

**Senator Grassley  
Questions for the Record**

**Cono Namorato  
Nominee, Assistant Attorney General for the Tax Division  
July 31, 2015**

1. In the past, you have expressed concern about both the complexity of the tax code and the lack of transparency for certain types of transactions. In what ways do these two issues impact the current tax system? What can be done to diminish the risk of tax fraud?

**Answer: The complexity of the tax code and the lack of transparency for certain types of transactions enable tax cheats to manipulate the system. Reducing the complexity of the tax code and requiring more transparency would certainly help to diminish the risk of tax fraud. I also assure you that if confirmed, in this and in all areas, I would work on advancing the core mission of the Tax Division: enforcing the nation’s tax laws fully, fairly, and consistently, through both civil and criminal litigation, in order to promote voluntary compliance with the tax laws, maintain public confidence in the integrity of the tax system, and promote the sound development of the law.**

2. I have misgivings regarding the way the Earned Income Tax Credit or EITC is being administered. The EITC is a magnet for tax fraud. According to a recent GAO Report, the EITC alone improperly paid out \$17.7 billion in the last year. What is the best approach to address this massive misallocation of taxpayer funds and widespread fraud?

**Answer: I share your concern regarding misuse of the EITC. As you may know, the Internal Revenue Service (the IRS) refers fraud cases involving EITC to the Tax Division and the Tax Division properly evaluates and vigorously prosecutes as warranted. I assure you that if confirmed, I would look forward to ensuring that the Tax Division continues to take appropriate enforcement action in these matters.**

3. In the past, you have been critical of the IRS for failing to enforce speech restrictions on religiously affiliated 501(c)(3) organizations. Under the Code, religiously affiliated 501(c)(3) organizations are prevented from engaging in certain types of political activity. First, they may not have a “substantial part” of their activities dedicated to influencing legislation. Second, they may not participate or intervene in political campaigns for or against a candidate for public office.

- a. If confirmed, to what extent will you focus on enforcing the ban against politicking and lobbying for religiously affiliated 501(c)(3) tax-exempt organizations?

**Answer: The Tax Division has no role in administering the rules against politicking and lobbying by religiously affiliated 501(c)(3) tax-exempt organizations. If I am confirmed and the IRS were to determine that a church or pastor violated the restrictions on political activity and referred the matter to the Tax Division, I would ensure that the matter was evaluated based on the available evidence and the applicable law, and litigated if warranted.**

- b. If confirmed, what guidance will you offer to the IRS concerning whether or not it should be monitoring the content of sermons?

**Answer: The Tax Division's role is limited on this issue. If I am confirmed, I would ensure that any case referred by the IRS for litigation on this matter would be evaluated based on the available evidence and the applicable law, and litigated if warranted.**

4. You have written extensively about Circular 230's potential to facilitate enforcement of the Tax Code. Circular 230 sets forth the regulations, sanctions, and disciplinary rules that apply to attorneys, CPAs, and other tax professionals when practicing before the IRS. The statute provides the IRS with the ability to censure, suspend, disbar, and fine those who fail to comply with the requirements.

- a. If confirmed, what role will you have in the enforcement of provisions under Circular 230?

**Answer: The enforcement of provisions under Circular 230 is within the jurisdiction of the IRS. The Tax Division's only role would be to litigate disciplinary action in Federal District Court after a practitioner exhausts all of his or her administrative remedies. In my experience, this type of litigation is extremely rare. However, if I am confirmed, supporting the disciplinary actions taken by the Office of Professional Responsibility would be a priority.**

- b. How concerned are you about violations of Circular 230? Please elaborate.

