

**Senator Grassley  
Questions for the Record**

**John Tuchi,  
Nominee: U.S. District Judge for the District of Arizona**

- 1. As Criminal Chief in the U.S. Attorney's Office, you worked frequently with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). Please describe your interactions with ATF Special Agent in Charge William Newell regarding the Hernandez case in 2007, in which ATF allegedly planned to have the Government of Mexico intercept firearms traffickers after ATF observed them cross the border with guns.**

Response: I had no interactions with ATF SAC Newell or any other ATF personnel regarding the *Hernandez* matter. The Tucson Office of the United States Attorney, which has a separate Criminal Division supervisory structure with its own Criminal Chief, supported the investigation and prosecuted the matter. In 2007 I was Criminal Chief of the Phoenix Office, whose AUSAs were not involved in the *Hernandez* matter, so I was unaware of the case at the time.

- 2. According to one memo from Mr. Newell:**

**As for the involvement of the USAO, we have discussed the case with them since early on and most recently have had several discussions with John Tuchi, the Criminal Chief. As a matter of fact during a recent conversation with John Tuchi he agreed that if we could provide enough identifying information of [sic] the individuals receiving the firearms in Mexico that he would be willing to explore charging these individuals with conspiracy. It is no secret that we have had prosecution issues with the USAO in Arizona lately, however we are actively pursuing Federal prosecution of this case with them . . . .**

**Does this accurately summarize your interactions with Mr. Newell? Why or why not?**

Response: No. I have never seen the memorandum referenced in this question so I am unable to put SAC Newell's statement in context to answer completely, but I can share my recollection of the one conversation I recall having with SAC Newell generally on this topic. I recall SAC Newell asking me, in or around mid-2009, for general information about what the Phoenix Office's evidentiary requirements were for charging recipients of trafficked firearms with conspiracy where the recipients were outside the United States. I recall outlining the kinds of evidence our prosecutors generally would require to charge a defendant so situated. SAC Newell never raised a specific case or investigation with me in our discussion, so I am unsure what case he might be referring to in the quoted excerpt above. To the extent the memorandum purports to tie my response to any specific case or any specific facts, it does not accurately summarize the interaction. I also do not recall more than one such conversation with SAC Newell about this issue. I do not know

whether SAC Newell had conversations with the Tucson Criminal Division on the same topic.

3. **In February 2010, ATF Counsel in Phoenix, Thomas Karmgard, sent a memo to the U.S. Attorney's Office for the District of Arizona arguing that the office was imposing unnecessary requirements on gun trafficking cases by requiring ATF to have possession of a straw purchased firearm before permitting prosecution. Are you familiar with Mr. Karmgard's memo? Did you read it? If so, what was your response to the memo? Do you agree with Mr. Karmgard's analysis? Please explain why or why not.**

Response: I am not familiar with Mr. Karmgard's memorandum and have not read it. At the time it was issued, I was outside the supervisory chain of the Criminal Division, working as the office's Tribal Liaison, and thus the memo would not have been shared with me. I therefore do not have a response to the memorandum or an opinion about its analysis.

4. **The U.S. Attorney's Office position had apparently arisen in part due to a reading of *United States v. Lopez-Alvarez*, 970 F.2d 583 (9th Cir. 1992). How do you view this case as applying to this issue?**

Response: The relevant portion of *Lopez-Alvarez* with respect to firearms trafficking cases is its holding on the *corpus delecti* rule, setting forth how much evidence independent of a defendant's admission is necessary to corroborate that admission. *Lopez-Alvarez* held that the test for what is sufficient corroboration of an admission is two-pronged: the government must introduce 1) sufficient evidence to establish that the core of the offense occurred; and 2) independent evidence tending to establish the trustworthiness of the statement, unless the confession is "by virtue of special circumstances, inherently reliable." *Id.* at 592. The test set forth by the Ninth Circuit in *Lopez-Alvarez* does not stand as a bar to bringing firearms trafficking cases involving defendant admissions. Whether the government will be able to meet the test in a given case will be determined by the specifics of the admission in that case and the other evidence gathered that relates to it. This is the current approach taken by the United States Attorney's Office in Arizona in assessing charges and because it remains binding Ninth Circuit precedent, if I am confirmed, it also would be my approach to evaluating admissions in criminal matters before me.

