayed its consideration of the 2016 certifications on the basis until the government was able to correct the issue.

NSA determined that a possible solution to the compliance problem was to stop conducting one specific type of upstream collection. So, ultimately, we decided that the most effective way to address the court's concerns was to stop collecting on this basis. It's called the "abouts" portion of upstream collection.

And by "abouts collection," I'm referring to NSA's ability to collect communications where the foreign intelligence target is neither the sender nor the recipient of the communication that's made, but is referenced within the communication itself. The FISA Court agreed with our solution, and approved the program as a whole on the basis of the NSA proposal.

In short, what I'm trying to say here is -- is that a compliance issue was identified, and after a great deal of hard work, the Department of Justice and the intelligence community proposed to the FISA Court an effective solution that took the relevant collection costs and compliance benefits into account, and the court agreed with the proposed solution. That is how the process works, and it works well.

Before I conclude, I would like to speak briefly about an issue that has been the subject of much public discussion. There have been requests -- numerous requests from both Congress and the advocacy

community for NSA to attempt to count the number of United States persons whose communications have been incidentally acquired in the course of FISA 702 collection.

During my confirmation hearing, and in a subsequent hearing before this committee, I committed to sitting down with Admiral Rogers and the subject matter experts in the intelligence community to understand why this has been so difficult.

Within my first few weeks on the job, I visited NSA, discussed with Admiral Rogers and his technical people and followed through on my commitment. What I learned was that the NSA has made -- this is hard for me to say. They have made extensive efforts.

(LAUGHTER)

Herculean, I think is the -- is -- say that again.

(UNKNOWN)
Herculean.

COATS:
Herculean. Herculean. All right. I had to turn to -- you know what I mean?

(LAUGHTER)

I mean, really tough efforts, all right, to devise a counting strategy that would be accurate and that would respond to the question that was asked. But I also learned that it remains infeasible to generate an exact, accurate, meaningful, and responsive methodology that can count how often a U.S. person's communications may be incidentally collected under 702.

I want to be clear here; to determine if communicants are U.S. persons, NSA would be required to conduct significant additional research trying to determine whether individuals who may be of no foreign intelligence interest are U.S. persons. And, from my perspective as the director of national intelligence, this raises two significant concerns.

First, I would be asking trained NSA analysts to conduct intense identity verification research on potential U.S. persons who are not targets of an investigation. From a privacy and civil liberties perspective, I find this unpalatable.

Second, those scores of analysis (ph) that would have to be shifted from key focus areas such as counterterrorism, counterintelligence, counterproliferation, issues with nations in which, such as North Korea, we need -- and Iran -- we need continuous and critical intelligence missions.

I can't justify such a diversion of critical resources and the mass of critical resources that we would need to try to attempt to reach this, even without the ability to reach a definite number. I can't justify that at a time when we face such a diversity of serious threats.

And finally, even if we decided the privacy intrusions were justified, and if I had unlimited staff to tackle this problem, we still do not believe it is possible to come up with an accurate, measurable result.

I'm aware that the Senate Intelligence Committee staff will be meeting, following this public hearing, in a classified session, and Admiral Rogers has instructed his experts to address this issue in greater detail.

Before I wrap up my remarks, I want to provide one final example that I have, for the purposes of today's hearing, chosen to declassify using my authority as the director of national intelligence to further illustrate the value of Section 702.

Before rising through the ranks to become, at one point, the second in command of the self-proclaimed Islamic State of Iraq and al- Sham, ISIS, Haji Iman, was a high school teacher and imam. His transformation from citizen to terrorist caused the U.S. government to offer a $7 million reward for information leading to him.

It also made him a top focus of the NSA's counterterrorism efforts. NSA, along with its I.C. partners, spent over two years, from 2014 to 2016, looking for Haji Iman. This search was ultimately successful primarily because of FISA Section 702.

Indeed, based almost exclusively on intelligence activities under Section 702, NSA collected a significant body of foreign intelligence about the activities of Haji Iman and his associates. Beginning with non-Section 702 collection, NSA learned of an individual closely associated with Haji Iman.

NSA used collection, permitted and authorized under Section 702, to collect intelligence on the close associates of Haji Iman, which allowed NSA to develop a robust body of knowledge concerning the personal network of his -- of Haji Iman and his close associates.

COATS:
Over a two-year period, using FISA Section 702 collection, and in close collaboration with our I.C. partners, NSA produced more intelligence on Haji Iman's associates, including their location. NSA and its tactical partners then combined this information, the Section 702 collection which was continuing and other intelligence assets to identify the reclusive Haji Iman and track his movements.

Ultimately, this collaboration enabled U.S. forces to attempt an apprehension of Haji Iman and two of his associates. On March 24th, 2016, during the attempted apprehension operation, shots were fired at the U.S. forces aircraft from Haji Iman's location.

U.S. forces returned fire, killing Haji Iman and the other associates at that location. Subsequent -- subsequent Section 702 collection confirmed Haji Iman's death.

As you can see from this sensitive example, Section 702 is an extremely valuable intelligence collection tool, and one that is subject to a rigorous, effective oversight program.

And therefore, allow me to reiterate my call on behalf of the intelligence community without hesitation -- my call for permanent reauthorization of the FISA Amendments Act without further amendment.

Mr. Chairman, thank you for your patience, and we would be willing to be open to your questions.

BURR:
Thank you, Director Coats.

The chair would recognize himself now for five minutes of questions.

In 2012, I mentioned in my opening statement, Director of National Intelligence Jim Clapper and Attorney General Eric Holder wrote a letter to the congressional leadership, asking Congress to pass a straight reauthorization of FISA.

The September 2012 statement of administration policy also urged the same. This would be to Director Coats and A.G. Rosenstein. Has the ODNI or the Department of Justice position changed at all since the time of the February 2012 letter?

COATS:
No, it's -- we strongly support the 2012 letter and request.

(CROSSTALK)

ROSENSTEIN:
We agree -- we agree 100 percent.

BURR:
Great.

This is to Admiral Rogers and to Director McCabe. Since Congress last authorized this authority in 2012, again, have there been any instances involving a deliberate or intentional compliance violation? Admiral Rogers.

ROGERS:
Not that I'm aware of.

BURR:
Director McCabe.

MCCABE:
No, sir.

BURR:
Admiral Rogers, this is to you.

ROGERS:
Yes, sir.

BURR:
If FISA's 702 statutory authorities were to end or even be diminished, what would be the impact on our national security?

ROGERS:
I could not generate the same level of insight that the nation, our friends and allies around the world, count on with respect to counterterrorism, counterproliferation.

I could not, for example, be able to recreate the insights on the Russian efforts to influence the 2016 election cycle. Without 702, we could not have produced that level of insight.

BURR:
This is a jump ball. April 26, 2017, the Foreign Intelligence Surveillance Court, commonly known as FISC, held that Section 02 (sic) certifications, including its targeting and minimization procedures, are both -- are lawful both under FISA statute and the Fourth Amendment.

As former Director Comey testified last month, the only reason our laws even require the certification to cover, and I quote, "these non-Americans who aren't in our country" is because their communication's transiting U.S.-based networks and systems.

Yet others have suggested imposing a Fourth Amendment warrant requirement on foreigners who are located outside of the United States. This is really NSA and justice -- would imposing such a warrant requirement impact our national security tools to protect America?

ROGERS:
(OFF-MIKE)

(CROSSTALK)

ROSENSTEIN:
He's deferring (ph) to me. I'll be happy to take the ball.

Yes, it would, Senator. I think what's important to recognize is that, in the absence of Section 702, the Department of Justice and the intelligence community, in every case in which we wanted to obtain foreign intelligence information, to collect against a particular target, we'd be required to obtain a court order that would need to be supported by probable cause.

The consequence of that is, number one, it'd be very time- consuming, because these are very thorough investigations and we produce very lengthy documents. In fact, Director McCabe and I spend a fair amount of our time every morning reviewing a stack of documents with our career agents and prosecutors, in which they have determined that it's appropriate to seek those orders.

So it'd be time-consuming, it would require a significant commitment of resources, and in addition to that, it would require a showing of probable cause.

And, as you know, the probable cause showing which is required under the Constitution, in circumstances in which privacy interests of Americans are at stake and it's required by the Fourth Amendment -- that's a relatively higher threshold than we require for foreign intelligence information.

And so we think it's important, Senator, that we not apply that Fourth Amendment constitutional standard to foreigners who are not in the United States.

BURR:
Thank you, Mr. Rosenstein.

Admiral Rogers, this is to you. There's a lot of news reporting, much of it inaccurate, that characterizes Section 702 as a means of targeting U.S. persons. We know that targeting U.S. persons is prohibited, as it -- as -- as is what is termed reverse targeting. Could you explain and clarify the reverse targeting prohibition? And what does it prevent the I.C. from targeting and collecting?

ROGERS:
So reverse targeting is designed to preclude our ability to bypass the law. And what do I mean by that? The law is expressly designed to ensure that we are not using this legal framework as a capability to target U.S. persons.

Reverse targeting is the following scenario: Say we're interested in generating insight on U.S. person A. We know that we can't get a Title I, we can't get a FISA warrant.

So under the idea (ph) reversal -- reverse targeting, the theory would be, "Well, why don't you just target a foreign entity that that U.S. person talks to? And then you'll get all the insights you want on the U.S. person, but you'll have bypassed the court process, you'll have bypassed the entire legal structure." 702 specifically reminds us, we cannot do that. We cannot use 702 as a vehicle to bypass other laws or to target U.S. persons.

BURR:
Can you -- last question -- can you please clarify for members and for the public, what's meant by "incidental collection"?

ROGERS:
Incidental collection, in the statute itself -- if you read the law, the statute acknowledges that, in the execution of this framework, we will encounter U.S. persons. We call that incidental collection.

That happens under two scenarios. Number one, which is about 90 percent of the time: We are monitoring two foreign individuals, and those foreign entities talk about or reference a U.S. person.

The second scenario that we do -- that we encounter what we call incidental collection, is we are targeting a valid foreign individual, and that valid foreign individual, a foreign intelligence target, ends up having a conversation with a U.S. person.

That's not the target of our collection. It's not why we are monitoring it in the first place. We're interested in that foreign target. That happens -- of the times we have incidental collection, that scenario happens about 10 percent of the time.

BURR:
And were that incidental collection to happen, do you have a procedure in place in both instances to minimize that?

(CROSSTALK)

ROGERS:
We do, a law -- the law specifically gives a set -- a set of processes that we have to follow, so if we do encounter a U.S. person incidentally in the course of our collection, we ask ourselves several questions. Number one, are we looking at potential criminal activity?

If we do that, we have a requirement to report or to inform the Department of Justice and the FBI, and they make the determination if it's illegal or not. We are an intelligence organization, not a law enforcement organization, not a law enforcement organization.

The second question we ask ourselves: Is there anything in this conversation that would lead us to believe that we're talking about harm to individuals? In that case, we do report. If we think we're dealing with something that is criminal or there's harm to individuals, we report it.

Other than that, unless there is a valid intelligence purpose, depending on the authority in a case of 702, we specifically purge the data. We remove it. We don't put it into our holdings. If we don't assess that there's intelligence value and it's a U.S. person, we have to purge the data.

BURR:
Thank you for that. Vice Chairman.

WARNER:
Thank you, Mr. Chairman.

As I indicated, I've got some questions on another matter, and, Director Coats and Admiral Rogers, they're mostly going to be directed at you gentlemen. And thank you for your testimony this morning.

And we all know now that, in March, then Director Comey testified about the existence of an ongoing FBI investigation into links between the Trump campaign and the Russian government.

And there are reports out in the press that the president separately appealed to you, Admiral Rogers, and to you, Director Coats, to downplay the Russia investigation. And now we've got additional reports, and we want to give you a chance to confirm or deny these, that the president separately addressed you, Director Coats, and asked you to, in effect, intervene with Director Comey, again, to downplay the FBI investigation.

Admiral Rogers, you draw the short straw. I'm going to start with you. Before we get to the substance of whether this call or request was made, you've had a very distinguished career, close to 40 years.

In your experience, would it be in any way typical for a president to ask questions or bring up an ongoing FBI investigation, particularly if that investigation concerns associates and individuals that might be associated with the president's campaign or his activities?

(CROSSTALK)

ROGERS:
So today I am not going to talk about theoreticals. I am not going to discuss the specifics of any interaction or conversations I may or may not...

WARNER:
Can you -- can you...

