

**Response of Michael M. McShane  
Nominee to be United States District Judge for the District of Oregon  
to the Written Questions of Senator Chuck Grassley**

- 1. A news article included in your Senate Questionnaire stated you “oppose mandatory minimum sentences and would like to preserve more judicial discretion.”**
- a. Can you please expound on this statement and fully describe how it affects sentencing in your courtroom?**

Response: The news article from the Willamette Week centered on the growing population of women property offenders in the Oregon prison system. The reporter refers to my practice of sending many female repeat property and drug offenders to prison as “unconventional.” She asked if I was advocating for mandatory minimum sentences for property crimes and I told her that I was not. I told her that I was satisfied with our recent, voter-passed initiative that set higher presumptive prison terms for property offenders, but allowed the court some discretion in imposing a departure. I was not referring to all mandatory sentences and I regret that my statement was reported in a manner that appeared so broad in scope.

My personal views have never affected my ability to follow the law in imposing sentences in my courtroom. If the law requires me to impose a mandatory sentence, I have always done so.

- b. As a state court judge, how much discretion did you have in sentencing, compared with federal district court judges?**

Response: Oregon’s sentencing guidelines set the presumptive sentence that a judge must follow unless the judge finds that there are substantial or compelling reasons to depart. In addition, Oregon has reduced judicial discretion by imposing mandatory minimum sentences for most violent felonies and certain drug crimes.

- c. If confirmed, what deference will you give to the federal sentencing guidelines?**

Response: I have practiced as both an attorney and a judge in a state that utilizes sentencing guidelines. The sentencing guidelines were enacted to make sure that similarly situated individuals are treated the same in different jurisdictions and even within the same jurisdiction. If confirmed as a federal district court judge, I would give appropriate deference to the sentences that the Sentencing Commission has created within the guidelines.

**d. In sentencing, what weight would you give to a person's background – such as family status, economic standing, or other perceived social disadvantages?**

Response: I believe that the due process concept of proportionality requires that defendants facing similar charges should receive the same sentence. I do not believe that judges should fashion sentences based on the defendant's background.

**2. What is the most important attribute of a judge, and do you possess it?**

Response: The most important attribute that I possess as a judge is humility. By keeping our ego in check, judges become better learners and listeners in the courtroom. As an attorney, there was nothing more frustrating than appearing in front of a judge whose ego impeded his or her ability to learn and ask questions. Humility is also what allows us to exercise the judicial restraint necessary to set aside our own biases and beliefs.

**3. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?**

Response: A humble temperament allows us to learn from the attorneys who appear before us and listen to the litigants, witnesses, and victims with an open and unbiased mind. A judge must also present him or herself in court as fair by setting aside personal views, applying the law, and using best efforts to make sure that those appearing in court have received a balanced opportunity to make their case. In my fifteen years on the bench, I believe I have met that standard.

**4. In general, Supreme Court precedents are binding on all lower federal courts, and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?**

Response: Yes.

**5. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

Response: As a trial judge, I am occasionally presented with cases of first impression. If I am dealing with a statute I begin with the principles of statutory construction, giving plain meaning to the statute and ascribing to it the presumption that it is constitutional. After that, I would look to analogous precedent in my own jurisdiction. Finally, I would look to similar cases in other jurisdictions.

- 6. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?**

Response: I would apply the decision despite my personal beliefs.

- 7. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?**

Response: Statutes enacted by Congress are presumed to be constitutional. A federal court should only declare a statute unconstitutional if Congress clearly exceeded its authority or the statute violates a constitutional provision based on clear precedent established by the appellate courts.

- 8. In your view, is it ever proper for judges to rely on foreign law, or the views of the “world community”, in determining the meaning of the Constitution?**

Response: No.

- 9. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?**

Response: I strongly support the notion of judicial restraint and, in particular, the need for trial judges to base decisions solely on precedent and the plain meaning of statutes. This has been my practice for the fifteen years that I have been a state court judge.

- 10. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?**

Response: Throughout the nomination process, both sides of the criminal and civil bar in my jurisdiction have been enthusiastically supportive of my potential appointment to the federal bench. I enjoy this support because the attorneys know I do not come into the case with bias or a personal agenda. They know that their clients will be treated respectfully and that they will get a fair hearing.