**Answer: As a former Director of the IRS Office of Professional Responsibility (IRS OPR), I believe that all practitioners who practice before the IRS should comport with the rules promulgated by the Treasury Department. I believe that the IRS OPR plays a vital role in educating practitioners and holding accountable those who fail to meet their obligations as outlined in Circular 230.**

5. A series of recent court decisions have limited the IRS’s statutory authority to promulgate regulations under Circular 230 pursuant to the Administrative Procedures Act (“APA”).<sup>1</sup> Recently, the APA was applied to the practitioner standard in *Ridgely v. Lew*. In *Ridgely*, the court determined the IRS could only regulate the “practice” of tax professionals such as CPAs as representatives of persons before the Service. The court held that a “representative” is one with “authority to bind others” and “practice” only encompasses “an investigation, adversarial hearing, or other adjudicative proceeding.” In your view, what impact do these decisions have on the use of Circular 230?

**Answer: In light of the decisions in *Loving* and *Ridgely*, the scope of Circular 230 is uncertain at this point. While I have not closely monitored this issue, I am aware of proposals to amend 31 U.S.C. § 330 to clarify the scope of Circular 230.**

6. On September 8, 2008, you co-authored a letter to the Internal Revenue Service (IRS) expressing concerns regarding “Pulpit Freedom Sunday,” an initiative launched by the Alliance Defense Fund (ADF). The letter was directed to the IRS’s Office of Professional Responsibility (OPR) and requested that the office: “(i) investigate whether, in the course of promoting and conducting the Pulpit Initiative, those lawyers working for ADF on the Pulpit Initiative have violated Circular 230, and (ii) take immediate and appropriate action to address this flagrant disregard of the ethical rules for practice before the IRS.”

ADF launched the Pulpit Freedom Sunday to encourage pastors and other religious leaders to speak openly about political candidates to their congregants once per year. The goal of the initiative is “to generate test cases [to] carry to the U.S. Supreme Court” in order to challenge the constitutionality of the political activity ban on First Amendment grounds.

The letter you co-authored asserted that “ADF, through its staff, designed the Pulpit Initiative to assist churches in violating section 501(c)(3) which expressly prohibits charities from intervening on behalf of, or in opposition to, any candidate for public office. ADF’s Pulpit Initiative openly incites religious leaders at churches to transgress this rule by preaching sermons on September 28, 2008 that constitute outright political campaign intervention.” The letter expressed concern that “[t]his activity—coordinating mass violation of Federal tax law—is clearly “incompetent and disreputable conduct” defined in and subject to sanction under Circular 230.”

- a. What prompted you to coauthor this letter to the IRS?

**Answer: I was prompted to write because I believe the conduct being advocated was a violation of federal law and Circular 230.**

- b. What client interest, if any, were you representing when you contacted the IRS?

**Answer: I was not representing any client interest when we contacted the IRS.**

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<sup>1</sup> See The Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237 (1946); see also 5 U.S.C. § 706(2)(C) (1966).

- c. Have you written any additional letters to the IRS concerning limitations on religiously affiliated 501(c)(3) organizations? If so, please provide them.

**Answer: I have not written any other letters to the IRS concerning limitations on religiously affiliated 501(c)(3) organizations.**

- d. To date, the IRS has not appeared to investigate pastors and churches participating in the Pulpit Initiative. If confirmed, how will you view the Pulpit Initiative and any similar initiatives?

**Answer: If I am confirmed and the IRS were to determine that a church or pastor violated the restrictions on political activity and referred the matter to the Tax Division, I would ensure that the merits of the litigation were evaluated in the same manner as any other referral.**

- e. What policies, if any, will you set for churches who discuss political issues, including political candidates, during sermons, if confirmed?

**Answer: The Tax Division does not set policy in this area. The policy is set by Congress and the Treasury Department.**

7. In this 2008 letter, you contended that “[b]ecause ADF’s lawyers are advising churches about their rights, privileges and liabilities under the Code and planning to assist in the presentation of that information to the IRS, the individuals affiliated with ADF are clearly practicing before the IRS and thus subject to Circular 230.” This appears to be a quite broad view of the scope of Circular 230.

- a. In light of the recent court decisions regarding the APA and Circular 230, do you maintain that the ADF’s actions in the Pulpit Initiative constitute practice within the meaning of Circular 230?