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

Response: I believe the most important attribute of a judge is a mindfulness that every matter before them is the most important matter they have. The parties in every matter depend on that judge to be fastidiously prepared, completely focused, possessed of patience, to exhibit fairness and impartiality, and to adhere to precedent and the rule of law. I am confident that I possess this mindfulness, and that if confirmed, I would demonstrate these underlying attributes.

- 6. 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 judge must remember he or she is there to serve and to get the job done right. From that realization flows the need for patience, respect and courtesy in dealing with all others, and for diligence and circumspection in addressing every decision. I believe my reputation among all quarters of my colleagues is for each of these qualities.

- 7. 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. Please describe your commitment to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?**

Response: As a United States District Judge, if confirmed, it would be my duty to follow Supreme Court and Ninth Circuit precedent at all times. I am committed to do so because I am convinced that for our legal system to function appropriately and for litigants to maintain faith in it, courts must apply the law with consistency and predictability.

- 8. 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: I would begin by looking to the text of the statutory or constitutional provision at issue, to determine whether that text's plain meaning would resolve the issue. If not, I would next look at whether the Supreme Court or the Ninth Circuit had decided an analogous issue. Finally, if necessary, I would also look to persuasive authority from other circuit courts.

- 9. 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 precedent.

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

Response: Congressional enactments are presumed Constitutional, and a court should only declare otherwise if, in a justiciable case or controversy, the enactment directly violates a provision of the Constitution and the enactment further cannot be read in any way that would be Constitutional.

- 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.**

Response: No, unless specifically instructed to do so by binding precedent from a higher court.

- 12. 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 understand that the justice system depends on all participants to fulfill their duty in their respective roles without regard to any underlying motivation. For the past 16 years as a prosecutor I have met my duty to reach charging and case disposition decisions dispassionately, focusing on the applicable law and my ethical obligations as an attorney. Political ideology has had no place in performing those duties. Similarly, if confirmed to the district court, my duty would be to follow precedent and to ground decisions in the text of the law, and I would continue to fulfill this duty without regard for any ideology.

- 13. 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: In a prior answer I identified fairness as a core attribute of a judge because without it, the judicial process would lack any integrity or meaning. If confirmed to the district court, I would strive to be fair and objective to every litigant, putting aside any personal views in favor of applying facts to law.

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

Response: If I am confirmed to the district court, active case management on both criminal and civil dockets will be necessary immediately in light of Arizona’s very high caseload. Setting prompt trial dates, issuing standard pretrial scheduling orders, actively and timely addressing discovery issues, and promptly considering and ruling on dispositive motions will move matters assigned to me. I also would plan to adjust my approach to case management based on learning from the many successful district judges already sitting in Arizona and elsewhere.

- 15. 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: Yes. Because the judge is ultimately responsible for the management of his or her calendar, and therefore the delivery of justice to those many litigants who are waiting on that calendar, the judge must have a role in controlling both pace and conduct of litigation. In consultation with counsel, the judge should set reasonable limits on preparation and trial time that move matters forward while observing every litigant’s applicable rights to due process. If confirmed, I would focus on setting prompt and firm

trial dates with continuances only for good cause shown. I also would rely on regular status conferences to keep preparation by counsel on track and to timely identify those cases needing additional attention.

- 16. 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: As a starting point, I would take care to decide only questions properly before the court that actually require decision for resolution of the matter. I would approach each question from a neutral perspective, seeking to resolve it consistent with applicable precedent and in a way that is faithful to the text of the law at issue. I would apply that law to the facts as presented by the parties. I believe the most difficult part of the transition if I am confirmed would be managing the mix of larger or more complex matters, which present issues requiring bigger blocks of time to resolve, and a high volume of smaller or more straightforward matters that nonetheless require hearing time and decisions on motion practice. Interspersing these types of matters in a way that moves them all efficiently toward resolution will be a balancing and learning experience.