(CROSSTALK)

ROGERS:
... If I could finish, sir, please -- that I may or may not have had with the president of the United States. But I will make the following comment. In the three-plus years that I have been the director of the National Security Agency, to the best of my recollection, I have never been directed to do anything I believe to be illegal, immoral, unethical or inappropriate.

And to the best of my recollection, during that same period of service, I do not recall ever feeling pressured to do so.

WARNER:
But have -- in your course, prior to the incident that we're going to discuss, was it in any regular course where a president would ask you to comment or intervene in any ongoing FBI investigation? Not talking about this circumstance, but is there any prior experience with that?

ROGERS:
I'm not going to talk about theoreticals today.

WARNER:
Well, let me ask you specifically. Did the president -- the reports that are out there -- ask you in any way, shape, or form to back off or downplay the Russia investigation?

ROGERS:
I'm not going to discuss the specifics of conversations with the president of the United States, but I stand by the comment I just made to you, sir.

WARNER:
Is -- do you feel that that -- those conversations were classified? We know that this -- there was an ongoing FBI investigation.

ROGERS:
Yes, sir.

WARNER:
There are press reports.

ROGERS:
Yes, sir.

WARNER:
I understand your answer. I'm -- I'm disappointed with that answer, but I may indicate -- and I told you I was going to bring this up...

ROGERS:
Sir.

WARNER:

... there is -- we have facts that there were other individuals that were aware of the call that was made to you, aware of the substance of that call, and that there was a memo prepared because of concerns about that call.

Will you comment at all about the existence...

ROGERS:
... I stand by the comments that I have made to you today, sir.

WARNER:
... so you will not confirm or deny the existence of a memo?

ROGERS:
I stand by the comments I have made to you today, sir.

WARNER:
I think it will be essential, Mr. Chairman, that that other individual who's served our country as well, with great distinction, who's no longer a member of the administration, has a chance to relay his -- his version of those facts.

Again, I understand...

ROGERS:
Yes, sir.

WARNER:
... your position. But I hope you'll also understand the enormous need for the American public to know. You've got the administration saying there's no there there. We have these reports, and yet we can't get confirmation.

I want to go to you, Director Coats. When you appeared before SASC, you said, and I quote, "If called before the investigative committee, I certainly will provide them with what I know and what I don't know." I have great respect for you.

You served on -- on this committee. I remember, as well, when we confirmed you, and I was proud to support your confirmation, you said that you would cooperate with this committee in any aspects that we request of the Russia investigation.

We now have press reports, and you can lay them to rest if they're not true, but we have press reports of not once but twice that the president of the United States asked you to either downplay the Russia investigation or to directly intervene with Director Comey.

Can you set the record straight about what happened or didn't happen?

COATS:
Well, Senator, as I responded to a similar question during my confirmation and in a second hearing before the committee, I do not feel it's appropriate for me to, in a public session in which confidential

conversations between the president and myself -- I don't believe it's appropriate for me to address that in a public session.

WARNER:
Gentlemen, I -- I understand...

(CROSSTALK)

COATS:
I -- I stated that before and I...

(CROSSTALK)

WARNER:
Well, I thought that you also said, at SASC, if brought before the investigative committee, you would, quote, "certainly provide them with what I know and what I don't know." We are before that investigative committee.

COATS:
Well, I stand by my previous statement, that we are in a public session here and I do not feel that I -- it is appropriate for me to address confidential information. Most of the information I've shared with the president, obviously, is directed toward intelligence matters during our oval briefings every morning at the -- at the White House, or most mornings when both the president and I'm in town.

But for intelligence-related matters, or any other matters that have been discussed, it is my belief that it's inappropriate for me to share that with the public.

WARNER:
Gentlemen, I -- I respect all of your service, and I understand and respect your commitment to the administration you're serving. We will have to bring forward that other individual about whether -- the existence of the memo that -- that may document some of the facts that took place in the conversation between the president and Admiral Rogers.

But I would only ask, as we go forward -- this will be my final comment, Mr. -- Mr. Chairman -- that we also have to weigh, in here, the public's absolute need to know. They're wondering what's going on. They're wondering what type of activities.

We see this pattern that, without confirmation or denial, appears that the president, not once, not twice -- but we will hear from Director Comey tomorrow -- this pattern where the president seems to want to interfere or downplay or halt the ongoing investigation, not only that the Justice Department's taking on but this committee's taking on.

And I hope, as we move forward on this, you'll realize the importance -- that the American public deserves to get the answers to these questions. Thank you, Mr....

(CROSSTALK)

COATS:

Well, Senator, I would like to respond to that, if -- if I could.

First of all, I'm always -- I -- I told you, and I committed to the committee that I would be available to testify before the committee. I don't think this is the appropriate venue to do this in, given that this is an open hearing, and a lot of confidential information relative to intelligence or other matters -- I just don't feel it's appropriate...

(CROSSTALK)

COATS:
... for me to do that in this situation.

And then, secondly, when I was asked yesterday to respond to a piece that I was told was going to be written and printed in the Washington Post this morning, my response to that was, in my time of service -- which is in interacting with the president of the United States or anybody in his administration, I have never been pressured.

I've never felt pressure to intervene or interfere in any way and shape -- with shaping intelligence in a political way, or in relationship...

WARNER:
All I -- all I'd...

COATS:
... to an ongoing investigation.

WARNER:
... all I'd say, Director Coats, is there was a chance here to lay to rest some of these press reports. If the president is asking you to intervene or downplay -- you may not have felt pressure, but if he's even asking, to me, that is a very relevant piece of information.

And again, at least in terms of the conversation with Admiral Rogers, I think we will get at least some -- another individual's version. But at some point, these facts have to come out.

Thank you, Mr. Chairman.

BURR:
Senator Risch.

RISCH:
Well, thank you very much, Mr. Chairman.

Thank you, Senator Coats -- excuse me, Director Coats and Admiral Rogers for your testimony. And with all due respect to my colleague from Virginia, I think you have cleared up, substantially, your direct testimony that you have never been pressured by anyone, including the president of the United States to do something illegal, immoral, or anything else.

Thank you for that. Let's go back to...

COATS:
Thank you, Senator (ph).

(CROSSTALK)

RISCH:
... let's go back to Section 702, which is what this hearing was supposed to be all about. It's becoming patently obvious, I think, that those of us that work in the intelligence community -- that we're in a different position than Europe is.

Europe is -- their -- their risks are obviously very high, and they're suffering these attacks on a very regular basis, and becoming more regular. So let's talk about our collection efforts versus the European collection efforts, and particularly as it relates to Section 702.

And, obviously, we hear in the media frequently about spats between us and the Europeans regarding intelligence matters. But we all know that there is a robust communication and cooperation between our European friends and ourselves. So I want to talk about it in -- I want to talk about 702 in -- in that respect.

Why don't we start, Director Coats, with you and then I'll -- I'll throw it up for anybody else that wants to comment on this.

How important is 702, the continuation of the -- of Section 702 and its related parts, to doing what we have been doing as far as helping the Europeans and the Europeans helping us and doing the things that we're doing here in America to see that we don't have the kind of situations that have been recently happening in Europe?

Director Coats, start with you.

COATS:
Well, having just returned a few weeks ago from major capitals in Europe, and discussing this very issue with my counterparts throughout the intelligence communities of these various countries, they voluntarily -- before I could even ask the question -- expressed extreme gratitude for the ability -- for -- for the information we have been able to share with them relative to threats.

And numerous threats have been avoided on the basis of collection that we have received through 702 authorities, and our notification of them -- of these impending threats, and they have been -- they have been deterred or -- or intercepted.

Unfortunately, what has happened just recently, particularly in -- in England, shows that, regardless of how good we are, there are bad actors out there that have bypassed the -- the more concentrated, large attack efforts and taken it, either through inspiration or direction from ISIS or other terrorist groups -- have chosen to take violent action against the citizens of those countries.

The purpose of the trip was to ensure them (sic) that that we would continue to work and share together their collection activities -- capabilities, in many -- many cases are -- are good, but, in some

cases, lack the ability that we have. And so this ability to share information with them that helps keep their people safe also is highly valued by them.

But I don't think we should take for granted that, just because Europe has been the recent target of these attacks, that the United States is safe from that. We know through intelligence that there's plotting going on, and we know that there's lone-wolf issues and -- and individuals that are taking instructions from ISIS through social media or that, for whatever reason, are copycatting what is happening.

And so that threat exists here also. And let me lastly say that the nations that I've talked to, many of which have been extremely concerned about violating privacy rights, have initiated new procedures and -- and legislation and mandates relative to getting the intelligence agencies better collection, because they think it -- they need it to protect their citizens.

RISCH:
Thank you very much.

In just the few seconds that I've got left, Mr. Rosenstein, could you -- could you tell me, please, we're -- we get a lot of pushback on -- from the privacy people. And we've now heard testimony that there's been no intentional violation over the 10 years.

RISCH:
Could you tell the American people what's in store for someone who these guys catch intentionally misusing 702, since you're the highest ranking member of the Department of Justice, here?

ROSENSTEIN:
Yes, Senator.

I can assure you, Senator, that, in Department of Justice, we treat with great seriousness any allegations of violations regarding classified information. So if there were a credible allegation that someone had willfully violated Section 702 in a way that was in violation of a criminal law, we would investigate that case, and if prosecution were justified, we would prosecute it.

I know Director McCabe shares with me that commitment. And we recognize that we have an obligation to the American people to make sure that these authorities are used appropriately and responsibly, that we comply with the Constitution and the laws and the procedures.

And we're committed to devote whatever resources are required to make sure that, if there are willful violations, people are held accountable for them.

RISCH:
And this is your commitment, and the Department of Justice's commitment, to the American people?

ROSENSTEIN:
That's correct.

RISCH:

Thank you, Mr. Rosenstein.

ROSENSTEIN:
Thank you.

(CROSSTALK)

BURR:
Senator Feinstein?

FEINSTEIN:
Thanks -- thank you, Mr. Chairman.

Just a couple of comments on Section 702. It's a program that I support. It's a program that I believe has worked well. It's a big program. It's an important one. It is a content collection program involving both internet and phone communications. So it can raise concerns about privacy and civil liberties.

In the year 2016, there were 106,469 authorized targets out of 3 billion internet users. That's the ratio. The question of unmasking has been raised. It's my understanding that 1,939 U.S. person identities were unmasked in 2016 based on collection that occurred under Section 702.

So my question is going to be the following, and I'll ask it all together and hopefully you'll -- you'll answer it.

I would like a description of the certification process and the use of an amicus. I would like your response to the fact that the question -- the program sunsets after five years -- about raising that sunset versus no sunset, because of the privacy concerns -- It's my belief there should be a sunset -- and the use of an amicus, which is currently used as part of the certification process, and whether that should be continued and formalized.

So, Admiral, it's -- program's under your auspice.

(CROSSTALK)

ROGERS:
I could -- if I could, DOJ is going to be smarter on the amicus piece, please.

FEINSTEIN:
OK.

ROGERS:
Will you take that piece, and I'll (OFF-MIKE)?

ROSENSTEIN:
I'm not sure I am smarter on the amicus piece, Senator. I can tell you this, though -- that, with regard to the question of unmasking -- now, this is actually primarily a question not for the department; the determination is made by the intelligence agencies, if there is a situation where a foreign person has

been communicating about an American person, and a decision is made whether or not the identity of an American person is necessary in order for that intelligence to be properly used.

I think what's important for people to recognize, Senator, is that's an internal issue. That is, that unmasking is done internally, you know, within the -- the cloak of confidentiality within the intelligence community.

That's a different issue from leaks. And -- in other words, if somebody's identity is disclosed internally because it's relevant for intelligence purposes -- because that's the goal of this collection, is to understand...

FEINSTEIN:
... Mr. Rosenstein, let me just tell you, I -- I just listened to somebody who should have known better talking about unmasking in a political sense -- that it's done politically. And that, of course, is not the case. And so what I'm looking for is the definition of how this is done and under what circumstances.

ROSENSTEIN:
Right. And -- and I -- I think, Senator, that, because that's really a decision made by the I.C., the intelligence community, not by the department, it would be appropriate for them to respond to that.

ROGERS:
I can do that. So, with respect to unmasking, the following criterias (ph) apply. First, for the National Security Agency, we define in writing who has the authority to unmask a U.S. person identity. That is 20 individuals in 12 different positions. I am one of the 20 in one of those 12 positions, the director.

