

Responses of Evan J. Wallach
Nominee to be United States Circuit Judge for the Federal Circuit
to the Written Questions of Senator Chuck Grassley

1. At your hearing, I asked you about the Federal Circuit’s 1999 decision in *Lachance v. White*, where it held that a whistleblower had to present “irrefragable proof” that wrongdoing actually occurred in order to prove the claim. You indicated that, as you understand it, the “irrefragable proof” standard is “very high” and essentially means that the whistleblower must present evidence that “cannot be refuted.” I indicated that I would like you to provide more robust written answers regarding this issue. Please review the statute and case authority, and provide answers to these questions.

a. What is your understanding of the “irrefragable proof” standard?

Response: I examined *Lachance* and cases upon which it relies, as well as several other cases. The CAFC relied in *Lachance* on *Alaska Airlines v. Johnson*. *Johnson* was one of a line of federal contracting cases that discussed the evidence needed to rebut a presumption that public officers perform their duties correctly, fairly, and in good faith. Based on reading those cases, I understand “irrefragable proof” to mean “clear and convincing evidence” as articulated in *Am-Pro Protective Agency v. U.S.* where the CAFC clarified what it characterized as “some confusion” about the use of the phrase “irrefragable proof.”

b. What evidence must the whistleblower present in order to meet the standard?

Response: My understanding is that the whistleblower must present clear and convincing evidence, a standard which is more than a preponderance of the evidence, but less than “beyond a reasonable doubt.” See, *Am-Pro Protective Agency v. U.S.*

c. Based on your review, do you believe *Lachance* is consistent with the text and intent of the statute? (Please answer this question independently of whether you believe *stare decisis* would compel you to apply the standard.)

Response: *Lachance* applies certain presumptions to performance by public officers of their duties and holds that rebuttal of those presumptions requires “irrefragable evidence.” The existence of those presumptions is based on the case authority discussed above. The word “irrefragable” is not found in the statute. I think it would be inappropriate for me to make any more specific comment in case the issue arises in front of me.

2. At your hearing, I asked about your experience in the areas listed below. Though you provided an answer, it was brief (given the time constraints of the hearing). Please take this opportunity to identify what experience you have with these issues.

a. Patent law.

Response: I sat by designation as a district judge in Nevada in a two week jury trial in a patent infringement. The jury found that the plaintiff had infringed on the defendant's patents related to a system of networked gaming devices and awarded \$1.5 million in damages.

b. Trademark law.

Response: As counsel for Nevada media entities, including newspapers and outdoor advertisers, and for Nevada hotel/casinos, I dealt with a number of trademark issues, such as use of similar casino names, over my time in practice.

c. Government contracts.

Response: As Brigade JAG for Nevada's Battle Born Brigade, I reviewed and occasionally participated in the negotiation of contracts. I also studied government contracting in the JAG Advanced Course.

d. Claims against the government.

Response: I represented a government owned contractor operated entity as one of numerous defendants in a radiation cancer case. The defense was based on sophisticated analysis of government contractor liability. I also represented military personnel before administrative boards and, where necessary, challenged those findings on appeal.

3. In *PS Chez Sidney, LLC v. U.S. Intern. Trade Com'n*, 30 C.I.T. 858 (2006), you held the Byrd Amendment to the Continued Dumping and Subsidy Offset Act (CDSOA) of 2000 violated the First Amendment, and therefore struck it down as unconstitutional. The Byrd Amendment requires an affected domestic producer to indicate they support the anti-dumping petition in order to be eligible to receive offset distributions under the CDSOA.

The Federal Circuit, in a 2 to 1 decision, essentially overruled your decision in an appeal from a similar case, holding that the Byrd Amendment neither violated the First Amendment nor the Equal Protection clause.¹ The Federal Circuit held the Amendment regulated commercial speech, which subjected it to a lower level of scrutiny. Do you agree with the Federal Circuit's decision in *SFK USA, Inc. v. U.S. Customs and Border Protection*? Please explain why or why not?

¹ See *SFK USA, Inc. v. U.S. Customs and Border Protection*, 556 F.3d 1337 (2009)

Response: Given that *PS Chez Sidney* is still before me in the CIT, and on appeal to the CAFC, I believe it would be inappropriate for me to comment on any issues related to the case.

