

**Responses of Vernon S. Broderick
Nominee to be United States District Court Judge for the Southern District of New York
To the Written Questions of Senator Chuck Grassley**

1. Do you believe that the Fair Housing Act authorizes disparate impact claims?

Response: If confirmed as a district court judge and were I to have a case come before me presenting the issue of whether the Fair Housing Act authorizes disparate impact claims, I would apply the relevant precedent of the Supreme Court and the Second Circuit Court of Appeals. I am not an expert and have not studied the Fair Housing Act or the relevant Supreme Court or Second Circuit precedents so as to have formed a belief concerning whether the Fair Housing Act authorizes disparate impact claims.

2. The New York County Lawyers' Association Task Force on the Housing Court issued a report (in 2006) on the protocol for judges in cases involving unrepresented litigants in housing court that advocated for a "more active role" for judges.

a. What role, if any did you have in drafting the report or contributing to this particular issue.

Response: I did not have any role in drafting the report or contributing to this particular issue. At most, I may have attended meetings where this issue was discussed, along with other issues, but I have no specific recollection of such a meeting.

b. What do you believe is the appropriate role for a judge to take in proceedings before them? What would you characterize as a 'more active role'?

Response: A judge should fairly and impartially find facts (where appropriate) and then faithfully apply the law to those facts. In doing so, a judge should respect the rule of law and should not favor any particular party or outcome. In other words, a judge should apply laws equally, predictably, transparently and in the same fashion to all regardless of the identity of the litigants. I do not know what it means for judges to have a "more active role." However, a district judge has an obligation to ensure equal justice for all litigants. If I am confirmed, I would consult with materials and other resources provided to judges for handling cases where one or more parties are appearing pro se.

c. If confirmed, what role do you intend to take in the cases that come before you?

Response: Please see my response to question 2b above.

3. The Criminal Law Committee of the Association of the Bar of the City of New York issued a report on a bill that proposed to amend criminal procedure and executive law to permit conditional sealing of some drug offenses.

a. What role, if any, did you play in the drafting and issuance of this report?

Response: I do not recall playing any role in the preparation, drafting, or issuance of this report.

b. Are you supportive of or opposed to sealing of drug offenses?

Response: If confirmed, I would apply the applicable laws and regulations related to sealing of records without regard to my personal views, if any.

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

Response: A judge should apply laws equally, predictably, transparently and in the same fashion to all regardless of the identity of the litigants. In applying the law a judge should only address those issues presented. It is also important that a judge be fair, respectful, courteous, patient, humble, open-minded, evenhanded and decisive. I believe I possess these attributes.

5. 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: An appropriate judicial temperament is critical to a judge's ability to administer justice faithfully and to instill confidence in litigants and the general public in the judicial system. It is particularly important that a judge be fair, respectful, courteous, patient, humble, open-minded, evenhanded and decisive. If confirmed, I will conduct myself so as to meet this standard.

6. 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?

Yes.

7. What assurances can you give this committee that, should you be confirmed, you will be able to eliminate any potential biases and influences, and that your courtroom decisions will not be affected by any political, economic, or philosophical influences?

I have been a criminal and civil litigator for over 20 years. During that time, I have represented the Government of the United States in criminal matters, represented individuals and corporations as a criminal defense attorney on a retained and pro bono basis and represented corporations in civil matters, including litigations. Throughout my career, I have represented all parties equally without regard to my personal beliefs and regardless of their economic status, political beliefs, or social status. I have also endeavored to treat everyone fairly and with dignity and respect. If confirmed as a district judge, I would be faithful to the

judicial oath and continue my practice of treating everyone fairly and with dignity and respect.

- 8. Do you believe the death penalty is an appropriate form of punishment? If called upon to do so, would you have any personal objection to imposing this sentence? Please explain your response.**

The Supreme Court has held that the death penalty is constitutional and if confirmed I would apply the relevant Supreme Court and Second Circuit Court of Appeals precedents to any case where death is a potential punishment.

- 9. 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: If confirmed as a district court judge and faced with a case of first impression involving the interpretation of a statute or provision, I would start with the text of the statute or provision at issue. If the plain language and structure of the text did not yield a clear answer, I would look to precedents of the Supreme Court and the Court of Appeals for the Second Circuit interpreting analogous provisions, as well as precedent from other federal courts, for guidance.

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

Response: Federal statutes are presumed to be constitutional. However, it is appropriate for a federal court to declare a statute enacted by Congress unconstitutional if it violates a provision clearly set out in the Constitution, or if Congress has exceeded its constitutional authority. In considering a constitutional challenge to a statute, a district judge must apply any applicable precedent of the Supreme Court and the relevant Circuit Court of Appeals. In addition, a district judge must be mindful of the relevant canons of construction, such as the presumption of constitutionality and the doctrine of constitutional avoidance.