Secondly, we outline in writing what -- the criteria that will be applied to a request to unmask in a report -- and again, part of our process under 702, to protect the identity of U.S. persons as part of our minimization procedures, when we think we need to reference a U.S. person in a report, we will not use a name. We will not use an identity. We say, "U.S. Person One, U.S. Person Two, U.S. Person Three."

That report is then promulgated. Some of the recipients of that report will sometimes come back to us and say, "I'm trying to understand what I am reading. Could you help me understand who is Person One or who is Person Two, et cetera?" We apply two criteria in response to their request.

Number one, you must make the request in writing. Number two, the request must be made on the basis of your official duties, not the fact that you just find this report really interesting and you're just curious. It has to tangibly tie to your job. And then finally -- I said two, but there's a third criterion, and that is the basis of the request must be that you need this identity to understand the intelligence you're reading.

We apply those three criteria, we do it in writing, and one of those 20 individuals then agrees or disagrees. And if we unmask, we go back to that entity who requested it -- not every individual who received the report, but that one entity who asked for us. We then provide them the U.S. identity, and we also remind them the classification of this report and the sensitivity of that identity remains in place.

By revealing this U.S. person to you, we are doing it to help you understand the intelligence, not -- not so that you can use that knowledge indiscriminately. It must remain appropriately protected.

FEINSTEIN:
Thank you.

COATS:
And, Senator, if I could just add something to that, given the nature of this issue -- and it's a legitimate question that you've asked -- I've talked with my colleagues at NSA and CIA, FBI and so forth, suggesting that we might ask our civil liberties and privacy protection agencies to take a look at this, to see if there -- Admiral Rogers laid out the procedures.

COATS:
Are these the right procedures, should we be doing something different, would they have recommendations that better protected people from misuse of this? So -- and they've all agreed to do that. So I think it's a legitimate issue to follow up on. I've talked to the agency heads about doing so, and they're willing to do it.

ROGERS:
And if I could, I also have an internal review that I have directed. Given all the attention, given the focus, let's step back, let's reassess this and let's ask ourselves, is there anything that would suggest we need to do something different in the process?

FEINSTEIN:
Good, good. Thank you.

ROSENSTEIN:
Mr. Chairman, with your permission, I'd like to more thoroughly answer the first question the senator asked, which is -- Senator Feinstein, my understanding is that an amicus was used in 2015, and that decision was made by the court at the Foreign Intelligence Surveillance Court, which has the statutory authority, if the court believes it's appropriate in a particular case. to appoint an amicus.

So my understanding is that that was done in 2015. Thank you.

FEINSTEIN:
Well, would -- would you feel it would be helpful to make it a part of the regular certification process?

ROSENSTEIN:
Well, my understanding, Senator, is that the statute permits the court to do it if the court believes it's appropriate. So I believe the court has that authority, and I'd leave it to the judges to decide when it's appropriate to exercise that.

FEINSTEIN:
Thank you. Thanks, Mr. (OFF-MIKE).

BURR:
Senator Rubio.

RUBIO:

Thank you all for being here. I understand fully the need of the president of the United States to be able to have conversations with members of the intelligence community that are protected, particularly in a classified setting.

I also understand that the ability of this community to function depends both on its credibility that its work that it's doing is in the national security interest of the United States, and also the importance of its independence -- that it is not an extension of politics, no matter which administration is at play.

And the absence of either one of those two things impacts everything we do, including this debate we're having here today. And the challenge that we have now is that, while the folks here with us this morning are constrained in what they can say, there are people that work -- apparently work for you that are not, and are constantly speaking to the media about things and saying things.

And it puts the Congress a very difficult position, because the issue of oversight, on both your independence and on your credibility, falls on us. And -- and I actually think, if (ph) what is being said to the media is untrue, then it is unfair to the president of the United States. And if it is, then it is -- that, if (ph) it is true, that it is something the American people deserve to know, and we, as an oversight committee, need to know in order to conduct our job.

And so my questions are geared to Director Coats and Admiral Rogers. You have testified that you have never felt pressured or threatened by the president or by anyone to influence any ongoing investigation by the FBI.

Are you prepared to say that you've never felt -- that you've never been asked by the president or the White House to influence an ongoing investigation?

COATS:
Well, Senator, I -- I just hate to keep repeating this, but I'm going to do it.

I am willing to come before the committee and tell you what I know and what I don't know. What I'm not willing to do is to share what I think is confidential information that ought to be protected in an open hearing. And so I'm not prepared to -- to answer your question today.

And not (ph)...

(CROSSTALK)

RUBIO:
Director -- Director Coats, I would just say, and with incredible respect that I have for you, I am not asking for classified information. I am asking whether or not you have ever been asked by anyone to influence an ongoing investigation.

COATS:
I understand, but I'm just not going to go down that road...

RUBIO:
OK. I -- Admiral...

(CROSSTALK)

COATS:
... to -- in a -- in a public forum. And I also was asked the question -- if the special prosecutor called upon me to meet with him to ask his questions. I said I would be willing to do that.

ROGERS:
I likewise stand by my previous comment.

RUBIO:
OK. Well, then, in the interest of time, let me ask both of you, has anyone ever asked you, now or in the past, this administration or any administration, to issue a statement that you knew to be false?

ROGERS:
For me, I stand by my previous statement. I've never been directed to do anything in the course of my three-plus years as the director of the National Security Agency...

RUBIO:
Not directed, asked.

ROGERS:
... that I felt to be inappropriate, nor have I felt pressured to do so.

RUBIO:
Have you ever been asked to say something that isn't true?

ROGERS:
I stand by my previous statement, sir.

RUBIO:
Director Coats?

COATS:
I do likewise.

RUBIO:
Well, let me ask this of everyone on this panel. Is anyone aware of any effort by anyone, in the White House or elsewhere, to seek advice on how to influence any investigation?

ROSENSTEIN:
My answer is absolutely no, Senator.

RUBIO:
No one has anything to add to that?

ROGERS:
I don't understand the question.

RUBIO:
The question is, are you aware of any efforts by anyone in the White House or the Executive Branch looking for advice from other members of the intelligence community about how to potentially influence an investigation?

ROGERS:
Are you talking about me? No.

COATS:
No.

RUBIO:
OK.

(UNKNOWN)
He wants to answer.

RUBIO:
Who wants to answer? I'm sorry?

MCCABE:
I'm not sure I understand the question. But if you're asking whether we -- I'm aware of requests to other people in the intelligence community, I am not.

RUBIO:
Seeking advice on how he (ph) could potentially influence someone. You're not aware...

MCCABE:
I'm not aware of it (ph).

RUBIO:
... of anyone ever saying or reporting that to you?

MCCABE:
No, sir.

RUBIO:
Has anyone ever come forward and said, "I just got a call from someone at the White House asking me what is the best way to influence someone on -- on an investigation"?

(UNKNOWN)
(OFF-MIKE)

COATS:
I've -- I've never received anything.

ROGERS:
I have no direct knowledge of such a call.

RUBIO:
There was an allegation made in one of the press reports, and that's why I asked. On a separate...

(CROSSTALK)

RUBIO:
I'm sorry -- who does?

(UNKNOWN)
Rosenstein (ph).

RUBIO:
Mr. Rosenstein.

ROSENSTEIN:
Our confusion (ph), Senator -- we just want to make sure we're clear on the question. And the answer is no, as I understand it.

ROSENSTEIN:
But I'm not sure I'm familiar with the particular media report that you're referring to.

RUBIO:
All right. I'm running out of time. I do want ask this, because this is important. Did the NSA routinely and extensively and repeatedly violate the rules that were put in place in 2011 to minimize the risk of collection of upstream information?

ROGERS:
Have we had compliance incidents? Yes. Have we reported every one of those to the court? Yes. Have we reported those to our congressional oversight and Congress? Yes. Have we reported those to the Department of Justice and the director of national intelligence? Yes.

RUBIO:
Did -- under the Obama administration, was there a significant uptick in efforts -- in incidents of unmasking, from 2012 to 2016?

ROGERS:
I don't know that, I have to take that for the record, to be honest.

RUBIO:
Who would know that?

ROGERS:
I -- we have the data, but I don't know that off the top of my head. I couldn't tell you unmasking on a year-by-year basis for the last five years. I apologize, I just don't know off -- off the top of my head.

RUBIO:

Thank you.

BURR:
Senator Wyden?

WYDEN:
Thank you very much, Mr. Chairman.

I've noted the conversations you've had with my colleagues with respect to the content of conversations that you may have had with the president. My question's a little different. Did any of you four write memos, take notes, or otherwise record yours or anyone else's interactions with the president related to the Russia investigation?

COATS:
I don't take any notes.

(CROSSTALK)

WYDEN:
Let's just get the four of you on the record.

ROSENSTEIN:
Senator, I rarely take notes. I'm actually taking a few today. But I am not going to answer questions concerning the Russia investigation. I think it's important for you to understand, when I...

WYDEN:
Not on whether you wrote a memo?

ROSENSTEIN:
I'm not going to answer any questions, Senator, about the -- the Russia...

WYDEN:
OK, my time's going to be short -- whether you wrote a memo, notes, anything.

MCCABE:
I also am not going to comment on any conversations I may have had or notes taken or not taken relative to the Russia investigation.

WYDEN:
OK.

ROGERS:
And the -- likewise, I take the same position.

WYDEN:
Director Coats, on March 23rd, you testified to the armed services committee that you were not aware of the president or White House personnel contacting anyone in the intelligence community with a request to drop the investigation into General Flynn.

Yesterday, the Washington Post reported that you had been asked by the president to intervene with Director Comey to back off of the FBI's focus on General Flynn. Which one of those is accurate?

COATS:
Senator, I will say once again I'm -- I'm not going to get into any discussion on that in an open hearing.

WYDEN:
Both of them can't be accurate, Mr. Director.

Mr. Director, as recently as April, you promised Americans that you would provide what you called a relevant metric for the number of law-abiding Americans who are swept up in the FISA 702 searches.

This morning, you went back on that promise. And you said that even putting together a sampling, a statistical estimate, would jeopardize national security. I think that is a very, very damaging position to stake out. We're going to battle it out in the course of this, because there are a lot of Americans who share our view that security and liberty are not mutually exclusive.

We can have both. And you rejected that this morning. You went back on a pledge, and I think it is damaging to the public. Now, let me...

(CROSSTALK)

COATS:
Senator, could I -- could I answer the question?

WYDEN:
Mr. Director, my time is short, and I want to ask you about one other...

(CROSSTALK)

COATS:
Well, I would like to answer your question.

WYDEN:
Briefly.

COATS:
What I pledged to you in my confirmation hearing is that I would make every effort to try to find out why we were not able to come to a specific number of collection on U.S. persons. I told you I would consult with Admiral Rogers. I told you I would go to the National Security -- Security Agency to try to determine whether or not I was able to do that.

I went out there. I talked to them. They went through the technical details. There were extensive efforts on the part of, I learned, on the parts of NSA to try to come to -- to get -- get you an appropriate answer. We were not able to do that.

WYDEN:
Mr. Director, respectfully, that's not what you said. You said, and I quote, "We are working to produce a relevant metric."

Now, let me go to my other question...

(CROSSTALK)

COATS:
... we were -- but we were not able to do it, to achieve it.

WYDEN:
... right. You told...

COATS:
So working to do it is different than doing it.

WYDEN:
... you told the American people that even a statistical sample would be jeopardizing America's national security. That is inaccurate and, I think, detrimental to the cause of ensuring we have both security and liberty. Now, here's my other question. We are trying to sort out...

BURR:
... Can the witness respond?

WYDEN:
... who the targets -- who are the targets...

BURR:
... Apparently not.

WYDEN:
... who are the targets of a 702 investigation. Director Comey gave three different answers in a hearing a month ago, and I think it would be very helpful if you would tell us who in fact is a target of these investigations.

I want to go after serious foreign threats, but we don't know as of now, with Director Comey having given three different answers, who the targets are. Mr. Director.

COATS:
Well, I can't speak for Director -- former Director Clapper. Targets, as I understand, are non-U.S. persons. Foreign individuals are the targets in terms -- 702 is directed and -- and prohibited from directing targets on U.S. persons.

WYDEN:
My -- my time is up. I will tell you, Director Comey gave three answers. He finally said, "I could be wrong, but I don't think so. I think it's confined to counterterrorism, to espionage." And finally he said he didn't think a diplomat could be targeted.

So we need you all, in addition to protecting the liberties of the American people, to tell us who the targets are.

Thank you, Chairman (ph).

