

**Senator Grassley
Questions for the Record**

**Walter David Counts, III,
Nominee, U.S. District Judge for the Western District of Texas**

- 1. As amended on December 1, 2015, Federal Rule of Civil Procedure 26(b)(1) defines the “scope of discovery” in litigation matters as “any nonprivileged matter that is relevant to any party’s claim or defense *and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.*”**

Chief Justice Roberts explained in his 2015 Year-End report that these amendments “make a significant change, for both lawyers and judges.”

- a. What is the effect of this amendment to Rule 26(b)(1)?**

Response: The amendment to Rule 26(b)(1) focuses on “proportionality” in determining scope of discovery. The explicit limitations on permissible discovery of the provision are based on privilege or relevance. The opening phrase of the subsection also makes clear that additional limitations may be imposed by court order. The effect of the amendment is that parties must now consider, before making a discovery request, whether their request is appropriate and “proportional” within the context of the case.

- b. If confirmed, how would you assess whether a discovery request is “proportional to the needs of the case”?**

Response: If confirmed, I would apply the standard established by the rule after careful consideration of the relevant criteria, bearing in mind the purposes of the amendment, which Chief Justice Roberts summarized as providing parties with efficient access to what is needed to prove a claim or defense, while eliminating unnecessary or wasteful discovery. As he explained, the amendment to the rule encourages the court and parties to make a “careful and realistic assessment of actual need.”

- c. How, if at all, would your assessment of whether a discovery request is “proportional to the needs of the case” differ from your view of the scope of discovery under the prior version of the rule?**

Response: While the previous version of the rule, before the amendment, did not use the term “proportional,” it did list similar criteria to be applied by the court in determining the appropriate limits of discovery. As the Advisory Committee notes,

the change merely reinforces the obligation of the parties to consider these factors in making discovery requests, responses or objections.

2. **The Chief Justice’s 2015 Year-End report also noted reports from litigants that “[a] judge who is available for prompt resolution of pretrial disputes saves parties time and money.”**

As amended on December 1, 2015, Rule 16 requires a district judge to issue a scheduling order within “the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.” This amendment shortened both applicable deadlines by 30 days.

- a. **Please explain the approach you will take to case management and the tools you will use to manage cases in a just and efficient manner if you are confirmed.**

Response: If confirmed as a district judge, I would issue a scheduling order early in each case to establish fair but firm deadlines, being flexible as a case proceeds to ensure that the parties are able to fully avail themselves of the judicial process, while ensuring prompt and efficient case resolution. Standing orders and status conferences are useful tools in simplifying issues and eliminating frivolous claims and defenses. As a magistrate judge, I have found that access by the parties to the judge is a pathway to an efficient pace of litigation.

- b. **Please explain and describe any effect the 2015 amendments to the Federal Rules of Civil Procedure will have on your approach to case management if confirmed.**

Response: The Chief Justice stated in his 2015 Year-End Report on the Federal Judiciary that the 2015 amendments “emphasize the crucial role of federal judges in engaging in early and effective case management” and added that they seek to encourage judges to “take on a stewardship role” in case management. If confirmed, I would engage with attorneys early in each case and use the techniques identified in the amendments to help resolve pretrial discovery disputes informally before the need for formal motions.

3. **As you know, parties frequently propose protective orders for the approval of the district judge during the course of discovery. The 2015 amendments to the Federal Rules of Civil Procedure included a change to Rule 26(c)(1)(B) adding “allocation of expenses” to the list of items that may be included in a protective order.**

- a. **How would you evaluate cost-allocation mechanisms included in proposed protective orders, if confirmed?**

Response: If confirmed, I would use the authority of the court as to expense allocation associated with discovery to limit, and hopefully eliminate, abusive discovery requests that are huge cost drivers in litigation and which impose undue

expense and burden on the parties. This should cause parties to consider if discovery requests are necessary for their case.

b. Under what circumstances, if any, would you consider ordering allocation of expenses pursuant to Rule 26(c)(1)(B) absent suggestion of the parties?

Response: If confirmed, absent a responding party's suggestion or request to allocate expenses differently, I would generally presume that the responding party is willing to bear the costs which it ordinarily bears in responding. The committee notes that the rule does not imply that cost-shifting should become a common practice.

c. Do you understand the 2015 amendment to Rule 26(c)(1)(B) to confer upon the district court a new authority or obligation to manage discovery costs through cost allocation?

Response: No, I do not understand this amendment to confer a new authority or obligation upon the district court to manage discovery costs through cost allocation. Courts presently exercise the authority to enter protective orders that allocate expenses for disclosure and discovery.

d. How, if at all, do you understand the cost-allocation provisions of Rule 26(c)(1)(B) to relate to those found in Rule 37?

Response: The cost-allocation provisions of these rules similarly encourage parties to engage in reasonable discovery practices by placing costs associated with unreasonable or abusive discovery practices on their proponent.

