

Nomination of Justice Allison Eid, to be United States Circuit Judge for the Tenth Circuit
Questions for the Record
Submitted September 27, 2017

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

a. Would you consider whether the right is expressly enumerated in the Constitution?

Response: If I am confirmed, I would faithfully apply Tenth Circuit and Supreme Court precedent regarding what role the express enumeration of a right plays in constitutional interpretation.

b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Response: If I am confirmed, I would faithfully apply Tenth Circuit and Supreme Court precedent regarding whether to consider a right's roots in this nation's history and tradition and would rely on sources used by the Supreme Court.

c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of another court of appeals?

Response: If I am confirmed, I would consider, and I would faithfully apply, Tenth Circuit and Supreme Court precedent. Although I would not be bound by the precedent of another court of appeals, I would certainly consider that precedent in arriving at a decision.

d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?

Response: If I am confirmed, I would consider, and I would faithfully apply, Tenth Circuit and Supreme Court precedent.

e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Response: If I am confirmed I will faithfully follow all Supreme Court precedent including *Planned Parenthood v. Casey* and *Lawrence v. Texas*.

f. What other factors would you consider?

Response: If I were confirmed to this position, I would follow Supreme Court precedent

and Tenth Circuit precedent regarding any other factors to be considered.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

Response: The Supreme Court has held that "statutory classifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clause.'" *Craig v. Boren*, 429 U.S. 190, 197 (1976) (quoting *Reed v. Reed*, 404 U.S. 71, 75 (1971)).

a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my personal opinion as to this issue. If I am confirmed I would faithfully apply Tenth Circuit and Supreme Court precedent regarding the application of the Equal Protection Clause to gender classifications.

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

Response: I do not know. If I were confirmed to this position, I would follow all Supreme Court precedent regarding the application of the Equal Protection Clause to gender classifications, including *United States v. Virginia*.

c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

Response: In *Lawrence v. Texas*, 539 U.S. 558 (2003), the United States Supreme Court held that there is a right to intimate relations between two consenting adults, and in *Obergefell v. Hodges*, 576 U.S. —, 135 S. Ct. 2584 (2015), the Court held that there is a right to same-sex marriage. If confirmed, I would follow these precedents, as I would follow all United States Supreme Court precedents.

d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

Response: Significant disagreement on this question exists, federal courts have reached differing conclusions, and it is my understanding that cases are currently pending in the federal courts on this issue. As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my opinion on a question that may come before both the Tenth Circuit and the Colorado Supreme Court.

3. At your nominations hearing, we discussed privacy issues in the Fourth Amendment context, but there are also important privacy protections rooted in other portions of the Constitution.

a. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

Response: In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the United States Supreme Court held that the use of contraceptives is protected by the right to privacy. If confirmed, I would follow that precedent.

b. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

Response: In *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court held that obtaining an abortion is protected by the right to privacy, and, if confirmed, I would follow that precedent.

c. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

Response: In *Lawrence v. Texas*, 539 U.S. 558 (2003), the United Supreme Court held that there is a right to intimate relations between two consenting adults, and in *Obergefell v. Hodges*, 576 U.S. —, 135 S. Ct. 2584 (2015), the Court held that there is a right to same-sex marriage. If confirmed, I would follow these precedents.

d. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Response: Please see my responses to Questions 3.a. through 3.c. above.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

Response: If I am confirmed, I would look to the Supreme Court's decisions for guidance on this question.

- b. What is the role of sociology, scientific evidence, and data in judicial analysis?

Response: If I were confirmed to this position, I would follow precedent regarding the appropriate use of sociology, scientific evidence, and data in judicial analysis.

5. You are a member of the Federalist Society, a group whose members often advocate an “originalist” interpretation of the Constitution.

a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

Response: *Brown v. Board of Education* is a fundamental, important, and longstanding precedent of the United States Supreme Court which I would follow if confirmed to this position.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism> (last visited September 25, 2017).

Response: As a former full-time academic, I am generally familiar with the debate within the legal academy concerning various methodologies for interpreting the Constitution and the criticisms raised in the piece you cite. In my experience on the Colorado Supreme Court, judges do not describe themselves in terms of labels such as “originalist,” and therefore I eschew labels.

6. In your 2004 article entitled *The Property Clause and New Federalism*, you discuss a federalism-based approach to judicial review of congressional legislation under the Commerce Clause of the Constitution. In the article, you discuss *United States v. Morrison*, 529 U.S. 598, 613 (2000), a case in which the Court struck down portions of the Violence Against Women Act based on a determination that the regulated conduct was not “in any sense of the phrase, economic activity.”

a. Your article states, “The Court preserved the substantial effects test not necessarily because it was the right test; in fact, no one in the Court’s majority defended the test on any grounds other than precedent.” Do you agree with Justice Thomas’s view, expressed in his *Morrison* concurrence, that the substantial effects test is an incorrect approach to Commerce Clause jurisprudence?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my personal opinion as to Justice Thomas' concurrence in *Morrison*. If I am confirmed I would faithfully apply the majority's holding in *Morrison* and all other Supreme Court precedent.

b. When, if ever, may Congress constitutionally regulate activity that is not inherently economic pursuant to the Commerce Clause?

