



Office of the Attorney General
Washington, D. C. 20530
February 10, 2014

MEMORANDUM TO ALL DEPARTMENT EMPLOYEES

FROM: THE ATTORNEY GENERAL

SUBJECT: Department Policy on Ensuring Equal Treatment for Same-Sex Married Couples

The Supreme Court's historic decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), declaring Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, unconstitutional, is an enormous triumph for equal protection under the law for all Americans. The Court's ruling gives real meaning to the Constitution's promise of equality for all members of our society, regardless of sexual orientation. The purpose of this memorandum is to discuss specific steps the Department has taken to implement the *Windsor* decision within individual components, and to announce the Department's policy for recognizing lawful same-sex marriages for purposes of the statutes, regulations, and policies enforced, administered, or interpreted by the Department. It is the Department's policy, to the extent federal law permits, to recognize lawful same-sex marriages as broadly as possible, and to recognize all marriages valid in the jurisdiction where the marriage was celebrated.¹

Implementation by Department Components

The Department is committed to ensuring equal treatment regardless of sexual orientation, and to using every tool and legal authority available to combat discrimination and safeguard the rights of all Americans. For example, I previously determined that as a matter of Department policy, the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), should be interpreted to extend to juror strikes based on sexual orientation. See Memorandum to All Department Attorneys, from Eric H. Holder, Jr., Attorney General, Re: *Guidance on Application of Batson v. Kentucky to Juror Strikes Based on Sexual Orientation* (Nov. 12, 2012).

I am proud of the role that the Department played in the litigation challenging Section 3 of DOMA. In February 2011, the President and I concluded that classifications based on sexual orientation should be subject to a heightened standard of constitutional scrutiny under equal protection principles, and that Section 3 of DOMA fails such scrutiny as applied to legally married same-sex couples. This Administration stopped defending Section 3 of DOMA against challenges under the equal protection component of the Fifth Amendment because of the

¹ This policy applies only to individuals in valid marriages, and does not apply to individuals who have entered into another similar relationship, such as a domestic partnership or civil union, recognized under state law that is not denominated as a marriage under the laws of that state. Additionally, marriages celebrated outside the United States that are generally not recognized in the United States, such as non-consensual marriages, are beyond the scope of this policy.

President's and my strong belief that it was unconstitutionally discriminatory. And in *Windsor*, the Supreme Court agreed, holding that Section 3 violates the Fifth Amendment.

Following the Supreme Court's decision, the President directed the Department to work with other federal agencies to ensure that the *Windsor* decision is implemented swiftly and smoothly. In addition to working closely with colleagues across the federal government, the Department undertook a review of all statutes, regulations, and policies it administers or enforces. As a result of this review, various components have released guidance consistent with the Department's policy to treat all individuals equally regardless of sexual orientation.

Components of the Department that administer benefit and compensation programs that implicate marital status, such as the Public Safety Officers' Benefits Program, the September 11th Victim Compensation Fund, and the Radiation Exposure Compensation Program, are issuing guidance providing that they will recognize same-sex marriages valid in the place where they were celebrated, regardless of where the married individuals reside, to the extent consistent with law. The United States Trustee Program issued guidance instructing Program personnel to apply the Bankruptcy Code and Bankruptcy Rules to same-sex married couples in the same manner they are applied to opposite-sex married couples, and to interpret references to marital status in the Code and Rules to cover individuals lawfully married under any jurisdiction with the legal authority to sanction marriages. The Bureau of Prisons has issued a memorandum providing that all of its policies that are affected by marital status, such as visitation at federal prisons and next-of-kin notification regarding inmates, will be interpreted to include same-sex marriages, regardless of the laws of the state where the inmate's spouse currently resides or where the inmate is subsequently placed by the Bureau. And the Bureau of Alcohol, Tobacco, Firearms, and Explosives has made clear that it will treat same-sex surviving spouses in the same manner as opposite-sex surviving spouses for purposes of carrying on a deceased spouse's licensed firearms or explosives business.

Department Policy

Statutes, Regulations, and Policies

Consistent with the Supreme Court's *Windsor* decision and the Department's policy of treating all individuals equally, regardless of sexual orientation, the Department will interpret the terms "spouse," "marriage," "widow," "widower," "husband," "wife," and any other term related to family or marital status in statutes, regulations, and policies administered, enforced, or interpreted by the Department, to include married same-sex spouses whenever allowable. The Department will take the same position in litigation, to the extent consistent with the lawful statutes, regulations, and policies over which other agencies bear primary administrative, enforcement, or interpretive responsibility. The Department will recognize all marriages, including same-sex marriages, valid in the jurisdiction where the marriage was celebrated to the extent consistent with law. It is the Department's policy to recognize lawful same-sex marriages as broadly as possible, to ensure equal treatment for all members of society regardless of sexual orientation.

