

**Senator Chuck Grassley
Questions for the Record**

**Elizabeth A. Wolford
Nominee, U.S. District Judge for the Western District of New York**

- 1. In a 2004 column discussing legislation that prohibited same-sex couples from entering into civil marriages but allowed them to form civil unions, you wrote that “the principle of *Brown v. Board of Education* stands for the proposition that the beliefs of the majority have no usefulness when dealing with issues of civil rights.”**

- a. Can you please explain what you meant by that statement?**

Response: In *Brown v. Board of Education of Topeka, Shawnee Co., Kansas*, 347 U.S. 483 (1954), the Supreme Court overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896), and held that the laws of four states, presumably representing the views of the majority of persons in those states, were unconstitutional because they violated the constitutionally protected civil rights of the minority in those states, more specifically the right to equal protection. According to the principle set forth by the Supreme Court in *Brown*, even if the majority was opposed to the notion of allowing racially integrated schools, the Constitution did not allow this majority view to be imposed upon the minority. In other words, if a right is constitutionally guaranteed, then it deserves constitutional protection even if it is unpopular.

- b. Is it your opinion that “beliefs of the majority” are never “useful” when dealing with a major issue such as the redefinition of marriage?**

Response: No.

- c. If confirmed, as a judge, what deference would you give to the “beliefs of the majority” as expressed through the legislative process?**

Response: If confirmed, I would faithfully adhere to established precedent and appropriately defer to the legislative process regardless of my personal opinion. If faced with a constitutional challenge to a duly enacted statute, a court should endeavor to uphold the constitutionality of the statute, if possible, and a statute should only be declared unconstitutional if it clearly violates the Constitution or if the legislature clearly acted beyond its constitutional authority.

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

Response: I believe respect is the most important attribute of a judge, and more specifically respect for the law, respect for the litigants, respect for the justice system, and respect for the position. While a judge should have many other attributes to be effective and fair, I believe

that this fundamental notion of respect is critical to possessing all other necessary attributes, and I believe that I possess it.

- 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: An appropriate judicial temperament is fundamental to the effective operation of a court. Without appropriate temperament, the public's confidence in the judicial system is jeopardized. I believe that an appropriate judicial temperament is reflected by patience, open mindedness, transparency, the ability to listen carefully, and decisiveness. I believe that I possess these qualities.

- 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. 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?**

Response: The ability of a judge to decide cases fairly based upon established precedent, without the influence of any biases or political views, is fundamental to the integrity of our judicial system. If I am fortunate enough to be confirmed, I can assure the Committee and future litigants that I will decide issues presented to me based on the facts and the law, and not based on my personal opinions. During my over twenty years of practice, I have represented clients from all different backgrounds with different views and opinions, and I have endeavored to zealously advocate on behalf of each of those clients without regard to whether their views or position matched my own.

- 6. 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.**

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 precedents to any case where death was a potential punishment.

- 7. 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 I am fortunate enough to be confirmed and I am faced with a case of first impression involving the interpretation of a statute, I would first look to the text of the statute. If the plain language and structure of the text did not yield a clear answer, I would look to precedents of the Supreme Court, the Court of Appeals for the Second Circuit, and other Circuit Courts of Appeals (in that order) interpreting analogous provisions.

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

Response: A court should attempt to decide a case without reaching a constitutional question. If that is not possible, a court should endeavor to uphold the constitutionality of the statute, if possible, and a statute should only be declared unconstitutional if it clearly violates the Constitution or if Congress clearly acted beyond its constitutional authority.

9. 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.

10. What is your understanding of the workload in the Western District of New York? If confirmed, how do you intend to manage your caseload?

Response: It is my understanding that judges in the Western District of New York have a heavy workload. If confirmed, I would endeavor to effectively manage my caseload by working diligently, making judicious use of Magistrate Judges, setting and maintaining reasonable schedules in all matters, encouraging and attempting to facilitate mediation or settlement when appropriate, and striving to decide all matters promptly.