(CROSSTALK)

COATS:
Well, I would like to respond to that by saying some of those targets are classified, highly classified.

WYDEN:
I understand that.

COATS:
Some of those targets, by revealing those names of those targets, release the methods that we use, and then it's turned against us and could cost the lives -- or put some of our agents in significant...

(CROSSTALK)

WYDEN:
Director Comey listed a number of targets, which is why there's confusion. He said that on the record. We need you to tell us on the record as well, consistent with protecting sources and methods.

BURR:
Senator Collins.

COLLINS:
Thank you, Mr. Chairman.

Director Coats, first let me thank you for a very cogent explanation of Section 702, and the fact that it cannot be used to target any person located in the United States, whether or not that person is an American. I think there's a lot of confusion about Section 702, and I appreciate your clear explanation this morning.

COATS:
Thank you.

COLLINS:
I have a question for each of you that I would like to ask, and I want to start with Admiral Rogers.

Admiral Rogers, did anyone at the White House direct you on how to respond today, or to -- were there discussions of executive privilege?

ROGERS:
Have I asked the White House is it their intent to invoke executive privilege? Yes. The answer I gave you today reflects my answer. No one else's.

(UNKNOWN)
What were you (inaudible) about (ph)?

COLLINS:
Director Coats?

COATS:
My -- my answer is exactly the same.

(CROSSTALK)

COLLINS:
Deputy Attorney General Rosenstein?

ROSENSTEIN:
I have not had any communications with the White House about invoking executive privilege today.

COLLINS:
Director McCabe?

MCCABE:
I have not had any conversations with the White House about executive privilege today either.

(CROSSTALK)

COLLINS:
Admiral Rogers, in January, the FBI, the CIA and NSA jointly issued an intelligence committee assessment on Russian involvement in the presidential elections.

The -- you've testified today that the I.C. relied in part on 702 authorities to support its conclusion that the Russians were involved in trying to influence the 2016 elections. Can you provide us with an update on NSA's further work in this area?

ROGERS:
In terms of the Russian efforts largely (ph)?

COLLINS:
Yes.

ROGERS:
Yes, ma'am.

We continue to focus analytic and collection effort trying to generate insights as -- as to what the Russians and others are doing, particularly with respect to efforts against U.S. infrastructure, U.S. processes like elections. We continue to generate insights on a regular basis.

If my memory is right, I testified before the SSCI -- we all -- we did open threat assessment, and in that hearing, which I think was the 11th of May, I reiterated, we continue to see this -- similar activity that we identified and highlighted in the January report. Those trends continue. Much of that activity continues.

COLLINS:
It's my understanding that President Obama requested the report that was issued in January. Is that correct?

ROGERS:
Yes, ma'am. He asked for a consolidated single input from the I.C. as to the question, did the Russians, or did they not, attempt to influence the U.S. election process?

COLLINS:
So could you explain the difference between the requests from President Obama for that unclassified assessment and the allegations that President Trump requested that you publicly report on whether or not there was any intelligence concerning collusion between the Russians and the members of the Trump campaign -- President Trump's campaign?

ROGERS:
So I apologize, I guess I'm confused by the question. Again, I'm not going to comment on any interactions with the president. I just don't feel that that -- that is appropriate. As I previously testified, I stand by that report.

COLLINS:
Let me ask a broader question that I truly am trying to get a handle on. And that is, how does the intelligence community reach a decision on whether or not to comply with a request that comes from the president of the United States?

Obviously, you report to the president of the United States. And I'm interested in what process you go through to decide whether or not to undertake a task that's been assigned by the president -- by any president.

ROGERS:
So, off the top of my head, I would say we comply unless we have reason to believe that we are being directed to do something that is illegal, immoral or unethical.

COLLINS:
Thank you.

ROGERS:
In which case, we will not execute that.

BURR:
Senator Heinrich?

HEINRICH:

Director McCabe, did -- did Director Comey ever share details of his conversations with the president with you? In particular, did Director Comey say that the president had asked for his loyalty?

MCCABE:
Sir, I'm not going to comment on conversations the director may have had with the president. I know he's here to testify in front of you tomorrow. You'll have an opportunity to ask him those...

(CROSSTALK)

HEINRICH:
I -- I'm asking you, did you have that conversation with Director Comey?

MCCABE:
And I've responded that I'm not going to comment on this conversation.

HEINRICH:
Why not?

MCCABE:
Because -- for two reasons. First, the -- as I mentioned, I'm not in a position to talk about conversations that Director Comey may or may not have had with the president.

HEINRICH:
I'm not asking you that. I'm asking about conversations that you had with Director Comey.

MCCABE:
And I think that those matters also begin to fall within the scope of -- of issues being investigated by the special counsel, and -- wouldn't be appropriate for me to comment on those today.

HEINRICH:
So you're not invoking the executive privilege, and obviously it's not classified. This is the oversight committee. Why would it not be appropriate for you to share that conversation with us?

MCCABE:
I think I'll let Director Comey speak for himself tomorrow in front of this committee.

HEINRICH:
We certainly look forward to that. But I think your -- your unwillingness to share that conversation is -- is an issue.

Director Coats, you've said as well that it would be inappropriate to answer a simple question about whether the president asked for your assistance in blunting the Russia investigation.

I -- I don't care how you felt. I'm not asking whether you felt pressured. I'm simply asking, did that conversation occur?

COATS:

And once again, Senator, I will say that I -- I do believe it's inappropriate for me to discuss that in an open session.

HEINRICH:
You realize -- and -- and obviously this is not releasing any classified information -- but you realize how simple it would simply be to say, "No, that never happened"? Why is it inappropriate, Director Coats?

COATS:
I think conversations between the president and myself are, for the most part...

HEINRICH:
You seem to apply that standard selectively.

COATS:
... no, I'm not applying it selectively. I'm -- I'm saying I don't think it's appropriate...

HEINRICH:
You could clear an awful lot up by simply saying that never happened.

(CROSSTALK)

COATS:
I -- I don't share -- I do not share with the general public conversations that I have with the president or many of my colleagues within the administration that I believe are -- should not be shared.

HEINRICH:
Well, I think your unwillingness to answer a very basic question speaks volumes.

COATS:
It's -- it's not a matter of unwillingness...

HEINRICH:
Mr. Rosenstein...

(CROSSTALK)

COATS:
... Senator, it's a matter...

HEINRICH:
It is a matter of unwillingness (ph).

(CROSSTALK)

COATS:
... it's a matter of how I share it and whom I share to. And when there are ongoing investigations, I think it's inappropriate to...

(CROSSTALK)

COATS:
... involved in that (ph).

HEINRICH:
So you don't think the American people deserve to know the answer to that question?

COATS:
I think the investigations will determine that. And your part...

HEINRICH:
Mr. Rosenstein, did you know, when you wrote the memo that was used as the primary justification for firing Director Comey, that the administration would be using it as a primary justification?

ROSENSTEIN:
Senator, as I know you're aware, I have -- there are a number of documents associated with me that are in the public record. The memorandum I wrote concerning Director Comey is in the public record.

The order appointing the special counsel is in the public record. The press release I issued accompanying that order is in the public record. And a written version of the statement that I delivered to 100 United States senators...

HEINRICH:
Were you aware that it would be...

(CROSSTALK)

HEINRICH:
... a (ph) primary justification for his firing by the...

(CROSSTALK)

ROSENSTEIN:
Pardon me, Senator -- 100 United States senators and 435 congressmen -- is in the public record. I answered many questions in the closed briefings of the 100 senators...

(CROSSTALK)

HEINRICH:
But you're not answering this question.

ROSENSTEIN:
... and, as I explained in those briefings, Senator, I support Mr. McCabe on this. We have a special counsel who is investigating -- now responsible for the Russia...

HEINRICH:
OK. At this point, you filibuster better than most of my colleagues.

So I'm going to move on to another question and say that, given that the president stated that the FBI director -- that his firing was in response to investigations into Russia, which he made very clear in Lester Holt's interviews, you've talked with both the president and the attorney general about this firing.

In light of Mr. Sessions's recusal, what role did the attorney general play in that firing? And was it appropriate for him to write the letter that he wrote in this case?

ROSENSTEIN:
I'm not trying to filibuster, Senator. I think I only took about 30 seconds but I -- I am not going to comment on that matter. I'm going to leave it to Special Counsel Mueller to determine whether that is within the scope of his investigation. And I believe that's appropriate for Mr. McCabe and me to do that, and we recognize...

(CROSSTALK)

HEINRICH:
OK, so you can't comment on recusal and what's in and -- inside and outside the scope of that recusal?

(UNKNOWN)
Mr. Chairman, let -- we ought to let the witness answer the question.

(UNKNOWN)
(OFF-MIKE)

(UNKNOWN)
Second the motion.

ROSENSTEIN:
So I'm sorry, your specific question is what's in the recusal, and my understanding is the recusal you're referring to is also in the public record, and I believe speaks for itself.

HEINRICH:
Thank you, Mr. Chair.

BURR:
Senator Blunt?

BLUNT:
Director McCabe, on May the 11th, when you were before this committee, you said that there has been no effort to impede the Russian investigation. Is that still your position?

MCCABE:
It is, but let me clarify, Senator. I think you're referring to the exchange that I had with Senator Rubio. And my understanding -- at least my intention in providing that answer was whether or not the firing of Director Comey had had a negative impact on our investigation.

And my response was then, and is now, that the FBI investigated and continues to investigate, and now, of course, under the rubric of the special counsel, the Russia investigation in a appropriate and unimpeded way, before Director Comey was fired and since he's been gone.

BLUNT:
Well, I think, as I recall that conversation, it was a discussion about whether there were plenty of resources, whether the funding was adequate. And what you were reported to have said -- I haven't looked at the exact transcript, but I have looked at the news article -- was that you were aware of no effort to impede the Russia investigation.

MCCABE:
We did talk about resource issues and whether or not we had asked for additional resources to pursue the investigation. And I believe my response at the time was we had not asked for additional resources, and that we had adequate resources to pursue the investigation. That was true then. It's still true today.

BLUNT:
And you would characterize your quote as -- "No effort to impede the Russian investigation," as still accurate?

MCCABE:
That's correct.

BLUNT:
On the 702 issue, when -- when the FBI wants to -- wants to follow up on or pursue a U.S. person in or outside the United States, what court do you go to get that to happen? Do you go to the FISA Court, as well?

MCCABE:
If we are seeking -- collection under 702?

BLUNT:
No, if -- well, if you're -- how -- how do you relate to 702? Do you ever seeks (ph) collection under 702?

MCCABE:
Sure, yes, we do. So when -- well, so let me step back just a minute. So, of course, when the FBI seeks electronic surveillance collection on a U.S. person, we go to the FISA Court and get a Title I FISA order to do so.

If we have an -- a -- an open, full investigation on a foreign person in a foreign place, and the collection is for the purpose of collecting foreign intelligence, we can nominate that person, or that -- as we refer to it internally, the selector -- whether it's an e- mail address, or that sort of thing -- we can nominate that for 702 coverage. We convey that nomination to the NSA and they pursue the coverage under their authority.

BLUNT:
But you would be the person that would pursue coverage for a U.S. person, either here or outside the United States?

MCCABE:
That's correct, Senator. We are...

BLUNT:
You being (ph) the FBI.

MCCABE:
We are the U.S. person agency, that's right.

BLUNT:
And, Admiral Rogers, Senator Feinstein mentioned that last year, 1,139 U.S. persons were -- the phrase we're using now -- unmasked for some purpose. Is that a number you agree with?

ROGERS:
It's in the 2016 ODNI-generated transparency report. From memory, the number is actually 1,934 -- from memory.

FEINSTEIN:
(OFF-MIKE) what I said.

ROGERS:
Could be wrong, but...

(CROSSTALK)

BLUNT:
I'm sorry, so I misheard. But 1,900 -- what would the number have been in 2015?

ROGERS:
To be honest, I don't know. I'd have to take that one for the record. I -- I do know that we didn't start with the -- the transparency commitment that we made, partnering with the DNI -- we didn't start that until the latter end of 2015.

So the 2015 data that's been published as a matter of public record is a subset of the entire calendar year. 2016 is the first calendar year where we have published all the data for the entire year.

BLUNT:
Director Coats, do you have any information on that?

COATS:
Well, I -- I've seen the number. I don't recall what it was, and I just asked my staff if we have it (ph)...

