

**Senator Chuck Grassley
Questions for the Record**

**John B. Owens
Nominee, United States Circuit Judge for the Ninth Circuit**

- 1. At your hearing, you said that the “a judge’s primary job is determining congressional intent”. This seems to be a misstatement of what is a judge’s “primary job”. Please clarify exactly what you meant by this statement. What is the role of judges under the Constitution and organic statutes of the judiciary?**

Response: An appellate court judge’s “primary job” in our judicial system is a limited one. That role is to review the case before him or her (so long as Article III standing exists) solely on the facts in the record, under the controlling standards of review, and with a strict adherence to Supreme Court and circuit precedent. An appellate judge may never treat an appeal as a “do-over,” nor confuse his or her role with that of the legislature.

At my hearing, when I said that “a judge’s primary job is determining congressional intent,” I was referring to the principle that a judge must follow the intent of Congress when interpreting a federal statute, even if he or she disagrees with the intent of Congress or believes that the law should have been written in a different way (or not at all). A judge may not permit his or her personal views to influence the interpretation of a federal statute.

- 2. What is your understanding of the constitutionality of states to provide “conscience rights” to pharmacists and health care providers who refuse to facilitate abortions or fill prescriptions for contraceptives if they are personally opposed to such practices?**

Response: I do not believe that the Supreme Court or Ninth Circuit has addressed this issue. Because a case presenting this issue could come before me if I am fortunate enough to be confirmed (and I understand that other courts are reviewing this issue), I do not believe that I can address this issue at this time. Moreover, because there is no case or controversy before me, I do not have the necessary briefing or factual record to help analyze this important question. I can say that if the Supreme Court or Ninth Circuit decides this issue, I would follow that precedent.

- 3. There was a recent decision by the New Mexico Supreme Court¹ where the Court held that a photographer improperly discriminated against a gay couple when she refused to take photos for their commitment ceremony for religious reasons and, as the Court**

¹ *Elane Photography, LLC v. Willock*, 2013 WL 4478229 (N.M. Aug. 22, 2013).

stated in its opinion, the Respondents are, “now are compelled by law to compromise the very religious beliefs that inspire their lives.”²

- a. **How would you respond if a party in a similar case claimed this was a Freedom of Speech violation? Particularly with respect to a creative and expressive art form such as photography?**

Response: I do not believe that the Ninth Circuit or Supreme Court has addressed this issue, and any decisions of the New Mexico Supreme Court are not binding on the Ninth Circuit. Because this issue could come before me if I am fortunate enough to be confirmed, I do not believe that I can address this issue at this time. Moreover, because there is no case or controversy before me, I do not have the necessary briefing or factual record to help analyze this important question. I can say that if the Supreme Court or Ninth Circuit decides this issue, I would follow that precedent, including First Amendment case law concerning speech and religion.

- b. **Do you think the New Mexico state legislature, by requiring companies that advertise publicly to act in this way, compels the company to speak the government’s message?**

Response: See 3a above.

- c. **How would you respond if an individual or company in this circumstance raised a Free Exercise claim?**

Response: See 3a above.

4. **If confirmed, what would be your judicial philosophy or approach in applying the Constitution to modern statutes and regulations?**

Response: If confirmed, I would first determine whether Article III standing exists. Next, I would review the text of the statutes or regulations in conjunction with the constitutional provisions at issue, and do so in a manner that is consistent with the constitutional avoidance doctrine. I then would consult relevant precedent from the Supreme Court and Ninth Circuit.

5. **What weight or consideration should a judge give to evolving norms and traditions of our society in interpreting the written Constitution?**

² *Id.*, Para. 90.

Response: I do not believe that evolving norms or traditions should have any role in interpreting the Constitution. As the Supreme Court has recognized, the Framers used certain language in the Constitution – such as in the Fourth Amendment – to ensure that the Constitution would continue to protect the rights of its citizens despite the changes in technology. *See Kyllo v. United States*, 533 U.S. 27 (2001).