- 17. According to the website of American Association for Justice (AAJ), it has established a Judicial Task Force, with the stated goals including the following: “To increase the number of pro-civil justice federal judges, increase the level of professional diversity of federal judicial nominees, identify nominees that may have an anti-civil justice bias, increase the number of trial lawyers serving on individual Senator’s judicial selection committees”.**

- a. Have you had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding your nomination? If yes, please detail what individuals you had contact with, the dates of the contacts, and the subject matter of the communications.**

Response: No, I have had no such contact.

- b. Are you aware of any endorsements or promised endorsements by AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ made to the White House or the Department of Justice regarding your nomination? If yes, please detail what individuals or groups made the endorsements, when the endorsements were made, and to whom the endorsements were made.**

Response: No, I am unaware of any such endorsements or promises.

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

Response: On the afternoon of February 4, I received these questions from the Department of Justice's Office of Legal Policy. I reviewed on-line the law and cases referenced in these questions and prepared my answers. I reviewed those answers with a member of the Office of Legal Policy and on February 10, I finalized them for submission.

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

Response: Yes, they do.

**Response of John J. Tuchi**  
**Nominee to be United States District Judge for the District of Arizona**  
**to the Written Questions for the Record**  
**of Senator Ted Cruz**

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

Response: My judicial philosophy is one of restraint, to decide only those questions necessary for resolution of the matter and to do so through adherence to applicable precedent, remaining faithful to the text of the law to be applied. I would treat all participants in the process with respect, strive to be patient and always to listen, being mindful that no one has a monopoly on the right answers. I do not know enough about the judicial philosophies of the many justices who served on the Warren, Burger and Rehnquist Courts to identify which mine most closely follows.

**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: The Supreme Court has held that the original public meaning of the Constitution at the founding should be used to interpret the Constitution. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 601 (2008). If confirmed I would follow *Heller* and other applicable precedents.

**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: Under no circumstances would I overrule that precedent. The role of a United States District Judge is to follow all applicable precedent as handed down by the Supreme Court and the circuit court of which their district is a constituent.

**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: In *Garcia*, the Supreme Court upheld Congress’s extension of the Fair Labor Standards Act’s protections to state employees under its Commerce Clause powers, rather than impose a “judicially created limitation” on its power. *See Garcia*, 469 U.S. at 551-56. If confirmed to the district court, I would be bound to follow the precedent of *Garcia* wherever it applied to the issues before me, and I would do so.

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

Response: The Supreme Court has held that Congress may regulate under the Commerce Clause in three ways: it may 1) “regulate the use of the channels of interstate commerce”; 2) “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce”; and 3) “regulate those activities having a substantial relation to interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558 (1995); *see also United States v. Morrison*, 529 U.S. 598 (2000). If confirmed to the district court, I would apply *Morrison*, *Lopez* and any other controlling precedent to questions involving Congress’s power to regulate non-economic activity through the Commerce Clause.

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

Response: In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court held that the courts have the authority in a justiciable case or controversy to invalidate presidential actions that 1) violate the Constitution or a statute properly enacted by Congress; or 2) exceed the authority granted to the President by the Constitution or by statute.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court found fundamental rights to be those “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.” *Id.* at 720-21 (internal citations omitted). If confirmed to the district court, I would apply *Glucksberg* and all other controlling precedent in analyzing substantive due process issues.

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

Response: Courts will apply heightened scrutiny under an Equal Protection Clause analysis to any classification created by law that abridges a suspect class or a fundamental right. The Supreme Court has found that race, alienage and gender, among others, are classifications meriting some level of heightened scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

**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 do not have an expectation either way. If confirmed and if facing a question involving race-conscious mechanisms in public higher education, I would identify and apply all controlling precedent.