In some circumstances, the Department may be called upon to take a position in litigation on the validity of a marriage for purposes of a statute or regulation enforced by the Department. For example, the Department enforces certain criminal provisions that depend on marital status. *See, e.g.*, 8 U.S.C. § 1325(c) (criminalizing entry into a marriage for purposes of evading any provision of immigration law); 18 U.S.C. § 115 (prohibiting the act of influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member, where “family member” includes the “spouse” of a Federal official); 18 U.S.C. § 208 (criminalizing financial conflicts of interest of federal employees, including the financial interests of an employee’s “spouse”)²; 18 U.S.C. § 1116 (prohibiting the killing of or attempt to kill a foreign official, official guest, or internally protected person, including the “spouse” of the covered individual). Consistent with the Supreme Court’s decision in *Windsor* and the purposes underlying these and other similar federal laws, the Department will take the position that, unless relevant considerations make such an interpretation infeasible, references to married persons in these statutes and regulations include legally married same-sex couples in marriages valid in the jurisdiction where the marriage was celebrated. Prosecutors should apply this directive prospectively for conduct that occurred on or after June 26, 2013, the date of the *Windsor* decision. For conduct that occurred prior to June 26, 2013, prosecutors should consult with their Criminal Division, Appellate Section contacts and should exercise discretion in charging someone on the basis of this directive and criminal provisions that depend on marital status.

Response to Invocations of Marital Privileges

This policy also applies to the Department’s response to invocations of marital privileges. Regardless of whether state or federal law applies, the Department will not challenge assertions of marital privilege by individuals in same-sex marriages valid in the place where the marriage was celebrated on the ground that the marriage is not valid in the state where the individuals reside, or formerly resided.

Rule 501 of the Federal Rules of Evidence provides that “[t]he common law—as interpreted by the United States courts in the light of reason and experience—governs a claim of privilege” unless provided otherwise by the U.S. Constitution, a federal statute, or rules prescribed by the Supreme Court. Fed. R. Evid. 501. Rule 501 further provides that “in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.” *Ibid.*

In criminal cases and civil cases involving federal questions, Rule 501 requires the application of federal common law. “In those situations where a federal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law” because “[w]hen a federal court chooses to absorb state law, it

² The Office of Government Ethics (OGE) issued a legal advisory on August 19, 2013, putting federal employees on notice of the application of 18 U.S.C. § 208 and other federal ethics provisions to individuals in same-sex marriages. *See Effect of the Supreme Court’s Decision in United States v. Windsor on the Executive Branch Ethics Program*, available at <http://www.oge.gov/OGE-Advisories/Legal-Advisories/LA-13-10--Effect-of-the-Supreme-Court-s-Decision-in-United-States-v--Windsor-on-the-Executive-Branch-Ethics-Program/>.

is applying the state law as a matter of federal common law.” Fed. R. Evid. 501 advisory committee notes.

Consistent with principles of common law, federal courts recognize two distinct marital privileges: the confidential communications privilege and the testimonial privilege. *See Trammel v. United States*, 445 U.S. 40 (1980); *Pereira v. United States*, 347 U.S. 1 (1954); *Wolfe v. United States*, 291 U.S. 7 (1934). A marriage must be recognized as valid in order for either marital privilege to be asserted.

Because there is no federal law of marriage, courts have regularly held that the question of whether individuals are spouses for purposes of the privilege must be determined by looking to state law. *See, e.g., United States v. Lustig*, 555 F.2d 737, 747–48 (9th Cir. 1977) (marital privilege depends on existence of valid marriage, as determined by state law); *see also Windsor*, 133 S. Ct. at 2689–90 (“By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States.”); *Trammel*, 445 U.S. at 63 (“[T]he law of marriage and domestic relations are concerns traditionally reserved to the states.”).

In applying federal common law, the Department will consider a marriage valid for purposes of the marital privilege if an individual is or was validly married in a jurisdiction authorized to sanction marriages, regardless of whether the marriage is or would have been recognized in the state where the married individuals reside or formerly resided, or where the civil or criminal action has been brought. The Department’s recognition of all marriages valid in the place where they were celebrated as a matter of federal common law for purposes of the marital privileges is consistent with respecting all marriages sanctioned by the states. It is also consistent with the purpose of the marital privilege to “protect[] . . . marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails.” *Wolfe*, 291 U.S. at 14.

In civil cases in which state law supplies the rule of decision, Rule of Evidence 501 provides that state law governs assertions of privilege. This portion of Rule 501 is unlikely to apply to the large majority of cases in which the United States is a party, as even federal law that adopts or incorporates state law is still generally considered federal law for purposes of Rule 501. However, in the event that the Department is a party to litigation in which state law governs assertions of privilege, as a matter of policy the Department will not challenge assertions of marital privilege by individuals in, or formerly in, a same-sex marriage valid in the place where the marriage was celebrated on the ground that the marriage is not valid in the state where the married individuals reside, or formerly resided.

This memorandum is not intended to be an exhaustive list of the many effects of the directive to broadly recognize same-sex marriages valid in the place where they were celebrated. Further questions about the Department’s recognition of same-sex marriages may be directed to the Chief of Staff, Civil Division, (202) 514-3301.