Response: The Supreme Court has held that the Commerce Clause permits Congress to regulate only that activity which has a "substantial effect" on interstate commerce. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000). If I am confirmed I will faithfully apply precedent in this area.

c. Congress has enacted important legislation pursuant to its authority under the Commerce Clause, including legislation to protect Americans' civil rights. If confirmed, what test would you apply to determine whether legislation is constitutional pursuant to Congress's authority under the Commerce Clause?

Response: The Supreme Court has held that the Commerce Clause permits Congress to regulate only that activity which has a "substantial effect" on interstate commerce. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000). If I am confirmed I will faithfully apply precedent in this area.

7. In *Taxpayers for Public Education v. Douglas County School District*, 351 P.3d 461 (Colo. 2015), the majority held that a county-funded school voucher program violated the state Constitution because the vouchers were nearly exclusively used at religious schools.

a. Both in your dissent and at your hearing, you cited *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), for the proposition that in a religious discrimination case, a court must look beyond the plain language of a statute or state constitutional provision to determine if the law was motivated by animus toward a particular religion. Do you agree that courts must look beyond the plain language of a statute or constitutional provision to determine whether facially neutral laws were motivated by discrimination on the basis of race, national origin, gender, sexual orientation, or gender identity?

Response: As a nominee for federal judicial office and as a sitting justice on the Colorado Supreme Court bound by our state's code of judicial ethics, it would be inappropriate for me to offer a view of a legal question that might come before me. If I am confirmed, I would follow precedent of the United States Supreme Court and the Tenth Circuit.

b. Are these classifications entitled to heightened scrutiny?

Response: As a nominee for federal judicial office and as a sitting justice on the Colorado Supreme Court bound by our state's code of judicial ethics, it would be inappropriate for me to offer a view of a legal question that might come before me. If I am confirmed, I would follow precedent of the United States Supreme Court and the Tenth Circuit.

c. Are there other contexts in which courts should look beyond the plain language of a statute to determine its meaning, and if so, which ones?

Response: Courts should always look first to the plain language of a statute. As the Colorado Supreme Court held in *In re Marriage of Ikeler*, 161 P.3d 663, 667 (Colo. 2007), if “the plain language is ambiguous or conflicts with other provisions of the statute, we may look beyond the language of the statute to other factors,” including statutory context.

d. Do you agree that religious organizations and schools that receive government funds while providing services to the public must not discriminate against members of the public?

Response: As a nominee for federal judicial office and as a sitting justice on the Colorado Supreme Court bound by our state’s code of judicial ethics, it would be inappropriate for me to offer a view of a legal question that might come before me. If I am confirmed, I would follow relevant precedent of the United States Supreme Court and the Tenth Circuit.

e. What, if any, limitations does the Constitution impose on government funding and government sponsorship of religious activity?

Response: As a nominee for federal judicial office and as a sitting justice on the Colorado Supreme Court bound by our state’s code of judicial ethics, it would be inappropriate for me to offer a view of a legal question that might come before me. If I am confirmed, I would follow relevant precedent of the United States Supreme Court and the Tenth Circuit.

8. In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Supreme Court held that life without parole sentences are unconstitutional as applied to minors, but in *Lucero v. People*, you authored the opinion of the Colorado Supreme Court holding that *Miller* did not apply to aggregate term-of-years sentences that amounted to *de facto* life without parole. The concurrence, however, would not have reached this issue because the defendant in *Lucero* would be eligible for parole at age 57, and thus was not serving a *de facto* life sentence.

a. In your nomination hearing, I asked you why you reached the issue of whether an aggregate term-of-years sentence would violate *Miller* instead of declining to reach that issue because the defendant would be eligible for parole at age 57. You responded that you considered your approach to be the narrower one. However, your opinion is now a precedent in the State of Colorado for a categorical rule interpreting *Miller*, whereas the concurrence’s approach merely would have adjudicated *Lucero*’s appeal. Why did you consider deciding the categorical holding to be narrower than the factual determination that *Lucero*’s sentence did not constitute *de facto* life without parole?

Response: In his concurrence, Justice Gabriel did reach the question of whether *Graham* and *Miller* would apply to aggregate term-of-years sentence, concluding that “*Graham* and *Miller* apply to *de facto* LWOP sentences.” He went on to conclude, however, that *Lucero* had not “established that he, in fact, received a *de facto* LWOP sentence in this case.” Therefore, both the majority and concurrence addressed the question regarding the application of *Graham* and *Miller*, but, unlike the concurrence, the majority did not reach the factual issue addressed by the concurrence.

b. Is it ever appropriate for a judge to go beyond what is necessary to decide a specific case in order to interpret or make law?

Response: A judge should decide the case narrowly based on the facts and the law.

9. During your hearing, you stated that “there actually are no cases of first impression” and “there is always precedent.” However, many cases present novel issues, including in the context of the Fourth Amendment. What is your approach for evaluating whether there is a Fourth Amendment violation when precedent does not resolve the issue for the technology employed in the case?

Response: As the United States Supreme Court stated in *Riley v. California*, – U.S. –, 134 S. Ct. 2473 (2014), courts must respect privacy interests even when new technologies arise: “Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans ‘the privacies of life,’ The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple – get a warrant.”