**Answer: All practitioners, regardless of their affiliation, who practice before the IRS should comport with the rules of practice promulgated by the Treasury Department.**

**It is my belief that rendering tax advice should be subject to regulation. Whether this can be done under Circular 230 is uncertain in light of the *Loving* and *Ridgely* decisions discussed above.**

- b. Do you believe the IRS should pursue sanctions and or disbarment against attorneys affiliated with ADF?

**Answer: As noted above, all practitioners, regardless of their affiliation, who practice before the IRS should comport with the rules of practice promulgated by the Treasury Department.**

8. In this same letter you also wrote: “In the course of organizing and publicizing this project, ADF’s staff of attorneys is inducing churches to engage in conduct designed to violate Federal tax law in a direct and blatant manner. This activity—coordinating mass violation of Federal tax law—is clearly ‘incompetent and disreputable conduct’ defined in and subject to sanction under Circular 230.” Pulpit Freedom Sunday encouraged pastors and other religious leaders to speak openly about political candidates to their congregants once per year. ADF stated the goal of this movement is “to generate test cases [to] carry to the U.S. Supreme Court” in order to challenge the constitutionality of the political activity ban.

In 2000, the Supreme Court decided *Legal Services Corp. v. Velazquez*, where it held that rules which effectively impair the advocacy of constitutional claims or which are intended to “distort” the process of constitutional adjudication run afoul of the First Amendment. In *Velazquez*, the Court evaluated the constitutionality of prohibitions on the expenditure of federal funds in “litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system,” imposed on Legal Services Co. (“LSC”).

The Court characterized the efforts by LSC attorneys to engage in structural reform litigation as “private” speech, even though their speech was publicly funded. The Court held that government restrictions attempting to circumscribe constitutional litigation amounted to regulation of private speech. The majority was particularly concerned with the potential for the Act to “foreclose advice or legal assistance to question the validity of statutes under the Constitution of the United States,” which the Court read to forbid LSC attorneys from challenging or questioning laws as inconsistent with the constitutional rights of their clients. The Supreme Court held that the restriction violated the principle of speech neutrality, and importantly, undermined the adjudicative function of the federal courts. The majority held that a lawyer’s advocacy to contest the constitutionality of government laws and policies was “inherent in the nature of the medium” of speech, and that the challenged restrictions impermissibly “alter[ed] the traditional role of attorneys” and “distort[ed] [the] usual functioning” of the legal system. The Court characterized the provision, without further elaboration, as “inconsistent with accepted separation-of-powers principles.”

In light of the Court’s decision in *Velazquez*, do you still believe the conduct by the attorneys at ADF is actionable, either criminally or through administrative procedures such as disbarment?

**Answer: I never believed the conduct of the ADF attorneys was criminal. As far as administrative disciplinary action is concerned, I see a difference in the conduct of the LSC attorneys and the ADF attorneys. The LSC attorneys were representing their clients in an ongoing proceeding. In my opinion, this situation is very different from the ADF attorneys who were advocating in advance of any proceeding that the law be violated.**

9. Usually, when attempting to revoke the tax-exempt status of religious organizations the IRS is required to comply with an extensive review process under the Church Audit Procedures Act (“CAPA”).<sup>2</sup> Complying with CAPA demands considerable time and resources, and an inquiry may only be initiated if “an appropriate high-level Treasury official reasonably believes (on the basis of facts and circumstances recorded in writing) that the church . . . may not be exempt.” CAPA has the effect of “making it more difficult for the IRS to initiate an examination of a church even if there is clear evidence of impermissible activity on the part of the church.” These procedures have historically shielded churches from the revocation of § 501(c)(3) status. In your letter to the IRS concerning the ADF, you urged the IRS to investigate attorneys under Circular 230, to prevent them from establishing a test case for religious organizations. Arguably, by advocating this approach, the protections and administrative requirements contained in CAPA are effectively side-stepped. Does this approach render illusory the protections provided in CAPA?

**Answer: For the reasons set out in #8 above, I do not believe the approach we advocated in our 2008 letter renders the CAPA protections illusory.**

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<sup>2</sup> See Church Audit Procedures Act, 26 U.S.C. § 7611(a)(1)-(3) (2006).