(CROSSTALK)

BLUNT:
All right. I guess what I'm -- what I'm asking, and we can -- you can take this for the record, is, was there an increase in 2016? Did you have significantly more requests, based on your subset in '15, happen in '16 than you had had -- than you had had...

(CROSSTALK)

COATS:
I don't know, off the top of my head. We'll take it for the record. But I will say this: 702 collection has continued. The amount of total collection has increased, generally, every year. It's more and more impactful for us. It generates more and more value.

BLUNT:
And when you have -- when 702 generates information that would indicate there was a U.S. person involved in a -- in criminal activity, what do you do with that information?

COATS:
If we become -- we report it to either -- to DOJ and the FBI, because we're not a criminal organization.

BLUNT:
And what -- what do you do if you get that information at DOJ, Mr. Rosenstein? Information from a 702 collection...

(CROSSTALK)

ROSENSTEIN:
... if we become aware...

BLUNT:
... that clearly indicates there's a crime involving a U.S. person.

ROSENSTEIN:
I -- I hesitate only because that's actually an FBI issue, so I would defer to Mr. McCabe.

BLUNT:
All right. Mr. McCabe?

MCCABE:
Sure.

So we take that referral, and if that's a U.S. person, we begin to build an investigation, aiming towards Title I FISA collection.

BLUNT:
With adequate protections for U.S. persons in that entire chain...

MCCABE:
Of course.

BLUNT:
... of transmission of...

MCCABE:
Of course.

BLUNT:
... of material?

MCCABE:
That's right.

BLUNT:
Thank you, Chairman.

BURR:
Senator King.

KING:
Thank you, Mr. Chairman.

First, on 702, like Senator Feinstein, I want to express my support for this important tool for our intelligence agencies. I do have a concern, which we can discuss, perhaps, in closed session, about the -- the process by which American names which are incidentally collected are then queried. I'm concerned by the distinction between query and search, and where we run into the Fourth Amendment.

It strikes me as bootstrapping to say, "We collected it legally under 702, and then we can go and look at these American persons." And I'm -- I believe that the Fourth Amendment imposes a warrant requirement in between that step, which is not present in the present process. We can discuss that at greater length.

Mr. McCabe, I -- I'm puzzled by your refusal to answer Senator Heinrich's question about a conversation you may have had with Director Comey. What's the basis of your refusal to answer that question?

MCCABE:
Sir, as I stated, I think, first, I can't sit here and tell you whether or not that -- those conversations that you're referring to...

KING:
Why not? Do you not remember them?

MCCABE:
No, no -- I'm sorry, sir. I can't -- I don't know whether conversations and -- along the lines that you've described fall within the purview of what the special counsel is now investigating.

KING:
Is there some prohibition in the law that I'm not familiar with that you can't discuss an item in -- that you've been asked, directly, a question?

MCCABE:

It would not be appropriate for me, sir, to discuss issues that are potentially within the purview of the special counsel's investigation.

KING:
And that's the basis of your refusal to answer this question?

MCCABE:
Yes, sir, and -- that and knowing, of course, that Director Comey will be sitting behind this table tomorrow.

(CROSSTALK)

KING:
So you -- it's your position that the special counsel's entitled to ask you questions about this, but not a -- an oversight committee of the United States Congress?

MCCABE:
It is my position that I have to be particularly careful about not stepping into the special counsel's lane, as they have now been authorized by the Department of Justice...

(CROSSTALK)

MCCABE:
... to investigate these matters.

KING:
I don't understand why the special counsel's lane takes precedence over the lane of the United States Congress in an investigative and oversight committee. Can you explain that distinction? Why does the special counsel get deference, and not this committee?

MCCABE:
Sir, I'd be happy to...

(CROSSTALK)

KING:
... some legal basis for the distinction?

MCCABE:
I would be happy to take that matter back, to discuss it more fully with my general counsel and with the department. But right now that's the...

KING:
On the record, I would like a legal justification for your refusal to answer the question today, because I think it's a straightforward question. It's not involving discussions with the president, it's involving discussions with Mr. Comey.

The -- gentlemen, Mr. -- Director Coats and Admiral Rogers -- I think you testified, Admiral Rogers, that you did discuss today's testimony with someone in the White House?

ROGERS:
I said I asked what -- did the White House intend to evoke (ph) executive privileges associated with any interactions between myself and the president of the United States.

KING:
And what was the answer to that question?

ROGERS:
I -- to be honest, I didn't get a definitive answer, and both myself and the DNI are still talking...

(CROSSTALK)

KING:
Then I'll ask both of you the same question. Why are you not answering these questions? Is there an invocation by the president of the United States of executive privilege? Is there, or not?

ROGERS:
Not that I'm aware of.

KING:
Then why are you not answering?

ROGERS:
Because I feel it is inappropriate, Senator.

KING:
I -- what you feel isn't relevant, Admiral. What's -- what -- what you feel isn't the answer.

ROGERS:
I stand accountable...

(CROSSTALK)

KING:
The answer is -- why are you not answering the questions? Is it an invocation of executive privilege? If there is, then let's know about it. If there isn't, answer the questions.

ROGERS:
I stand by the comments that I've made. I'm not interested in repeating myself, sir. And I don't mean that in a -- in a -- in a contentious way.

KING:
Well I do mean it in a contentious way.

ROGERS:

Yes, sir.

KING:
I don't understand why you're not answering our questions. You can't -- when -- when you were -- when you were confirmed before the Armed Services Committee, you took an oath: Do you solemnly swear to give the committee the truth, the full truth and nothing but the truth, so help you God?

ROGERS:
I do.

KING:
You answered yes to that.

ROGERS:
And I've also answered that those conversations were classified, and it is not appropriate in an open forum to discuss those classified conversations.

KING:
What is classified about a conversation involving whether or not you should intervene in the FBI investigation?

ROGERS:
Sir, I stand by my previous comments.

KING:
Mr. Coats, same series of questions. What's the basis for your refusal to answer these questions today?

COATS:
The basis is that -- what I've previously explained. I do not believe it is appropriate for me to get into it...

(CROSSTALK)

KING:
What's that basis? I'm not satisfied with "I do not believe it is appropriate" or "I do not feel I should answer." I want -- I want to understand a legal basis. You swore that oath to tell us the truth, the whole truth and nothing but the truth. And today, you are refusing to do so.

What is the legal basis for your refusal to testify to this committee?

COATS:
I'm not sure I have a legal basis, but I'm -- I'm more than willing to sit before this committee and in it's -- in -- during its investigative process in a closed session and answer your question.

KING:
Well, we're going to be having a closed session in a few hours. Do you commit to me that you're going to answer these questions in a direct and unencumbered way?

COATS:

Well, that -- that closed session you're going to have in a few hours involves the staff going over the technicalities of a number of these issues, and doesn't involve us. But...

(CROSSTALK)

KING:
Well, is it your testimony that...

(CROSSTALK)

KING:
... when you are before this committee in a closed session, you will answer these questions directly and unequivocally and without hesitation?

COATS:
I -- I plan to do that. But I do have -- I do have to work through the legal counsel at the White House relative to whether or not they're going to exercise executive (OFF-MIKE).

KING:
Admiral Rogers, will you answer these questions in a closed session?

ROGERS:
I likewise respond as the DNI has. I certainly hope that that is what happens. I believe that's the appropriate thing. But I do have to acknowledge, because of the sensitive nature and the executive privilege aspects of this, I need to be talking to the general counsel and the White House.

I hope we come to a position where we can have this dialogue. I welcome that dialogue, sir.

KING:
I hope so, too. And I would just add, in conclusion, that both of you testified you had never been pressured under three years (ph). I would argue that you have waived executive privilege by, in effect, testifying as to something that didn't happen.

And I believe you opened the door to these questions. And I -- I -- I -- it is my belief you are inappropriately refusing to answer these questions today.

Thank you, Mr. Chairman.

BURR:
Before I turn to Senator Lankford, let me say that the vice chairman and I have had conversations with acting Attorney General Rosenstein when the special counsel was named.

And, as I had shared with the members of this committee prior to that, that as we carried out an investigation, there would come a point in time, either with an investigation that was currently ongoing at the FBI, or, if there was a special counsel, with the special counsel, where there would be avenues that this committee could not explore.

And it was my hope that already the vice chair and I would've had that conversation with the special counsel. We have not. We've made the request. We intend to have it. And I think that both of us anticipated that we would reach this point at -- at some point in the investigation.

We -- we are there, where there are some things that will fall into the special counsel and/or an active investigation. Vice Chairman.

WARNER:
Let me just say, though, that, at this point, we've not had that conversation with Mr. Mueller. We've not been waved off on any subject, and the way I'm hearing all of you gentlemen is that Mr. Mueller has not waved you off from answering any of these questions. Is that correct?

COATS:
I've had no conversations with Mr. Mueller. I've -- I've been out -- out of the country for the last nine days...

WARNER:
I would just let you (ph)...

(CROSSTALK)

COATS:
... so I haven't had an opportunity (ph) to talk to him.

WARNER:
... have -- have any of you had -- because if you've not have questions waved off with Mr. Mueller, I think, frankly -- and I understand your commitment to the administration -- but that Senator King, Senator Heinrich and my questions deserve answers, and at some point, the American public deserves full answers.

BURR:
I'm going to ask Mr. Rosenstein to address that.

ROSENSTEIN:
Thank you, Mr. Chairman. And I'm -- I'm sensitive to your desire to keep our answers brief, and my full answer, actually, would be very lengthy.

But my brief answer, from my perspective at the Department of Justice -- and I've been there for 27 years, and Mr. McCabe also is a career employee of the Department of Justice -- our default position is that, when there's a Justice Department investigation, we do not discuss it publicly.

That's our default rule, so nobody needs to...

WARNER:
Is that the rule for the president of the United States, as well?

ROSENSTEIN:
I -- I don't -- I don't know what...

WARNER:
Because that is what the questions are being asked about, reports that nobody -- nobody has laid to rest here that the president of the United States has intervened directly in an ongoing FBI investigation. And we've gotten no answer from any of you.

And frankly, we've at least heard from Director Coats and Admiral Rogers that they've not been asked to recuse an answer because of Director Mueller. And I don't understand why we can't get that answer.

ROSENSTEIN:
So, I'm not answering for Director Rogers or Director Coats. I'm answering for Director McCabe and myself with regard to the Department of Justice.

BURR:
Senator Lankford.

LANKFORD:
Director McCabe, can I ask you -- do you feel confident at this point the FBI is fully cooperating with special counsel for any requests in communication and setting up of the coordination between the offices for documents, work products, insights, anything the special counsel -- as they're trying to get organized and get -- and get prepared for the investigations they're taking on?

Is everyone in the FBI fully cooperating with special counsel?

MCCABE:
Absolutely, sir. I'm absolutely confident of that. We have a robust relationship with the special counsel's office, and we are supporting them with personnel and resources in any way they request.

LANKFORD:
Thank you.

Admiral Rogers, this spring, NSA decided to stop doing "about" queries. That was a long conversation that's happened there. It's now come out into public about that conversation -- that that was identified as a problem. The court agreed with that, and that has been stopped.

What I need to ask you is who first identified that as a problem.

ROGERS:
The National Security Agency did.

LANKFORD:
OK. So how did you report that? Reported that to who? How did that conversation go once you identified we -- we're uncomfortable with this type?

ROGERS:
So, in 2016, I had directed our office of compliance, let's do a fundamental baseline review of compliance associated with 702.

LANKFORD:
OK.

ROGERS:
We completed that effort, and my memory is I was briefed on something like October the 20th. That led me to believe the technical solution that we put in place is not working with the reliability that's necessary here (ph).

I then, from memory, and -- had (ph) through -- went to the Department of Justice and then on to the FISA Court. At the end of October -- I think it was something like the 26th of October -- and we informed the court we have a compliance issue here, and we're concerned that there's an underlying issue with the technical solution we put in place.

We told the court we were going to need some period of time to work our way through that. The court granted us that time. In -- in return, the court also said, "We will allow you to continue 702 under the '16 authorizations, but we will not -- will not reauthorize '17 until you show us that you have addressed this."

We then went through an internal process, interacted with the Department of Justice as well as the court, and by March, we had come to a solution that the FISA Court was comfortable with. The court then authorized us to execute that solution and also, then, granted us authority for the '17 702 effort.

LANKFORD:
So you reported initially to the court, "This is an issue," or the court initially came to you and said, "We have an issue"?

ROGERS:
I went to the court and said, "We have an issue."

LANKFORD:
And the court said, "We agree, we have a problem as well"?

ROGERS:
Check (ph).

