

**Senator Jeff Sessions**  
**Questions for the Record**  
**William Orrick, III**

1. **Do you agree that federal law is clear that state and local law enforcement can initiate requests to the Department of Homeland Security to verify the immigration status of individuals for any purpose authorized by law and that no agreement between state and local law enforcement and the federal government is required for a state or local officer or employee to communicate with the Attorney General regarding the immigration status of any individual?**

Response: I agree.

2. **In your opinion, what determines whether a state law is preempted, laws passed by Congress or the policy of a particular administration? Please explain your answer.**

Response: Case law is clear that the Constitution, laws passed by Congress, and federal regulations implementing those laws, not a particular administration's policy, determine whether a state law is preempted.

3. **If a state chooses to assist in enforcing federal laws using its own resources and Congress has not expressly stated whether it states to assist in enforcing those federal laws, is the state preempted from assisting?**

Response: In the immigration context, *Arizona v. United States* makes clear that there are certain areas where the state is preempted from acting. In other areas, the same preemption concerns may not apply.

- a. **Do you agree that the doctrines of federalism and dual sovereignty ensure that states are empowered to enforce federal laws unless Congress expressly prohibits them from doing so? Please explain your answer.**

Response: Again, in the immigration context, *Arizona v. United States* makes clear that there are certain areas where the state is preempted from acting to enforce federal laws. In other areas, the same preemption concerns may not apply. I have never researched this question outside of the immigration context, and since this is an issue which may come before me if I am fortunate enough to be confirmed, I am hesitant to comment further. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

4. **In your view, under what circumstances is it acceptable for state and local governments to enforce immigration laws?**

Response: In *Arizona v. United States*, the Supreme Court explained that with respect to immigration, as in other matters, state and local enforcement measures are preempted only where Congress has "withdraw[n] specific powers from the states by enacting a

statute containing an express preemption provision”; where states or localities seek to regulate “a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance”; or where the state or local laws “conflict with federal law.” 132 S. Ct. 2492, 2500 – 2504 (2012).

**5. What limits are there on the executive’s discretion in deciding whether to enforce the law?**

Response: I have never researched this question and do not have an answer to it.

**a. Do you believe the President’s prosecutorial discretion authority gives him the power to exempt whole classes of individuals from application of the law?**

Response: This is an issue which might come before me if I am confirmed and as a result I am reluctant to express any views on this topic. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

**b. Do you agree that the “faithfully execute” clause in Article II of the Constitution requires that a President enforce the laws passed by previous Congresses and signed by previous Presidents?**

Response: I am not aware of any precedent suggesting that the President’s duty to faithfully execute the laws of the United States varies depending on which Congress enacted, or which President signed, the statute at issue.

**c. Do you agree that the Constitution grants Congress plenary authority over immigration policy?**

Response: In *Arizona v. United States*, the Supreme Court stated that “[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.” 132 S. Ct. 2492, 2498 (2012). If confirmed as a judge and presented with a case raising a question about the extent of Congress’s authority over immigration, I would follow all applicable precedents of the Supreme Court and the Ninth Circuit.

**6. In a speech at the Immigration and Customs Enforcement Office Principal Legal Advisors Conference, you defended the President’s authority to choose not to prosecute certain illegal aliens because “the judges before whom we argue our cases will do their best to do justice, and that may mean that they’ll be tempted to interpret the law in a results-oriented way.”**

**a. Do you believe it is ever proper for a judge to engage in results-oriented decisionmaking? If so, under what circumstances?**

Response: No. I do not believe it is ever proper for a judge to engage in results-oriented decisionmaking.

**b. Does this statement accurately reflect your judicial philosophy?**

Response: No. As stated above, it is not proper for a judge to engage in results-oriented decisionmaking. In my speech, I was actually criticizing the unfortunate reality that immigration cases can be particularly susceptible to judges who try to find a way not supported by the law to help sympathetic petitioners. If judges do so, they damage the INA and the government's ability to enforce the law as Congress intended. This risk of adverse decisions in sympathetic cases is one reason why, in order to fulfill their responsibility to enforce the INA effectively, government lawyers must be aware of the entire context of a case in determining whether the exercise of prosecutorial discretion is appropriate.

**c. Do you believe a judge should consider his or her own values or policy preferences in determining what the law means? If so, under what circumstances?**

Response: No.

**7. When Attorney General Holder announced the Justice Department would sue Utah over the provision of its immigration law that requires law enforcement to check individuals' immigration status, he also stated that the Department would not challenge the state's guest worker laws, even though they were – according to the Attorney General – “clearly preempted by federal law.” The Attorney General stated that “in light of the constructive conversations the Department continues to have with Utah officials about these provisions pursuant to the Justice Department's long-standing policy of exploring resolution short of litigation before filing suit against a state, the department is not challenging these provisions today.”**

**a. To your knowledge, did the Justice Department ever provide Arizona, Alabama, or South Carolina the opportunity to “explore a resolution short of litigation” before suing them?**

Response: Yes, to my knowledge then Assistant Attorney General West and Assistant Attorney General Perez met with the Attorneys General of Arizona, Alabama and South Carolina prior to filing suit in order to explore resolution short of litigation, just as they met with the Attorney General of Utah.