11. 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, judges play an important role in controlling the pace and conduct of litigation, and I believe that it is critical to the administration of justice that matters be resolved fairly, promptly and efficiently. If confirmed, I would take the steps described in my response to Question 10 to control and manage each case on my docket.

12. 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, I would resolve legal issues by looking to relevant Constitutional or statutory provisions and any precedent from the Supreme Court and the Court of Appeals for the Second Circuit, and I would resolve factual issues by looking to the admissible evidence in the record. While I will need to familiarize myself with areas of the law with which I have

not had as much experience as other areas, such as criminal law, I believe that the most difficult part of the transition will be adapting to the somewhat isolating nature of being a judge which I anticipate will be very different than working with a team of lawyers advocating on behalf of a client.

13. 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 not had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group who has identified themselves to me as associated with the AAJ regarding my nomination.

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 not aware of any such endorsements or promised endorsements.

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

Response: I received the questions on July 17, 2013, and prepared responses that day and the following day. On July 21, 2013, I discussed my responses with a representative of the Department of Justice and I authorized the Department of Justice to transmit my responses to the Committee.

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

Response: Yes.

**Response of Elizabeth A. Wolford
Nominee to be United States District Judge for the Western District of New York
to the Questions for Judicial Nominees
from 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: I believe that a judge should be fair and impartial, treat all litigants with respect and patience, and decide only the matter before the court with faithful adherence to the law and binding precedent. I have not studied the Justices of the Supreme Court so as to be able to identify and analogize to their judicial philosophies, although I would note that a District Judge would be bound to follow the precedent of the Supreme Court and a District Judge's personal views or philosophy should play no part in his or her decisionmaking.

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: If a District Judge is faced with a Constitutional question, he or she should look to whether there is any binding precedent from the Supreme Court or the Court of Appeals for their Circuit. 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 I am confirmed as a District Judge, I would follow United States Supreme Court precedent, including any binding precedent where the Court used originalism to interpret the Constitution.

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 I am confirmed as a District Judge, I would be bound by controlling precedent and I would have no authority to overrule it.

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: This decision by the Supreme Court is binding on lower courts, and therefore I would abide by it if confirmed as a District Judge, regardless of my personal views, if any.

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 identified three general categories of activity that Congress may regulate under its Commerce Clause power: (1) the use of channels of interstate commerce; (2) instrumentalities of interstate commerce and the persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. In *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court articulated limitations on the reach of the Commerce Clause power to certain non-economic activities. In *Gonzales v. Raich*, 545 U.S. 1 (2005), Justice Scalia observed that “Congress may regulate even noneconomic activity if that regulation is a necessary part of a more general regulation of interstate commerce.” *Id.* at 37 (Scalia, J., concurring). If confirmed and faced with a case that presented a challenge to the constitutionality of a statute on the grounds that it extended to non-economic activity, I would need to research carefully the issue to ensure that my decision was consistent with controlling precedent.

Presidential Power

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

Response: The Supreme Court has recognized that the President’s ability to issue executive orders or executive actions must “stem either from an act of Congress or from the Constitution itself.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). The courts may limit a President’s attempt to exercise executive powers in excess of that authority as articulated by the Supreme Court.

Individual Rights

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

Response: The Supreme Court has recognized certain rights as “fundamental” for purposes of the substantive due process doctrine when they 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 (1997) (citations omitted).

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

Response: The Supreme Court applies heightened scrutiny in evaluation of suspect classifications, such as race and national origin. The Supreme Court has also explained that heightened scrutiny should be applied when a classification burdens a right the Court has identified as fundamental.

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 on the issue of racial preferences in public higher education, including the Supreme Court's recent decision in *Fisher v. University of Texas at Austin*, 81 U.S.L.W. 4503 (2013), regardless of any personal views or expectations.