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

Response: Integrity. A judge with integrity is one who strictly adheres to the rule of law and renders fair and impartial decisions. I am a person of integrity and I live by integrity as a person and in my role as a magistrate judge.

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: Diligence, decisiveness, humility, and an even temper are key elements that make up the appropriate temperament of a judge, humility being the most important. A judge must also demonstrate patience, showing dignity and respect for all. As a magistrate judge, I meet this standard and demonstrate all of these elements, and if confirmed, would do so as a district judge.

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. 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: If confirmed as a district judge, I pledge to follow the precedents of the Supreme Court and the Fifth Circuit without regard to any personal views. I am committed to following the rule of law and precedent and will faithfully discharge that duty.

- 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: In a case of first impression, I would initially examine the plain language of the statute. If the language were clear and unambiguous, I would apply the plain meaning of the text, using the canons of construction approved by the Supreme Court and Fifth Circuit. If unclear or ambiguous, I would then look to Supreme Court and Fifth Circuit opinions in which those courts interpreted similar or analogous language. If no analogous authority from the Supreme Court or Fifth Circuit exists, I would look for persuasive authority from other federal circuits addressing similar or analogous language.

- 8. 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: In all cases, I would apply Supreme Court and Fifth Circuit precedent regardless of agreement with those decisions.

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

Response: A judge should always use restraint in considering whether a statute is constitutional, beginning each analysis with the presumption that statutes enacted by Congress are valid. A judge should decide a case by the most narrow possible construct, avoiding resolution of a case by reaching the constitutional question if another avenue exists. Only in cases where Congress has exceeded its authority under the Constitution or where the statute violates a provision of the Constitution should a statute be held unconstitutional.

- 10. 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. It is not appropriate to rely upon foreign law or the views of the world community in determining the meaning of the Constitution.

- 11. 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: My record as a magistrate judge proves my commitment to following precedent. If confirmed as a district judge, I pledge to follow precedent strictly and without regard to political ideology or motivation.

- 12. 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: My record as a magistrate judge clearly demonstrates my commitment to be fair to every litigant and to apply the law without regard to personal views. If confirmed as a district judge, I pledge to do the same.

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

Response: I manage my caseload by issuing scheduling orders, setting and enforcing reasonable but fair deadlines for discovery, motions, and trials, ensuring that parties are able to fully avail themselves of the judicial system while being ever-mindful of the importance of case resolution. As a magistrate judge for more than seven years, I have extensive experience managing the heavy docket of the Midland/Odessa Division of the Western District of Texas. If confirmed as a district judge, I would continue this practice and would refer appropriate matters to the magistrate judge for assistance. Prompt judicial rulings also assist in caseload management.

- 14. 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: Judges have an important role in controlling litigation. The pace and conduct of litigation is directly related to the public's confidence in the judicial system. It is important that litigants have the opportunity to fully avail themselves of the judicial process, and at the same time, efficient case resolution is vital to the overall health of the system. As a magistrate judge, I act as a facilitator to assist attorneys and parties to process litigation as efficiently as possible. This is done in a number of ways, including the entry of scheduling orders, and the setting and enforcing of reasonable deadlines for discovery, motions, and trials. Status conferences are useful tools to determine issues and to address the needs of the parties. I rule promptly on motions without undue delay. If confirmed, I would continue these practices.

- 15. As a judge, you have experience deciding cases and writing opinions. Please describe how you reach a decision in cases that come before you and to what sources of information you look for guidance.**

Response: In deciding cases and writing opinions, I first determine the issue or issues presented. To do this, I review the pleadings and briefs filed in the case and read any case law cited by the parties, along with additional research conducted by myself and my staff. I make a fair and impartial evaluation of the facts and apply the relevant law according to precedent from the U.S. Supreme Court and Fifth Circuit. I then make every effort to effectively communicate the issue or issues and the reasoning for my decision in the case as clearly and concisely as possible.

- 16. President Obama said that deciding the “truly difficult” cases requires applying “one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy . . . the critical ingredient is supplied by what is in the judge’s heart.” Do you agree with this statement?**

Response: While I am not aware of the full context of this quotation, I believe judges should faithfully apply the law according to precedent and without regard to personal beliefs, preferences or biases.

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

Response: These questions were forwarded to me on September 14, 2016, by the Department of Justice Office of Legal Policy (DOJ OLP). I reviewed the questions and drafted my answers to them prior to submitting those answers to the DOJ OLP for review. I subsequently finalized my answers for submission and requested DOJ OLP to forward them to the Senate Judiciary Committee.

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

Response: Yes.