LANKFORD:
And then it got held up, went through the process of review, and then the court is now signed off on the other 16 (ph)?

ROGERS:
That is correct.

LANKFORD:
So how -- how does this harm your collection capabilities, to be able to not do the "about" collections?

ROGERS:

So I -- I acknowledge that, in doing this, we were going to lose some intelligence value. But my concern was I just felt it was important -- we needed to be able to show that we are fully compliant with the law. And the technical solution we had put in place, I just didn't think was generating the level of reliability. And as a result of that, I said we need to make the change.

I will say this, and the -- FISA's court opinion also says the same thing. I also told the court at the time, if we can work that technical solution in a way it generates greater reliability, I would potentially come back to the Department of Justice and the court to recommend that we reinstitute it. And in fact the court acknowledged that in their certification.

LANKFORD:
When you say greater reliability, tell me what you mean by that.

ROGERS:
Because it was generating errors. Our -- our office of incompliance (ph) highlighted the specific number of cases in 2016. And I thought to myself, "Clearly it's not working as we think it is." We were doing queries unknowingly to the operator, in a handful of situations, against U.S. persons. And I just said, "Hey, that is not in accordance with the intent of (ph) the law."

LANKFORD:
Yeah. Clearly -- clearly it's not. Not only the intent, it's actual statute itself that (ph)...

(CROSSTALK)

ROGERS:
Correct, right. The statute (ph).

LANKFORD:
... that -- that we protect U.S. persons from...

(CROSSTALK)

ROGERS:
Yes, sir.

LANKFORD:
... foreign-directed.

So what I'm hearing from you is the accountability system worked.

ROGERS:
Yes, sir.

LANKFORD:
That -- the issue rose up, we're collecting, we do have information on U.S. persons. We don't want to get (ph) that information. Immediately, the process started going through to be able to stop it. The court then put the final stop on it. It was corrected, and then that's now cleared.

ROGERS:
Yes, sir. And, in fact, we're purging the data as well. I don't know if (ph) we stopped doing it, but we're purging the data that we had collected under the previous authorization.

LANKFORD:
So the issue on 702 -- most Oklahomans that I interact with don't know the term "702." But it -- if I asked them, "Should we collect information on terrorist organizations and terrorists overseas who are planning to carry out attacks on us and our allies?" They don't hesitate. They say absolutely we should do that.

Now, they don't want collection on themselves and their mom, but they absolutely want us to be able to target terrorists. And so the issue that I think we've been talking about, when we talk about 702 on this dais, is a normal conversation back home that, if we miss something internationally, everyone says, "I thought we were doing this. Why aren't we?"

So I fully appreciate the civil liberties conversation, the privacy questions. Those are things I'm also passionate about, and it's very interesting for me to be able to hear from you that you're passionate about and NSA is passionate about -- to make sure that we're not collecting on Americans.

So I appreciate that, and in this case, when it comes out in the public media that this has occurred, it actually shows the system itself worked. When there was a query going on that was collecting on Americans, it was stopped immediately, data's purged. But we're still continuing to be able to target on threats internationally, and I do appreciate that.

Thank you. I appreciate and yield back the time.

BURR:
Senator Manchin?

MANCHIN:
Thank you, Mr. Chairman.

I want to thank all four of you for your service, and you all are held at the highest -- I think, the highest regards by your -- by your colleagues and your peers, and I think that speaks volumes of the character of all four of you, and I appreciate that very much.

We have a committee here, which I'm so proud to be service (ph) -- I'm brand new on the committee, this is my first -- my first time at this, and I don't think there's a person up here that doesn't want to find out the facts and the truth and be able to go back home and explain to the Democrat and Republican colleagues and -- no matter what political persuasion -- that we have gotten the facts.

We got it from our intel, which we truly appreciate and respect the quality of job -- work that you do. And this is our findings. We're having a hard time getting there, as you can tell, and I respect where you all are coming from.

And I hope you could understand that, sooner or later, we're going to have to -- there has to be one element of this government that the public can look at and say, "This is not politically motivated. This is not a witch hunt."

No one's trying to harm anybody, we just want to do the business of our government and our country, and do the best that we can for that and make sure that they have the confidence in the people that they've put at the head and have elected. That's what we're trying to get to. Today's been very difficult -- my (ph) -- me sitting here listening to some of the answers and -- and inability to answer some of the questions.

If the intelligence committee in the Senate cannot get answers we know in an open setting like this, are these answers that we're asking -- the questions that were simply asked today, would they be given into a classified intel setting that we would have?

MANCHIN:
Could you -- could you answer differently than what you're giving us in (ph) open session? I think, Director Coats, you said that you would be able to answer differently in (OFF-MIKE)?

COATS:
I think I've made that very clear.

MANCHIN:
Yes.

COATS:
I've tried to (ph).

(CROSSTALK)

MANCHIN:
Admiral Rogers, would you be...

ROGERS:
... And likewise, I certainly hope so.

MANCHIN:
... Mr. Rosenstein, would you?

ROSENSTEIN:
Senator, speaking for Mr. McCabe and myself, you know, we have been involved in managing the criminal investigation. And so I would ask that you -- as Chairman Burr suggested, it's really appropriate for Director Mueller, since we've turned over control of that investigation to him, to make the determination in the first instance about what we can and can't speak about.

So I would encourage you to use Mr. Mueller as your point person as to whether or not it's appropriate to reveal that information.

MANCHIN:

Let's just say the questions that was asked to Mr. McCabe -- I think they weren't anything on the investigation side. It was asked pretty personal and directly. Could you answer differently in -- in a classified setting, sir?

MCCABE:
I would reiterate the DAG's comments that it's -- at this point, with the special counsel involved, it would be appropriate for the committee to -- to have an understanding with the special counsel's office as to where those questions would go.

But I would also point out that, as we have historically when we are investigating sensitive matters in which operational security is of utmost importance, members of the intelligence community typically come and brief the leadership -- congressional leadership on sensitive investigative matters.

We have done so. I have done so. Director Comey has done so prior to the appointment of the special counsel. And some of the questions that you have asked this morning were addressed in those closed, very restricted, very small settings.

MANCHIN:
Well, let me say this -- that, if it would be the desire of the chairman and vice chairman, if we could, since we have a classified hearing scheduled for 2 o'clock this afternoon, would you all make yourself available?

Since it doesn't linger on -- there's been a lot of questions, a lot of anticipation and a lot of build-up -- anxiety, if you will -- I think you could really help an awful lot of us clear the day up, if you will.

BURR:
If I could address the senator's question, this afternoon is set with technical people to walk us through 702. Rest assured that we will take the first available opportunity to have people back in closed session to address those questions that they can address.

And, hopefully prior to that, the vice chair and I would have an opportunity to meet with Director Mueller to determine whether that fits within the scope of his current investigation. And we will do that.

MANCHIN:
Well, Mr. Chairman, the only thing I'm saying is that I know that you can tell by the intensity of the questions here that there's a lot of concerns right now.

And we have both Director Coats and Admiral Rogers who are willing to say in a classified hearing that they would be able to answer differently. That's the only reason I was bringing that up. And we have it to (ph) -- this (ph) afternoon. I would hope that would maybe be considered.

But let me ask a question. Does the president support Section 702, reauthorization of the FISA and expanded authority?

(UNKNOWN)
Absolutely.

MANCHIN:

Everyone?

(UNKNOWN)
Full support.

MANCHIN:
Wonderful. Full support there.

Did the president ask, or was he given any specific intelligence or info concerning the Russian active measures in the 2016 presidential election? Was he briefed on that? Did he ask for that briefing, or did -- is it an automatic briefing that you give?

Admiral Rogers?

COATS:
Well all -- all that took place before I was...

(CROSSTALK)

ROGERS:
I will say yes, he was briefed on the results of the intelligence community assessment. I was part of that, in January, prior to his assuming his duties. He and I have discussed, as well, the specifics of that assessment subsequent to after he'd become the president -- assumed the duties.

MANCHIN:
Let me just say, just in finishing up, I -- I just would hope that you all, with your expertise and all of your knowledge, would help us put closure to this sooner or later. I mean, we need your help. We need your assistance, we really do.

And this is a committee that I think will take the facts as you give them to us and decipher that, and come up with some appropriate action and -- and a final report, which is I think what the public is looking for. We can't do that without your assistance. Thank you all.

COATS:
And, Senator, I -- I -- I fully understand that statement. And, as the chairman mentioned, the procedures he's going to put in place relative to when we hold that hearing and the relationship it is to the official investigation that's going on by Director Mueller will dictate when and how we do that.

MANCHIN:
I think we need you in the skiff sooner than later. Thank you.

BURR:
Senator Cotton.

COTTON:
Thank you, gentlemen. I want to talk about the import of Section 702 to our national security.

Admiral Rogers, I'll direct most of these questions to you as the subject matter expert on the panel on signals intelligence from foreign threats, though I might turn some of our lawyers for legal questions.

Does Section 702, Admiral Rogers, allow you to collect information on U.S. citizens?

ROGERS:
As intentionally targeted individuals? No.

COTTON:
Yes. Intentionally target them.

ROGERS:
No.

(CROSSTALK)

COTTON:
Does it allow you -- does it allow you to target foreigners to do what's called reverse targeting of U.S. citizens, knowing those U.S. citizens are in communications?

ROGERS:
No, it does not.

COTTON:
Does it allow you to collect information on foreigners who are on U.S. soil?

ROGERS:
No, 702...

COTTON:
It doesn't?

ROGERS:
... is outside the United States.

COTTON:
So you can collect information on an ISIS terrorist in Syria, and he comes to the United States, and you can no longer collect information on his cell phone or his e-mail address?

ROGERS:
We're in a foreign intelligence organization. We coordinate with the FBI. But, yes, sir, we don't do internal -- domestic collection, broadly.

COTTON:
Mr. Rosenstein, do foreigners have constitutional rights?

ROSENSTEIN:

When they're in the United States, Senator, different rules apply. And that's why I think it's important for people to understand that Section 702 applies only in circumstances where it's a foreign national outside the United States.

If they're inside the United States, we would need to rely on other provisions of FISA to do that collection. So, yes, we can do it, but we need to apply different rules. And Mr. McCabe, as the director indicated, is responsible for that.

COTTON:
Mr. McCabe, what happens when an ISIS terrorist comes from Syria to the United States and Director Rogers -- or Admiral Rogers can no longer use Section 702 to monitor his electronic communications?

MCCABE:
Admiral -- Admiral Rogers's folks notify mine, and then we work together to pursue coverage under different elements of the FISA statute.

COTTON:
I'm -- I'm sure you work as hard as you can to make sure that is absolutely seamless, but it does seem to me that Section 702, because it's limited to foreigners on foreign soil without targeting any U.S. persons anywhere, goes the extra mile to protect the constitutional rights of American citizens and even the supposed constitutional rights of foreigners when they come on U.S. soil.

That's one reason why I support the permanent extension of Section 702, and I introduced legislation to that effect yesterday, with the support of all seven Republicans on this committee.

Tom Bossert, the counterterrorism and homeland security adviser to the president, writes (ph) in today's New York Times about our legislation. The Trump administration supports this bill without condition. Admiral Rogers, is that your position?

ROGERS:
Could you repeat it again? I apologize, sir. I'm...

(CROSSTALK)

ROGERS:
... somewhere else.

COTTON:
... Trump administration supports this bill without condition?

ROGERS:
Yes.

COTTON:
On a scale of 1 to 10, how enthusiastic would you be if this bill passed? You can go over 10, and be excessively enthusiastic.

(LAUGHTER)

ROGERS:
I would be ecstatic that we'd be in a position to continue to generate significant insights for this nation's security.

COTTON:
So, you'd dial it straight up to 11?

ROGERS:
Yes, sir.

COTTON:
OK. Director Coats?

COATS:
My level's about 100.

COTTON:
Mr. Rosenstein?

ROSENSTEIN:
Senator, I'm not familiar with the rating system. I do think it's very important.

COTTON:
Director McCabe?

MCCABE:
I'm at 11.

COTTON:
Director Coats, you had an exchange earlier with Senator Wyden about the efforts to estimate and declassify the number of persons who might be subject to incidental collection under Section 702. This is when you have a lawful 702 order, but someone does in fact communicate with an American citizen.

It's my understanding that it would be virtually impossible to do so in a way that wouldn't further infringe on the rights of American citizens. Is that correct?