6. What is your understanding of the current state of the law with regard to the interplay between the establishment clause and free exercise clause of the First Amendment?

Response: The Supreme Court has stated that “there is room for play in the joints between the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.” *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (citation and internal quotation marks omitted). If confirmed and the issue came before me, I would apply *Cutter* and other relevant Supreme Court and Ninth Circuit precedent.

7. Do you believe that the death penalty is an acceptable form of punishment?

Response: Yes. The Supreme Court has held that the death penalty is permissible so long as certain procedural safeguards are observed. If confirmed and the issue came before me, I would follow that precedent.

8. Do you believe there is a right to privacy in the U.S. Constitution?

Response: The Supreme Court has not found a generalized right to privacy in the Constitution. However, the Supreme Court has used the term privacy when describing some of the protections that the Bill of Rights and Fourteenth Amendment guarantee. If confirmed, I would follow those precedents.

a. Where is it located?

Response: For example, the Supreme Court has used the term “privacy” when describing the protections that the Fourth Amendment guarantees. *See, e.g., Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011). The Supreme Court has held that the Fourteenth Amendment protects certain rights deeply rooted in our Nation’s history, such as the right to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), to direct the education of one’s children, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

b. From what does it derive?

Response: See 8a above.

c. What is your understanding, in general terms, of the contours of that right?

Response: See 8a above.

9. In *Griswold*, Justice Douglas stated that, although the Bill of Rights did not explicitly mention the right to privacy, it could be found in the “penumbras” and “emanations” of the Constitution.

a. Do you agree with Justice Douglas that there are certain rights that are not explicitly stated in our Constitution that can be found by “reading between the lines”?

Response: No I do not. If confirmed, I would not “read between the lines” when faced with a case that featured constitutional issues. Rather, I would follow the analysis set forth in *Washington v. Glucksberg*, 521 U.S. 702 (1997).

b. Is it appropriate for a judge to search for “penumbras” and “emanations” in the Constitution?

Response: No it is not. If confirmed, I would not search for “penumbras” or “emanations” when faced with a case that featured constitutional issues. Rather, I would follow the analysis set forth in *Washington v. Glucksberg*, 521 U.S. 702 (1997).

10. What standard of scrutiny do you believe is appropriate in a Second Amendment challenge against a Federal or State gun law?

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008), the Supreme Court noted that a standard of scrutiny higher than rational basis would apply in Second Amendment challenges against Federal and State gun laws. Because this issue could come before me if I am fortunate enough to be confirmed, I do not believe that I can address this issue at this time. Moreover, because there is no case or controversy before me, I do not have the necessary briefing or a complete factual record before me to help analyze this important issue. I can say that I would follow the Court’s instruction in *Heller* that the standard of scrutiny would be higher than rational basis, and if the Supreme Court or Ninth Circuit subsequently provides guidance about the appropriate standard of review, I would follow that precedent.

11. In *Brown v. Entertainment Merchants Association.*, Justice Breyer supplemented his opinion with appendices comprising scientific articles on the sociological and psychological harm of playing violent video games.

- a. **When, if ever, do you think it is appropriate for appellate judges to conduct research outside the record of the case?**

Response: I do not think it is appropriate for appellate judges to conduct research outside the record of a case.

- b. **When, if ever, do you think it is appropriate for appellate judges to base their opinions psychological and sociological scientific studies?**

Response: If such studies are part of the appellate record, an appellate judge could consider these studies in limited situations, such as whether the district court properly admitted certain expert opinion testimony under Federal Rule of Evidence 702.

12. What would be your definition of an “activist judge”?

Response: I define an activist judge as one who decides cases based on his or her personal views, and not on an unbiased reading of the law and facts in a case.

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

Response: Judge Wallace and Justice Ginsburg both taught me that fairness and impartiality are a judge’s most important attributes, and I have seen the best judges display these attributes at the trial and appellate level. During my career, I have served as a federal prosecutor, a criminal defense attorney, a plaintiff’s attorney, and a civil defense attorney. By occupying all four corners of the courtroom, I am confident that I will be fair and impartial if I am fortunate enough to be confirmed, and I believe that I have demonstrated this attribute throughout my career.