Questions for the Record
Senate Committee on the Judiciary
Senator Thom Tillis

Walter David Counts, III
Nominee, U.S. District Judge for the Western District of Texas

1. **Some individuals have argued that the United States Constitution is a “living document,” subject to different interpretations as society changes. Do you subscribe to this point of view?**

Response: No, I do not subscribe to the point of view that the Constitution is subject to different interpretations as society changes.

2. **What role, if any, should societal pressure or popular opinion play in interpreting statutes or the United States Constitution?**

Response: None. Neither societal pressure nor popular opinion have any role in the proper exercise of judicial authority, including in the interpretation of statutes and the U.S. Constitution. As a magistrate judge, I rely on the rule of law and precedent in making rulings and drafting opinions, without regard to societal pressure or popular opinion, and if confirmed as a district judge, I pledge to continue to do so.

3. **Please define judicial activism. Is judicial activism ever appropriate?**

Response: Judicial activism is action that exceeds the proper exercise of judicial authority, relying upon personal views as opposed to the rule of law and precedent. Judicial activism is never appropriate.

4. **When, if ever, is it appropriate for a federal court to rule that a statute is unconstitutional?**

Response: A judge should always use restraint in considering whether a statute is constitutional, beginning each analysis with the presumption that statutes enacted by Congress are valid. A judge should decide a case by the most narrow possible construct, avoiding resolution of the case by reaching the constitutional question if another avenue exists. Only in cases where Congress has exceeded its authority under the Constitution or where the

statute violates a provision of the Constitution should a statute be held unconstitutional.

5. What is a fundamental right? From where are these rights derived?

Response: The Supreme Court has defined a fundamental right as a right so rooted in the history and traditions of our people as to be ranked as fundamental and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed. *See generally Washington v. Glucksberg*, 521 U.S. 702 (1997) (internal quotation marks omitted). Fundamental rights are derived from the Bill of Rights and the Due Process Clause of the Fourteenth Amendment to the Constitution, as recognized by the Supreme Court. *See, e.g., id.* at 719-720.

6. Do you believe the First Amendment or any other provision of the United States Constitution protects private citizens and businesses from being required to perform services that violate their sincerely held religious beliefs?

Response: Yes. In a case concerning the Religious Freedom Restoration Act of 1993 (RFRA), the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc., et al.*, 134 S. Ct. 2751 (2014), in which the court struck down a provision of the Patient Protection and Affordable Care Act of 2010, makes clear that the Constitution protects private citizens and businesses from being required to perform services that violate their sincerely held religious beliefs. The Supreme Court has likewise ruled that the Free Exercise Clause of the First Amendment to the Constitution extends beyond facial discrimination and even "forbids subtle departures from neutrality," and "covert suppression of particular religious beliefs." *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 580 U.S. 520 at 534 (1993) (internal citations omitted).

7. What level of scrutiny is constitutionally required when a statute or regulation related to firearms is challenged under the Second Amendment of the United States Constitution?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court declined to specifically define the level of scrutiny required to evaluate the extent to which a legislature may regulate a specific, enumerated right, including the right to keep and bear arms. The Supreme Court made clear that the standard in such cases is not the rational-basis standard, but is a

heightened level of scrutiny. If confirmed as a district judge, my analysis would be guided by Supreme Court and Fifth Circuit precedent.

8. Do you believe it is constitutional for states to require voters to show photo identification before being eligible to cast their vote?

Response: Various courts have decided the constitutionality of photo identification requirements in relation to voter laws, with varying results depending upon the facts of the state's law. The results are fact-specific. For example, in *Veasey v. Abbott*, 2016 WL 3923868 (July 20, 2016), the Fifth Circuit *en banc*, struck down a portion of a 2011 Texas voter identification law and the Supreme Court in *Crawford v. Marion County Election Board, et al.*, 553 U.S. 181 (2008), upheld an Indiana voter identification law.

9. One challenge you will face as a federal judge is managing a demanding caseload. If confirmed, how will you balance competing priorities of judicial efficiency and due process to all litigants involved in the cases on your docket? Will you give certain cases priority over others? If so, please describe the process you will use to make these decisions.

Response: I manage my caseload by issuing scheduling orders, setting and enforcing reasonable but fair deadlines for discovery, motions, and trials, ensuring that parties are able to fully avail themselves of the judicial system while being ever-mindful of the importance of case resolution. As a magistrate judge for more than seven years, I have extensive experience managing the heavy civil and criminal dockets of the Midland/Odessa Division of the Western District of Texas. If confirmed as a district judge, I would continue this practice, and would refer appropriate matters to the magistrate judge for assistance. Criminal cases require strict adherence with the Speedy Trial Act and the speedy trial provision of the Sixth Amendment to the U.S. Constitution.

10. Do you believe the death penalty is constitutional? Would you have a problem imposing the death penalty?

Response: The Supreme Court has held that the death penalty is constitutional and I would follow the law in imposing the death penalty. As a state prosecutor, I sought the death penalty where appropriate and have had that penalty imposed.