

Senator Jeff Sessions
Questions for the Record
Stuart F. Delery, to be Associate Attorney General of the United States

1. **Do you believe that there are any limits to the President's authority to suspend enforcement of our civil immigration laws? If so, what are they?**

RESPONSE: Yes. As explained in the Office of Legal Counsel's November 19, 2014 memorandum entitled "The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others" ("OLC Memo"), "[i]mmigration officials' discretion in enforcing the laws is not, however, unlimited. Limits on enforcement discretion are both implicit in, and fundamental to, the Constitution's allocation of governmental powers between the two political branches." OLC Memo at 5. Citing the Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985), OLC recognized that "Congress 'may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue'." OLC Memo at 6.

2. **On November 19, 2014, the Office of Legal Counsel – which you supervise – issued a memorandum opinion for the Secretary of Homeland Security and the Counsel to the President, entitled "The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others."**
 - a. **Did you personally approve the issuance of the memorandum by the Office of Legal Counsel?**
 - b. **Do you agree with the conclusions in the memorandum?**

RESPONSE: The Office of the Associate Attorney General does not supervise the Office of Legal Counsel, and I did not see or approve the memorandum before it was issued. Because I supervise the Civil Division, however, I am responsible for supervising the Department's handling of litigation related to the DHS deferred action guidance, including *Texas v. United States*, in which a petition for certiorari is currently pending before the Supreme Court. The briefs the Department has filed in those cases are the best description of the Government's position.

3. **At the hearing, I asked you to identify the number of people who, in connection with the IRS/Lerner investigation, were interviewed at the White House and their names. Please list the names and positions of witnesses who were interviewed in connection with this investigation who are or were staff within the Executive Office of the President.**

RESPONSE: I was not involved in supervising the investigation. As the Department informed Congress in its October 23, 2015 letter regarding the criminal investigation of the handling of tax-

exemption, in collaboration with the FBI and Treasury Inspector General for Tax Administration, the Department's Criminal and Civil Rights Divisions conducted an exhaustive probe. That probe included more than 100 witness interviews and the collection of more than one million pages of Internal Revenue Service (IRS) documents and review of almost 500 tax-exemption applications. Top-level IRS officials were interviewed, including a former IRS Commissioner, former Acting IRS Commissioner and former Exempt Organizations Director Lois Lerner, along with other key personnel. The Department's investigation analyzed the culpability of every IRS employee who played a role in coordinating for review applications or handling them afterwards, from line-level revenue agents and managers to senior executive officials.

4. **The Justice Department's investigation of the IRS/Lerner matter found substantial evidence of mismanagement and poor judgment. Has there been any disciplinary action taken pursuant to that finding?**

RESPONSE: As the Department informed Congress in its October 23, 2015, letter, based on the recommendation of experienced career prosecutors and supervising attorneys at the Department who conducted an exhaustive investigation, the Department has closed its investigation and will not seek criminal charges. Professional discipline is ultimately up to the IRS, and I respectfully refer you to that agency for further information.

5. **Are there any complaints by Justice Department investigators regarding how the IRS/Lerner investigation was conducted?**

RESPONSE: I was not involved in supervising the investigation. However, having inquired in response to your question, I am not aware of any complaints by Justice Department investigators related to this investigation.

6. **In your view, should churches or religious organizations that advocate for traditional marriage lose their tax exempt status for "political activity" in the wake of the Supreme Court's decision in *Obergefell v. Hodges*?**

RESPONSE: Current law prohibits political campaign activity by charities and churches by defining a tax-exempt 501(c)(3) organization as one "which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." 28 U.S.C. § 2522(a)(2). Responsibility for determining compliance with this statute falls in the first instance to the IRS. The IRS has issued guidance clarifying that "the ban by Congress is on political campaign activity regarding a candidate; churches and other 501(c)(3) organizations can engage in a limited amount of lobbying (including ballot measures) and advocate for or against issues that are in the political arena." Application of this legal standard would depend on analysis of the facts and circumstances of a particular case. As a general matter, however, First Amendment protected issue advocacy, including the advocacy your question seems to describe, would not violate Section 2522(a)(2). If any issues regarding the tax-exempt status of churches or religious organizations arise, I will base my analysis on the statutory requirements and relevant court precedent.

7. **Do you believe that the First Amendment protects persons who, based on sincerely held religious beliefs decline to provide a service, such as baking a cake for a same-sex marriage wedding ceremony, from being forced by law to do so?**

RESPONSE: Questions about the interaction of the equal rights for gays and lesbians and religious beliefs against same-sex marriage are beginning to arise, and I am committed to looking at any such question that comes before the Department fairly, based on the facts of each case, and what the Constitution, the Religious Freedom Restoration Act (RFRA), and other relevant sources of law require. This is an emotionally charged issue. Same-sex couples want equal access to the institution of marriage, and it is now settled that the Constitution entitles them to that equal access. On the other hand, some Americans believe that marriage between people of the same sex conflicts with their sincere and deep religious views. The First Amendment protects those views, as the Supreme Court in *Obergefell v. Hodges* made clear: “[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.” *Obergefell*, 576 U.S. ___, 135 S. Ct. 2584, 2592 (2015). As a general matter, under RFRA, the government in most circumstances may not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, unless it demonstrates that the application of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. If called upon to apply this standard in any particular circumstance, I will base my decisions on the law as Congress enacted it and the courts have determined it, relying on the analysis of the talented and dedicated career attorneys who carry the work of the Department and approaching the questions with respect for all perspectives.

8. **You signed and filed briefs in the U.S. Supreme Court in the cases of *Obergefell v. Hodges* and *United States v. Windsor*. Do you stand by all of the arguments in the briefs you signed and filed in those cases?**

RESPONSE: Yes.