- 11. 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? Please explain.**

No, foreign law or the views of the “world community” should not play a role in determining the meaning of the Constitution. The interpretation of the Constitution by the Supreme Court and other federal courts should be used to determine the meaning of the Constitution.

- 12. What is your understanding of the workload in the Southern District of New York? If confirmed, how do you intend to manage your caseload?**

My understanding is that the district judges in the Southern District of New York have a heavy workload. If confirmed, I would establish rules for litigants to provide clear guidance

about my expectations. Among other things, I would set and adhere to firm deadlines for pretrial discovery, motions and trial. I would also monitor my docket closely using chambers or courthouse staff where appropriate, encourage mediation or settlement when possible, make productive use of the magistrate judges where appropriate and strive to decide all matters promptly.

13. 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: It is critically important to the administration of justice that matters are resolved fairly, promptly and efficiently. Judges play a pivotal role in accomplishing that goal by controlling the pace and conduct of litigation. If confirmed as a district judge, I would take the steps described in my response to Question 12 to control and manage each case on my docket.

14. You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?

Response: If confirmed as a district court judge, I would endeavor to apply laws equally, predictably, transparently and in the same fashion to all regardless of the identity of the litigants. I would respect the rule of law and would not favor any particular party or outcome. In addition, I would strive to address only those issues specifically presented by the particular case before me.

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

Response: I received these questions on Thursday, May 30, 2013. Over the course of several days, I drafted responses to the questions. I discussed my responses with a representative of the Department of Justice and authorized the Department of Justice to transmit them to the Committee on Monday, June 3, 2013.

16. Do these answers reflect your true and personal views?

Yes.

**Responses of Vernon S. Broderick
Nominee to be United States District Judge for the Southern District of New York
To the Written Questions of Senator Ted Cruz**

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: Were I to be confirmed as a district court judge, my judicial philosophy would be characterized by a commitment to an impartial adherence to the rule of law and to treating all litigants fairly and with respect. This means that I would exercise judicial restraint in all matters by deciding only the issues in controversy before me and applying prevailing applicable precedent. I do not consider myself to be a student of the judicial philosophies of Supreme Court Justices and therefore do not have a view which Justice's judicial philosophy would be most analogous with my philosophy.

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: District court judges are constrained to follow prevailing legal precedent on all matters in which the Supreme Court or their particular court of appeals has spoken. Therefore, if I am confirmed as a district court judge I would apply the United States Supreme Court and Second Circuit Court of Appeals decisions to interpret the Constitution. One example of a binding decision where the Supreme Court has interpreted the Constitution using originalism is *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: If confirmed as a district court judge, I would be required to apply precedential authority issued by the Supreme Court and the Second Circuit Court of Appeals. Therefore, I would not overrule precedent as a district court judge.

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: *Garcia v. San Antonio Metro Transit Authority* is binding precedent. Therefore, if confirmed as a district court judge, I would apply the precedent articulated by the Supreme Court in *Garcia*.

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

Response: According to *United States v. Lopez*, 514 U.S. 549, 558–59 (1995), the federal government first “may regulate the use of the channels of interstate commerce,” second “may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce” even if threatened only by “intrastate activities,” and third may “regulate those activities having a substantial relation to interstate commerce, i.e., . . . that substantially affect interstate commerce.” If I am

confirmed as a district court judge and presented with a case involving the scope of Congress's Commerce Clause power, I would follow the binding precedent of the United States Supreme Court, including *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), *Gonzales v. Raich*, 545 U.S. 1, 37 (2005), as well as any other relevant precedent.

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

Response: The President's authority to issue executive orders and take executive actions is limited by the Constitution and federal statutes. If the President issues an executive order or acts in a way that violates the Constitution or a statute properly enacted by Congress and a challenge to that action is properly brought before a court, then a federal judge can invalidate the action as exceeding the President's authority. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

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

Response: The Supreme Court discussed the "established method of substantive-due process analysis" in *Washington v. Glucksberg*, observing that "the Due Process Clause specifically protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,'... and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted). For a district court judge sitting in the Southern District of New York, a right is fundamental when it has previously been so characterized by either the United States Supreme Court or the Second Circuit Court of Appeals. If confirmed, I would apply the relevant precedent by these two courts.

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

Response: According to Supreme Court precedent, a classification should be subjected to heightened scrutiny under the Equal Protection Clause when it differentiates based on race, alienage, national origin, or gender. The Court has also explained that heightened scrutiny should be applied when a classification burdens a right the Court has identified as "fundamental," such as the right to vote.

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: If confirmed, I would abide by *Grutter* and all other Supreme Court precedents regardless of my personal views and expectations.