4. **Your academic writings have focused on the Law of War. You have argued that waterboarding constitutes torture; that procedures initially afforded detainees in military tribunals violated the Geneva Conventions; and that the Bush Administration erred in determining Al Qaeda and Taliban detainees were not protected by the Geneva Conventions. The Federal Circuit has a limited jurisdiction, and if confirmed, it is unlikely that you will decide cases on these issues. Nevertheless, when you authored these writings, you were serving as a federal judge. Do you think your writings were an appropriate action for a sitting federal judge?**

Response: I considered Canon 4 before and while writing any articles, and on occasion consulted the Code of Conduct Committee, Committee Counsel, and counsel at the Administrative Office of the U.S. Courts. I did my best to present material fairly and dispassionately, and I thought the articles contributed to the law, the legal system and the administration of justice.

5. **In 1992, prior to your appointment to the bench, you authored an opinion piece entitled, *President's Much Ballyhooed Foreign-Policy Prowess and Illusion*. In the article, you questioned President George H.W. Bush's foreign affairs credentials, including the role he played in the fall of the Soviet Union and his execution of the Iraq War. You wrote, the "factual history of any event or policy, the truth or falsity of any statement, seems to have no bearing on what the Republicans are willing to say." Again, these issues are unlikely to arise in your court, if confirmed. And I recognize you authored this article prior to your appointment to the federal bench. Nonetheless, this statement appears to be rather partisan for a judge.**

- a. **Do you think this statement demonstrates appropriate judicial temperament? Do you still stand by it?**

Response: If I had said it as a judge, the statement would not demonstrate appropriate judicial temperament. I wrote it as the lawyer for the Nevada Democratic Party at the request of a local newspaper which had a politically conservative editorial page and wanted an argument from the Democratic side. I would not write a statement like that as a judge, and I would not stand by it today.

- b. **Can you appreciate that some may view this statement as evidence that you have pre-judged the credibility of an entire class of potential litigants? Can you provide any examples from your judicial record that demonstrate this is not the case?**

Response: If anyone thought I ever prejudged any group in any fashion I would deeply regret it. I believe my entire judicial record demonstrates my commitment to judicial neutrality and actual and apparent fairness. I take very seriously my oath to do equal justice, and I strive to let all sides have a complete opportunity to convince me of the merits of their case. One of my goals in any case is to decide cases in a way such that the parties feel, win or lose, that they got a fair shake.

- c. Can you pledge to the Committee that you will treat all litigants who appear before you in a fair and non-partisan fashion?**

Response: Yes

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

Response: Commitment to fundamental rule of law principles, including predictability, uniformity, transparency, neutrality and stare decisis. I believe I do possess that commitment, and I have argued to foreign judges that they should adopt it.

- 7. 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: The important elements of judicial temperament are that a judge should be neutral to all litigants, appreciate the serious nature of their claims and how important they are to the parties, work to understand the parties' positions and the authorities underlying them, be able to act as an efficient case manager while still giving a full opportunity to develop and try a case, and be able to limit and control the tension inherent in any courtroom where attorneys and their clients passionately believe in their cause. On an appellate bench a judge should also be able to work collegially and efficiently with other judges while articulating what that judge believes is the correct result as a matter of law. I believe I meet that standard.

- 8. 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

- 9. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded 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: In a case of first impression I would give the parties a full opportunity to brief the matter and, where appropriate, I would encourage the filing of amicus briefs. Once fully briefed, I would examine all authorities cited by the parties, as well as statutory law on point. If I felt legislative or agency intent was clear, and no Constitutional or legal issues were raised, I would attempt to apply the law as intended. If a statute or regulation was unclear or was not at issue, I would review analogous case law in the Supreme Court and the Federal Circuit, followed, when necessary, by consideration of other case precedent.

10. What would you do if you believed the Supreme Court had seriously erred in rendering a decision? Would you apply that decision or would you use your own judgment of the merits, or your best judgment of the merits?

Response: I am bound by Supreme Court precedent and will continue to be so.

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

A federal court should declare unconstitutional a statute that violates the clear provisions of the U.S. Constitution, where the statute cannot be interpreted to apply, or is not applied, in a constitutional manner.

12. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider, in making this decision?

Response: I would uphold all Federal Circuit precedent unless the precedent is overruled by the Supreme Court or by the Federal Circuit *en banc*.

a. Do you believe the Federal Circuit should revisit its holding in *Lachance*?

Response: Given that the question of whether to grant a rehearing of *Lachance en banc* might come before me for a vote if I was on the CAFC, and I believe I would have to disqualify myself if I had expressed a previous opinion as to the outcome of such a vote, it would be inappropriate for me to comment on that issue.

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

Response: I thought about each question, drafted notes of each area where I should do further research, read *Lachance v. White*, and cases which cited it, and then prepared these answers in draft. I reviewed my draft answers with attorneys from the Office of Legal Policy of the Department of Justice, and then submitted them.

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

Response: Yes.