- 11. If confirmed, how do you intend to manage your caseload?**

Response: In civil cases, I would use the case management rules found in the federal rules of civil procedure to assure that discovery and motion practice are being completed in a timely manner. I would hold regular status hearings in criminal cases to ensure that both

sides are complying with discovery deadlines. I would issue decisions as quickly as possible so as to not hinder the litigation. I would set realistic dates and set an expectation in my courtroom that the attorneys will be held to those dates.

**12. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?**

Response: Judges do have a role in controlling the pace and conduct of the litigation by being accessible, by setting clear expectations during case management conferences, by issuing rulings in a timely manner, by holding attorneys to the standards of professionalism, and by setting firm trial dates.

**13. As a judge, you have experience deciding cases and writing opinions. Please describe how you reach a decision in cases that come before you and to what sources of information you look for guidance.**

Response: In deciding cases and issuing opinions, I begin with a respectful analysis of the memoranda of the attorneys before me. I rely on counsel to outline the basic legal structure of the issue and I expect them to assist me in focusing on the issues during oral argument. I then look to the statutes and the case law that control the issue and apply it to the facts of the case.

**14. Please describe with particularity the process by which these questions were answered.**

Response: I received the questions via email from the United States Department of Justice on February 20, 2013. I drafted my responses that same day. On February 21, I reviewed my responses with an official at the Department of Justice and submitted my final response on February 24.

**15. Do these answers reflect your true and personal views?**

Response: Yes.

**Response of Michael J. McShane  
Nominee to be United States District Judge for the District of Oregon  
to the Written Questions of Senator Ted Cruz**

Judicial Philosophy

**Describe how you would characterize your judicial philosophy, and identify which US Supreme Court Justice's judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.**

Response: My judicial philosophy is that the rule of law holds our constitutional system together and judges must apply it irrespective of popular opinion or personal beliefs. Within that framework, the role of the judge is one of restraint; restricting him or herself to applying the law to the facts and not ascribing to the law a purpose or meaning that fits the world view of the judge. I am not familiar enough with any one Supreme Court Justice's judicial philosophy to say which is most analogous with mine. I greatly admire those Justices, such as Hugo Black, who valued the importance of judicial restraint, even in those moments when it clashed with popular opinion.

**Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?**

Response: Yes. I believe that the original intent of the framers of the Constitution should be used to interpret the Constitution. I also believe that determining the public meaning of the text at the time it was written is "a critical tool of Constitutional interpretation." *District of Columbia v Heller*, 554 U.S. 570 (2008).

**If a decision is precedent today while you're going through the confirmation process, under what circumstance would you overrule that precedent as a judge?**

Response: No circumstance exists in which I would overrule precedent.

Congressional Power

**Explain whether you agree that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).**

Response: If confirmed to be a District Court Judge, I would follow the holding of *Garcia* and any other relevant precedent of my Circuit and of the United States Supreme Court.

**Do you believe that Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?**

Response: Congress has the authority to regulate what is described by the Supreme Court as “three broad categories” of activity. *Unites States v Lopez*, 514 U.S. 549 (1995). This authority includes the power to regulate the channels and instrumentalities of interstate commerce, as well as activities that have a substantial effect on interstate commerce.

### Presidential Power

#### **What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?**

Response: This is not an area of law that I have been presented with during my career as an attorney or a judge. It is my general understanding that the President’s power to issue executive orders or executive actions “must stem either from an act of Congress or from the Constitution itself.” *Youngstown Sheet and Tube v Sawyer*, 343 U.S. 579, 586 (1952). Any executive order or action that is alleged to exceed these limitations would be subject to judicial review.

### Individual Rights

#### **When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?**

Response: A right is “fundamental” for purposes of substantive due process only when it is defined as such by the precedent of the Supreme Court. This would include only those rights that have been found to be “deeply rooted in our Nation’s history and tradition” and “implicit in the concept of ordered liberty.” *Snyder v Massachusetts*, 291 U.S. 97, 105 (1934); *Palko v Connecticut*, 302 U.S. 319, 325 (1937). It is an area in which courts are cautioned to exercise great restraint, “lest the liberty of the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” *Washington v Glucksberg*, 521 U.S. 702,720 (1997).

#### **When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?**

Response: A classification should be subject to heightened scrutiny if it meets the definition of a “suspect classification” or a “quasi suspect classification” as defined by the precedent of the Supreme Court.

#### **Do you "expect that [15] years from now, the use of racial preferences will no longer be necessary" in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).**

Response: I hold no personal expectations as to the use of racial preferences in public higher education 15 years from now. As a trial judge, I would not use my personal expectations as a guide in applying applicable law.