14. Do you think that collegiality is an important element of the work of a Circuit Court? If so, how would you approach your work on the court, if confirmed?

Response: In my view, collegiality is essential to the work of the circuit court. If confirmed, I would always keep an open mind, carefully consider the briefs and arguments of counsel, and listen to my colleagues. I also would be respectful to court staff at all times.

15. 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 federal judge must never forget that he or she is extremely fortunate to hold an Article III position. Accordingly, a judge at all times must be collegial to the parties, court staff, and fellow judges, and always keep an open mind and be willing to listen to others. I believe that I have shown throughout my career that I meet this standard.

16. In general, Supreme Court precedents are binding on all lower federal courts. 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.

17. 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 the case involved statutory or constitutional interpretation, I would look to the text of the relevant statute or section of the Constitution. I also may look to analogous Supreme Court and Ninth Circuit precedent, and possibly to persuasive and non-binding out-of-circuit authority that had addressed the issue. At all times, I would attempt to decide the case on the narrowest ground possible.

18. 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: If confirmed, I would follow all binding precedent, even if I believed that the Supreme Court or Ninth Circuit had seriously erred in rendering it.

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

Response: A federal court should strive to uphold a congressional statute unless there has been a plain showing that the statute is unconstitutional. As part of this analysis, the court should, when necessary, apply the constitutional avoidance doctrine to interpret the statute in a fashion that would render it constitutional.

20. What weight should a judge give legislative intent in statutory analysis?

Response: In determining legislative intent, the Supreme Court has instructed courts to start with the text of the statute, as the text sets out what Congress intended. If the text is plain, then no further inquiry is needed as to what Congress intended. In the rare case where the text does not end the inquiry as to what Congress intended, then a lower court should follow Supreme Court and circuit authority to resolve any ambiguity as to what Congress intended.

21. Do you believe that a judge's gender, ethnicity, or other demographic factor has any or should have any influence in the outcome of a case? Please explain.

Response: No I do not. The outcome of a case should never be influenced by the particular judge's gender, ethnicity, or other demographic factor.

22. 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 I do not. I do not believe that foreign law or "world community" views play any role when determining the meaning of the U.S. Constitution.

23. 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: Impartiality lies at the core of our judicial system, and I learned this both as a law clerk and as a trial attorney who has appeared before federal judges around the country. And by serving many roles in the courtroom – prosecutor, criminal defense attorney, plaintiff's attorney, and civil defense attorney – I have gained a broad perspective that will ensure that I will be fair and impartial at all times. Throughout my career, I have never based any litigation decisions on any personal beliefs that I might have.

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

Response: A three-judge panel cannot overturn binding precedent of the Ninth Circuit or Supreme Court. Federal Rule of Appellate Procedure 35 provides that the en banc process can overrule Ninth Circuit precedent only when the matter "involves a question of exceptional importance" or review "is necessary to secure or maintain uniformity of the

court's decisions." If confirmed, I would follow Rule 35 and the applicable Ninth Circuit procedures concerning en banc proceedings.

25. 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?

If confirmed, I would confine my review to the case before me, and limit my decision to the facts in the record and the arguments made by the parties in their briefs and at oral argument. For guidance, I would look to Supreme Court and Ninth Circuit precedent, and when necessary, out-of-circuit precedent that might be persuasive though nonbinding. I also would consider the views of my colleagues before rendering any final decision.

Judges in the Ninth Circuit review a wide array of cases and areas of law, and encounter a very heavy caseload. If I am confirmed, undoubtedly I will encounter areas of law that are new to me, along with a considerable backlog of cases to decide. Both of these issues will prove difficult. To overcome this, I will work hard and put in the extra effort necessary to ensure that all parties receive a reasoned and careful decision in every case.

26. 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 nature of the communications.**

Response: No I have not.