**b. What specific differences between the enforcement law and the guest worker law led to the decision to challenge one but not the other?**

Response: The Attorney General has been unequivocal that the guest worker provision is preempted and will be challenged unless it is repealed or modified in a way that comports with federal law. As the Attorney General has indicated in public

statements, however, the guest worker law does not go into effect until July 2013, whereas the enforcement laws would have gone into effect in 2011 unless they were enjoined.

- c. **To what extent did political considerations influence the decision not to challenge Utah's guest worker law?**

Response: To my knowledge, none.

- d. **What was your role in determining whether the Justice Department would challenge Utah's guest worker law and the state's enforcement law?**

Response: I helped supervise the review of Utah's immigration statutes. I reviewed the work of the team assigned to the analysis of those statutes, helped coordinate the necessary fact-gathering with the Departments of Homeland Security and State and disseminated the litigation team's analysis to those Departments as well as internally at the Department of Justice. I was a member of groups that met with Utah Attorney General Shurtleff on two occasions. I met several times with others within the Department, as well as with attorneys from DHS and the State Department, to discuss the possible litigation scenarios.

- e. **Do you believe that a State should be able to issue work permits to illegal aliens?**

Response: This is an issue that might come before me in the future if I am confirmed, and I am reluctant to express any views on it. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

8. **In *Liu v. Holder*, you are listed as counsel of record along with Assistant Attorney General of the Civil Division Tony West. In that case, the Justice Department argued that the court should apply heightened scrutiny, rather than rational basis review, to classifications based on sexual orientation, and hold Section 3 of the Defense of Marriage Act (DOMA) unconstitutional. It is my understanding that the courts have rejected your arguments.**

- a. **Do you agree that the Executive Branch has a clear and unwavering duty to vigorously defend the constitutionality of any law for which a reasonable defense may be made?**

Response: I agree generally with the proposition espoused above, except in the rare instances where a determination by the President and Attorney General has been made that the law is unconstitutional or where the law represents an inappropriate legislative interference with the Executive Branch.

- b. **Do you agree that there is a difference between refusing to defend a law that the administration regards as unconstitutional and refusing to defend a law that the administration opposes on policy grounds?**

Response: Yes.

- c. **Do you agree that if an administration refuses to defend clearly constitutional laws based on its own policy views, it is a violation of the oath to protect and defend the Constitution and the laws of the United States?**

Response: Yes.

- d. **Would you characterize the Justice Department's brief in *Liu v. Holder* as a "vigorous" defense of the law?**

Response: I would characterize the brief as a vigorous assertion of the United States government's position in light of the President's and Attorney General's determination regarding the constitutionality of Section 3 of DOMA.

- e. **Do you agree that there are several reasonable arguments in defense of DOMA, including that the law is rationally related to legitimate government interests in procreation and childrearing, or do you agree with the administration that it is not rationally related to those ends?**

Response: As this is an issue which may come before me if I am fortunate enough to be confirmed, I am hesitant to express any views on it. I can assure you that if I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

- f. **Do you acknowledge that the Bush administration successfully defended DOMA using precisely the foregoing arguments?**

Response: Yes.

- g. **Do you acknowledge that those same arguments have been widely relied on by federal and state courts in upholding states' traditional marriage laws?**

Response: Yes, some courts have upheld states' marriage laws using the same or similar arguments.

9. **Do you believe there is a federal constitutional right to same-sex marriage?**

Response: Neither the Supreme Court nor the Ninth Circuit has recognized a federal constitutional right to same-sex marriage. If I were presented with a case raising this issue, I would follow all applicable legal authorities and precedents.

**a. Have you ever expressed an opinion as to whether there is a federal constitutional right to same-sex marriage? If so, what was that opinion?**

Response: I have taken litigation positions both for and against DOMA's constitutionality while representing the United States. I do not recall expressing an opinion outside the context of those cases regarding DOMA's constitutionality or whether there is or is not a federal constitutional right to same-sex marriage.

**10. In your questionnaire, you stated that part of your duties at the Justice Department include "spearhead[ing] or participat[ing] in a wide range of projects, including matters related to... tobacco litigation." Please explain in detail the work you have done with respect to tobacco litigation matters.**

Response: When I arrived at the Department, I was asked to join the team in the Civil Division that was considering whether to recommend to the Solicitor General to seek en banc review or certiorari in the *United States v. Philip Morris* tobacco litigation. I attended several meetings on that topic. Once certiorari was denied, the case was remanded to district court and I had no material further involvement in tobacco litigation matters after that time.

**11. Do you believe that the death penalty constitutes cruel and unusual punishment under the Constitution? Please explain your answer.**

Response: It is settled law that the death penalty does not constitute cruel and unusual punishment under the Constitution. I will have no difficulty applying controlling precedent on this issue.

**12. Do you believe that the death penalty is an acceptable form of punishment? Please explain your answer.**

Response: Again, Supreme Court precedent establishes that the death penalty is a constitutional form of punishment and I will have no difficulty applying controlling precedent in this regard.