COATS:
Well that's -- yes, and that's one of the central reasons why I came to the conclusion. But the main reason I came to the conclusion is that -- is -- just is not conceivably possible. We could go through the procedures, we could shift hundreds of people to go over and breach the rights of hundreds of thousands of -- of American citizens to determine -- of individuals to determine whether or not they are American citizens or not.

But we still, having done that, could not get to an accurate number -- the number that Senator Wyden was trying to -- to get us to. And I was -- my -- my pledge to him was I would go out there, try to fully understand why it was we couldn't get that.

There'll be detailed discussions on that on (ph) the closed session with the staff and the technicians from both NSA and from Senate staff, here and others, relative to all of the efforts that have been made to try to answer the question.

And, as I said -- said in my statement, even if we were to take people off their regular jobs and say, "get on this issue," even if we could put other measures in place, we still would not be able to come up -- it's hard to explain how difficult this is or why this is the case, but that is what is going to be discussed in the -- in the closed session, because all this is classified information, this -- this afternoon. I assume the staff of members, all the members here will be there.

But my pledge was to do the best I could to try to get to the -- to some (ph) answer. And the result was we couldn't get to an answer, number one, and number two, trying to get to an answer would totally disrupt the efforts of the agency.

Now, if -- you know, you might be able to make the case -- let's hire a thousand more people and get to the answer -- if you knew you would get to the answer. Admiral Rogers has told me -- I hope he doesn't mind me saying this -- that if someone out there knows how to get to it, he's welcome to have -- have them come out and tell NSA how to do it.

But everybody says get the -- you can get to the number, it's easy, there's all kinds of agencies out there that can do it. I think you might welcome the advice if -- if they wanted to do that.

(CROSSTALK)

COATS:
It really raises the question of why there has to be an exact number.

COTTON:
Well, if we're going to hire a thousand new people, I'd sooner them (ph) focus on terrorists and foreign intelligence services than violating the privacy rights of American citizens.

My time is expired.

BURR:
Senator Harris?

HARRIS:
Thank you.

Admiral Rogers, in response to the question from Senator Manchin, you, it appears, felt free to discuss the conversations you've had with the president in January about Russian active measures. Can you share with this committee how you're determining which conversations you can share and which you don't feel free to share?

ROGERS:
Ma'am, the fact that we briefed the president previously, both went up to New York and previously as (ph) a matter of public record.

HARRIS:
So if it's a matter of public record, then you feel free to discuss those conversations?

ROGERS:
If it's not classified. You can keep trying to trip me up...

(CROSSTALK)

HARRIS:
Is the...

ROGERS:
... Senator, if you could, could I get to respond, please, ma'am?

HARRIS:
No, sir. No, no.

ROGERS:
OK.

HARRIS:
Are you saying that, if it is classified, you will not discuss it? And then my follow-up question, obviously, would be do you believe that discussion of Russian active measures is not the subject of classified information?

ROGERS:
I stand by my previous comments.

HARRIS:
Thank you.

Mr. Rosenstein, when you appointed a special counsel on May 17th, you stated, quote, "Based upon the unique circumstances, the public interest requires me to place this investigation under the authority of a person who exercises a degree of independence from the normal chain of command."

The order you issued along with that statement provides that 28 CFR 600.4 through 10 were applicable. Those are otherwise known as the special counsel regulations. Is that correct?

ROSENSTEIN:
Yes, Senator.

HARRIS:
And it states that the special counsel, quote, "shall not be subject to the day-to-day supervision of any official of the department." However, the regulations permit you, as acting Attorney General, for this matter to override Director Mueller's investigative and prosecutorial decisions under specified circumstances. Is that correct?

ROSENSTEIN:

Yes, Senator.

HARRIS:
And it also provides that you may fire or remove Director Mueller under specified circumstances. Is that correct?

ROSENSTEIN:
Yes.

HARRIS:
And you indicated in your statement that you chose a person who exercises a degree of independence, not full independence, from the normal chain of command.

So my question is this: In December of 2003, then Attorney General John Ashcroft recused himself from the investigation into the leak that led to the disclosure of Valerie Plame's identity as a CIA officer. The acting Attorney General at the time was Jim Comey.

HARRIS:
He appointed a special counsel, Patrick Fitzgerald, to take over the matter. In a letter dated December 30th of 2003, Mr. Comey wrote the following to Mr. Fitzgerald. Quote, "I direct you to exercise the authority as special counsel independent of the supervision or control of any officer of the department."

In a subsequent letter, dated February 6, 2004, Mr. Comey wrote to clarify the earlier letter, stating that his delegation of authority to Mr. Fitzgerald was, quote, "plenary."

Moreover it said that my, quote, "conferral on you of the title of special counsel in this matter should not be misunderstood to suggest that your position and authorities are defined or limited by 28 CFR Part 600." Those are the special counsel regulations we discussed.

So would you agree, Mr. Rosenstein, to provide a letter to Director Mueller similarly providing that Director Mueller has the authority as special counsel, quote, "independent of the supervision or control of any officer of the department," and ensure that Director Mueller has the authority that is plenary and not, quote, "defined or limited by the special counsel regulations?"

ROSENSTEIN:
Senator, I'm very sensitive about time, and I'd like to have a very lengthy conversation and explain that all to you. I tried to do that...

HARRIS:
Can you give me a yes or no answer, please?

ROSENSTEIN:
Well, it's not a short answer, Senator. The answer is...

(CROSSTALK)

HARRIS:

It is either you are willing to do that or not...

ROSENSTEIN:
... well...

HARRIS:
... as -- as has -- we have precedent in that regard.

ROSENSTEIN:
But the...

WARNER:
... Mr. Chairman, they should be allowed to answer the question.

ROSENSTEIN:
It's a -- it's a long question you pose, Senator, and I fully appreciate the import of your question, and I'll get to the answer.

My quibble with you is, Pat Fitzgerald is a very principled, very independent person. I have a lot of respect for him. Now, Pat Fitzgerald could have been fired by the president, because he was a United States attorney. Robert Mueller cannot, because he's protected by those special counsel regulations.

So although it's theoretically true that there are circumstances where he could be removed by the acting attorney general, which, for this case at this time, is me, your assurance of his independence is Robert Mueller's integrity and Andy McCabe's integrity and my integrity. And those regulations...

(CROSSTALK)

HARRIS:
Sir, if I -- if I may, the greater assurance is not that you and I believe in Director Mueller's integrity, which -- I have no question about Mr. Mueller's integrity.

It is that you would put in writing an indication, based on your authority as the acting attorney general, that he has full independence in regards to the investigations that are before him. Are you willing or are you not willing to give him the authority to be fully independent of your ability, statutorily and legally, to fire him?

ROSENSTEIN:
He is -- he has the...

HARRIS:
Yes or no, sir?

ROSENSTEIN:
... he has the full independence that is authorized by those regulations, Senator, as I said (ph).

HARRIS:
Are you willing to do as has been done before?

(CROSSTALK)

BURR:
Will the -- would the senator suspend? The chair is going to exercise its right to allow the witnesses to answer the question, and the committee is on notice to provide the witnesses the courtesy which has not been extended all the way across -- extend the courtesy for questions to get answered.

HARRIS:
Mr. Chairman, respectfully, I would...

BURR:
... Mr. Rosenstein, will you...

HARRIS:
... point out that this witness has joked with the -- as we all have, at his ability to filibuster.

BURR:
... the senator will suspend. Mr. Rosenstein, would you like to thoroughly answer the question?

ROSENSTEIN:
Thank you, Mr. Chairman.

Senator, I am not joking. The truth is, I have a lot of experience with these issues, and I could give -- I could speak to you for a very long time about it, and I'm sympathetic -- I appreciate the five minute limit. That's not my limit.

But -- but the answer is, it -- it's -- this originated, as you may know, with the independent counsel statute. And I worked for an independent counsel, and I worked in the department during the independent counsel era, when independent counsels were appointed by authorization of the Senate, they were appointed by federal judges and they had the -- essentially the authority equivalent to the attorney general.

That statute sunsetted, and the majority of members of this body concluded that that was appropriate, because they did not want special -- independent counsels who were 100 percent independent of the Department of Justice. That was a determination made by the legislature. Now, I know the folks at the department who drafted this regulation under Janet Reno, and they drafted it to deal with this type of circumstance.

And the idea was that there would be some circumstances where, because of unusual events, it was appropriate to appoint somebody from outside the department -- not somebody like Pat Fitzgerald, who was a U.S. Attorney who could be fired, but somebody from outside the department who could be trusted to conduct this investigation independently, and could be given an appropriate degree of independence.

Now under the regulation, he has, I believe, adequate authority to conduct this investigation. And your ultimate check, Senator, is, number one, the integrity of the people involved in the investigation, but,

number two, the fact that, if he were overruled or if he were fired, we would be required, under the regulation, to report to the Congress.

And so I believe that's an appropriate check. And so, while I realize that, theoretically, anybody could be fired, and so there's a potential for undermining an investigation, I am confident, Senator, that Director Mueller, Mr. McCabe and I and anybody else who may fill those positions in the future will protect the integrity of that investigation.

That's my commitment to you, and that's the guarantee that you and the American people have.

BURR:
Senator Cornyn.

HARRIS:
So is that a no?

BURR:
Senator Cornyn.

CORNYN:
Well, seems to be one thing we all agree on, at least so far, based on the questions and the comments, and that is that 702 is an important tool for the intelligence community and one that needs to be preserved.

And I agree with Senator Cotton that it should be extended without a sunset provision, as currently written. So it's good to have one --one thing we agree on.

But I want to ask Director Coats and perhaps Admiral Rogers, if you want to comment on this as well -- as I understand the framework of 702, it is to intentionally not target American citizens.

It is to intentionally -- to target foreign persons and to not collect information from American citizens, except by way of incidental collection. And I think you've described, Admiral Rogers, the extensive procedures that the law requires, and that NSA practices have in place, to minimize the access of anybody in the intelligence community to that U.S. person.

And indeed you've talked about purging incidental collection that was made in the course of the 702 investigation. So it strikes me, Director Coats -- the question that Senator Wyden has asked you, and it's come up several times -- to intentionally target American citizens in order to generate a number is just the opposite of what the structure of 702 provides.

Because the holes -- the whole idea is to not collect, not to be able to gather information about American citizens, except in the course -- incidental course of collecting information against a foreign intelligence target. Is that -- is that a fair statement?

COATS:
That's fair in my mind. And it was an (ph) essential piece of the information, a fact, that caused me to come to the conclusion that this would -- this would do just exactly what you said. You're breaching someone's privacy to determine whether or not they are an American person.

CORNYN:
To generate a list for Congress.

COATS:
It potentially could -- yes. To generate a list for Congress. That wasn't the only basis on which we made the decision, but that was an essential basis.

CORNYN:
Thank you.

I want to ask a little bit more about the minimization procedures and the importance of those, and a little bit about unmasking of U.S. persons' names, that Admiral Rogers and others have -- Director Coats, you've talked about -- you've explained the -- the process and the elaborate procedures that are in place to make sure that this is not done accidentally or casually.

And I think that's very important to reassuring the American people that, in the collection of foreign intelligence, we are extraordinarily protective of the privacy of U.S. citizens who might be incidentally collected against. And so, to me, the minimization procedures are very important.

The internal policies of the NSA, when it comes to collecting foreign intelligence that happens to incidentally impact American citizens, is absolutely critical to this balance between security and individual privacy.

Perhaps this is a question for Mr. Rosenstein, though, and maybe Director McCabe. If someone is to use the unmasking process for a political purpose, is that potentially a crime?

ROSENSTEIN:
Yes, Senator.

CORNYN:
And, Director McCabe, perhaps -- or Deputy Attorney General Rosenstein -- for somebody to leak the name of an American citizen that is unmasked in the course of incidental collection -- to leak that classified information -- is that also potentially a crime?

ROSENSTEIN:
Yes, I think that's the most significant point, Senator. I think it's important for people to understand -- unmasking is done in the course of ordinary, legitimate intelligence gathering, when the identity of the person on the other end of the phone -- the other end of the message may be relevant to understand the intelligence significance of the communication.

Leaking is a completely different matter. Leaking is a crime. Disclosing information to somebody without a legitimate purpose, need to know that information -- that will be prosecuted in appropriate circumstances.

And there have been cases where we've been able to determine there was a willful violation of federal law, a disclosure that was not authorized, and prosecutions have been brought and will be brought.

CORNYN:
And, Mr. Rosenstein, not pick on you or Director McCabe, but I -- I think there's some confusion when we talk about -- generically about Russian investigations.