- 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: I am not aware of any such endorsements or promised endorsements.

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

Response: On the afternoon of November 6, 2013, I received these questions and prepared my answers. I reviewed my answers with an attorney at the Justice Department and then finalized them for submission.

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

Response: Yes.

**Questions for Judicial Nominees
Senator Ted Cruz**

**John B. Owens
Nominee, United States Circuit Judge for the Ninth Circuit**

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 philosophy is that an appellate court judge plays a very limited role in our judicial system. That role is to review only the case before the court under the proper standard of review, to follow binding precedent, and to base any decision solely on the facts in the record. At no time do one's personal views come into play. In carrying out one's duties, the judge always must have an open mind, be prepared through hard work, and treat the parties, staff, and fellow judges with respect. Although I cannot say that my philosophy is specific to any of the courts or Justices mentioned above, I have tremendous respect for the work ethic, intellectual abilities, and leadership skills of Justice Ruth Bader Ginsburg and Chief Justice Rehnquist.

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 stated that originalism should be employed when interpreting the Constitution. If confirmed and a case presenting this issue came before me, I would follow the approach taken in cases like *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: A three-judge panel cannot overrule binding precedent of the Ninth Circuit or Supreme Court. Federal Rule of Appellate Procedure 35 provides that the en banc process can overrule Ninth Circuit precedent only when the matter "involves a question of exceptional importance" or review "is necessary to secure or maintain uniformity of the court's decisions[.]" If confirmed, I would follow Rule 35 and the applicable Ninth Circuit procedures concerning en banc proceedings.

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 Auth.*, 469 U.S. 528 (1985), is binding Supreme Court precedent. If confirmed and this issue came before me, I would follow that precedent when addressing questions of state sovereign interests, as well as other binding precedent including *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992).

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 invalidated federal statutes that exceeded Congress' Commerce Clause Power, and stressed the non-economic nature of the activities that those statutes regulated. See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). However, the Supreme Court has not held that Congress can never regulate non-economic activity through Commerce Clause legislation. If confirmed and this issue came before me, I would carefully review binding Supreme Court and Ninth Circuit precedent concerning the limits of Congress's power under the Commerce Clause to regulate non-economic activity.

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

Response: Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952), addressed how courts should review a President's executive orders and actions, and the Supreme Court adopted this concurrence as a majority holding in *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In *Youngstown* and *Dames & Moore*, the Supreme Court set out three guideposts for reviewing the actions of the President. First, "[w]hen the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" Second, "[w]hen the President acts in the absence of congressional authorization he may enter 'a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.'" In this situation, the Court must "consider[] all the circumstances which might shed light on the views of the Legislative Branch toward such action, including 'congressional inertia, indifference or quiescence.'" Third, "when the President acts in contravention of the will of Congress, 'his power is at its lowest ebb,' and the Court can sustain his actions 'only by disabling the Congress from acting upon the subject.'" *Dames & Moore*, 453 U.S. at 668-69 (quoting *Youngstown*). If confirmed and a case presenting this issue came before me, I would follow this and other relevant Supreme Court and Ninth Circuit precedent when addressing challenges to executive orders and actions.

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 reviewed its precedent and discussed two aspects of its substantive due process clause analysis. First, the Court recognized that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" Second, the Court recognized that it has "required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." *Id.* at 720-21 (citations omitted). If confirmed and a case presenting this issue came before me, I would follow *Glucksberg* and any other relevant Supreme Court and Ninth Circuit precedent applying *Glucksberg*.

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

Response: Supreme Court precedent dictates that the Equal Protection Clause triggers heightened scrutiny (either strict or intermediate) when reviewing classifications like race, gender and religion. If confirmed and this issue came before me, I would follow binding Supreme Court and Ninth Circuit precedent.

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 and this issue came before me, I would follow relevant Supreme Court and Ninth Circuit precedent concerning the use of racial preferences in higher education, and this would include cases like *Grutter* and *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013). Any personal expectation that I might have as to this issue (or any other issue) would not be relevant.