We've described the role of the special counsel, which I think you've discussed in great detail. But that's primarily to investigate potential criminal acts and (ph) counterintelligence activities, is it not?

ROSENSTEIN:
The answer to that is -- is yes. The -- it is -- the idea of the Russian investigation -- that has much broader significance, I know, to many of you than the piece that Director McCabe and I are referring to and the piece that Director Mueller is investigating.

CORNYN:
Right. Well, that's -- that's enormously helpful, at least to me, because when people speak generically of the Russian investigation, I think they're also including things like our responsibility as the Intelligence Committee to do oversight of -- of the intelligence and of the counter -- potential countermeasures we might undertake to deal with the active measures campaign of the Russian government, which were clearly documented in the intelligence community assessment.

But, by my count, there are multiple committees of the United States Senate, including the Judiciary Committee on which I serve, which has different jurisdiction and oversight responsibilities. It's our job to do the investigation and write legislation. We're not the FBI, we're not the special counsel, we're not the Department of Justice.

And I'm afraid, in the conversation that we've been having here, people been conflating all of those, and those are very distinct, and importantly distinct, functions.

Thank you.

BURR:
Senator Reed.

REED:
Well, thank you very much, Mr. Chairman.

Director McCabe, on May 11th, you testify (ph), quote, "Director Comey enjoyed broad support within (ph) the FBI, and still does to this day." And then you added that you hold him in the absolute highest regard. Is still -- that the case?

MCCABE:
It is, sir.

REED:
Thank you.

Director McCabe, I'm trying to understand the rationale for your unwillingness to comment upon your conversations with Director Comey. First, you have had, I would presume -- and correct me if I'm wrong -- conversations with Mr. Mueller. You've had those conversations?

MCCABE:
Yes, sir.

REED:
You're fully familiar with the scope of the investigation, since you (ph) dealt with not only Mr. Mueller, but also with (OFF- MIKE).

MCCABE:
I am, sir, but I think it's important to note that Mr. Mueller and his team are currently in the process of determining what that scope is. And much in the way that Senator Cornyn just referred to, the FBI maintains a -- a much broader responsibility to continue investigating issues relative to potential Russian counterintelligence activity and -- and threats -- threats posed to us from our Russian adversaries.

(CROSSTALK)

MCCABE:
So -- so determining exactly where those lanes in the road are, where does Director Mueller's scope overlap into our pre- existing and long-running Russian responsibilities, is somewhat of a challenge at the moment. And that is why I am trying to be particularly respectful of his efforts and not to take any steps that might compromise his investigation.

REED:
But, getting back to your rationale for not commenting on the conversation between you and Mr. Comey, there's -- it seems to me that what you've said is that there -- either that is part of a criminal investigation, or likely to become part of a criminal investigation -- the conversation between the president of the United States and Mr. Comey -- and therefore you cannot properly comment on that. Is that accurate?

MCCABE:
That's accurate, sir.

REED:
What about the conversations between Director Coats and Admiral Rogers with the president of the United States? Is that likely to become or is part of a ongoing criminal investigation?

MCCABE:
I couldn't comment on that, sir. I'm not -- I'm not familiar with that, and it wouldn't be -- for the same reasons it's not appropriate for me to comment on Director Comey's conversations, I -- I certainly wouldn't comment on those that I'm further away from.

REED:
Mr. Rosenstein, are you aware of the possibility of an investigation -- the conversations that Director Coats and Admiral Rogers have had with the president?

ROSENSTEIN:
My familiarity with that, Senator, is limited to what I read in the newspaper this morning and what we heard here today.

REED:
Director Coats, have you had any contact with the special prosecutor or any (OFF-MIKE)?

COATS:
I have not.

REED:
Have you been advised by any of your counsels or -- private or public -- that these -- this conversation that you had with the president could be subject to a criminal investigation?

COATS:
I have -- no, I have not.

REED:
Admiral Rogers, same question.

ROGERS:
To the last question, no, I have not.

REED:
Let me just return again to the -- the points that I think Senator King made very well, which is this unwillingness to comment on the conversation with the president, but to characterize it in a way that you didn't feel pressured -- yet refusing to answer very specific and non-intelligence related issue -- I don't see how it would impact on the classification and our status whether or not you were specifically asked by the president to do anything.

You still maintain that you can't comment on whether you were asked or not?

COATS:
Nothing has changed since my initial response.

ROGERS:
I stand by my previous answer.

REED:
I just must say, the impression that I have is that, if you could say that, you would say that.

Thank you, I have no further questions.

BURR:
Senator McCain?

MCCAIN:

Well, gentlemen, you're here at an interesting time. It's funny how sometimes events run together. This morning's Washington Post -- "Top intelligence official told associates Trump asked him if he could intervene with Comey on FBI Russia probe."

(CROSSTALK)

MCCAIN:
It goes into some detail. I'm sure you've -- you've read the article. And it's more than disturbing, obviously, if it's true that the president of the United States was trying to get the director of national intelligence and others to abandon a investigation into Russian involvement. It's pretty serious.

I also understand the position that you're in, because it is classified information, and yet here it is on this morning's Washington Post in some detail. I'm sure you've -- you've read it. So I guess if I understand you right, Director Coats -- is that in a closed session, you are more than ready to discuss this situation. Is that correct?

COATS:
I would hope we'd have the opportunity to do that.

MCCAIN:
Well, I hope we can provide you with that opportunity.

You know, it's -- it's just -- shows what kind of an Orwellian existence that we live in. I mean, it's detailed, as -- as you know from reading the story, as to when you met, what you discussed, et cetera, et cetera.

And yet, here in a public hearing before the American people, we can't talk about what was described in detail in this morning's Washington Post. Do you want to comment on that, Dan?

COATS:
Are you asking me to comment on the Washington -- integrity of the Washington Post's reporting? I guess I've been around town...

MCCAIN:
It's pretty -- it's pretty detailed.

COATS:
... I guess I've been around town long enough to say -- not take everything at -- at face value that's printed in the Post. I served on the committee here, and often saw that that information that we had discussed had been reported, but that -- wasn't always accurate.

But I think this is -- the response that I -- I gave to the Post was that I did not want to publicly share what I thought were private conversations with the president of the United States, most of them -- almost all of them -- intelligence-related and classified. I didn't think it was appropriate to do so on an open -- for the Post to report what it reported, or do that in an open session.

MCCAIN:

Well, it's an unfortunate situation that you're sitting there because it's classified information, and this morning's Washington Post describes in some detail -- not just outlined, but times and dates and subjects that are being discussed. And I'm certainly not blaming you, but it certainly is an interesting town in which we exist.

COATS:
Now, just because it's published in the -- in the Washington Post doesn't mean it's now unclassified.

MCCAIN:
But unfortunately, whether it's classified or not, it's now out to the world, which is obviously not your fault, but -- describes dates and times, and who met with whom. And so, well, do you -- do you want to tell us any more about the Russian involvement in our election that we don't already know from reading the Washington Post?

COATS:
I don't think that's a -- that's a position that I'm in. I do know that there are ongoing investigations. And I do know that we continue to provide all the relevant intelligence we have to enable those investigations to be carried out with integrity and with knowledge.

MCCAIN:
Well, it must be a bit frustrating to you, in protecting what is clearly sensitive information, then -- and to read all about it in -- in the Washington Post. You have my sympathy, and I expressed that at your confirmation hearing, doubting your sanity.

So, Admiral, you got anything to say about it?

ROGERS:
No, sir, other than, boy, some days I sure wish I was an ensign on the bridge of that destroyer again.

MCCAIN:
I can understand that. I feel the same way.

Mr. Rosenstein?

ROSENSTEIN:
Senator, I can't speak for anybody else, but I'm proud to be here. I'm proud to be here with Director McCabe, and I'm sure he feels the same way.

MCCABE:
I do.

(LAUGHTER)

MCCAIN:
Whatever that might mean. Thank you, Mr. Chair.

BURR:
Thank you, Senator McCain. The chair is going to recognize Senator Wyden for one question on 702.

WYDEN:
Thank you very much, Mr. Chairman. I appreciate the courtesy.

This one, Director Coats, I'd like a yes or no answer on. Can the government use FISA act Section 702 to collect communications it knows are entirely domestic?

COATS:
Not to my knowledge. It would be against the law.

WYDEN:
Thank you, Mr. Chairman.

BURR:
Senator Warner.

WARNER:
Again, I want to thank all the witnesses. But I come out of this hearing with more questions than when I went in.

Gentlemen, you were both willing to somehow characterize your conversations with the president that you didn't feel pressure, but you wouldn't share the content.

In the case of Admiral Rogers, we will have an independent third- party that will at least provide some level of contemporaneous description of -- of that conversation, and obviously why there was concerns enough to -- to commit that to writing.

I'm pretty frustrated that there is this deference to the special prosecutor, even though the special prosecutor has not talked to you. I'm concerned that the Deputy Attorney General -- also deference to the special prosecutor. But there doesn't seem to be, in this committee, and -- and the chairman I have committed to making sure that we appropriately de-conflict.

What we don't seem to have is the same commitment to find out whether the president of the United States tried to intervene directly with leaders of our intelligence community and ask them to back off or downplay.

You -- you've testified to the -- your feelings response, candidly. Your feelings response is important, but the content of his communication with you is absolutely critical.

And I guess I would just say the president's not above the law. If the president intervenes in -- in a conversation -- and intervenes in an investigation like that, would that not be subject of some concern, Mr. Rosenstein?

ROSENSTEIN:
Senator, if anybody obstructs a federal investigation, it would be a subject of concern. I don't care who they are.

And I could commit to you, if you're looking for commitment from Mr. McCabe and from me, that if there is any credible allegation that anybody seeks to obstruct a federal investigation, it will be investigated appropriately, whether it's by Mr. McCabe, by me, by the special counsel. That's our responsibility and we'll see to it.

WARNER:
Well, I thank the chairman for the fact that we've been working on this in a bipartisan way, and we will ultimately have to get to the content of those conversations.

Thank you.

BURR:
Director Coats, I know you've got to go. Give me 90 more seconds, if I could.

And this question -- probably to you, Admiral Rogers. Have our partners globally used 702 intelligence to stop a terrorist attack?

ROGERS:
Yes, sir, and I -- if we were not -- if we were to lose a 702 authority, I would fully expect leaders from some of our closest allies to put out one loud scream.

BURR:
And, in most cases, didn't they take credit for our intelligence?

ROGERS:
We don't -- they don't publicly talk about where it comes from, but we acknowledge NSA is a -- is a primary provider of insights.

BURR:
I just wanted to get it on the record there...

ROGERS:
Yes, sir. A host of nations rely on it (ph).

BURR:
... that this is -- a global asset...

ROGERS:
Yes.

BURR:
... that the war on terror has is 702.

ROGERS:
Yes, sir.

BURR:
Now...

(CROSSTALK)

COATS:
Mr. Chairman, if I could just take...

BURR:
Yes, sir?

COATS:
... the time you -- you were trying to protect for me, for my next appointment, to just say, following -- and I just want to repeat -- following my interaction with my contemporaries in a number of European countries, they are deeply, deeply grateful to us, for the information derived from 702 has saved -- what they said -- literally hundreds of lives.

BURR:
Well, certainly the committee is privy to those instances in a lot of cases, and we're grateful for that.

And, gentlemen, I -- I want to -- I want to thank you for your testimony. But before we adjourn, I would ask each of you to take a message back to the administration. You're in positions whereby you're required to keep this committee fully and currently informed of intelligence activities.

In cases where the sensitivity of those activities would not be appropriate for the full committee or open session, there's a mechanism that you may use to brief the appropriate parties. It's sometimes, often, referred to as the Gang of Eight notification briefing. And I think, without exception, everybody at the table has utilized that tool before.

Congressional oversight of the intelligence activities of our government is necessary, and it must be robust. Thus the provisions of this unique briefing mechanism -- given the availability of that sensitive briefing avenue, at no time should you be in a position where you come to Congress without an answer.

It may be in a different format, but the requirements of our oversight duties and your agencies demand it.

With that, again, I thank you for being here.

This hearing's adjourned.

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WITNESSES:

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ANDREW MCCABE, ACTING FBI DIRECTOR

ADMIRAL MICHAEL S. ROGERS (USN), DIRECTOR, NATIONAL SECURITY AGENCY, AND COMMANDER, U.S. CYBER COMMAND

ROD J. ROSENSTEIN, DEPUTY ATTORNEY GENERAL