

**Nomination of Allison Eid
To the U.S. Court of Appeals for the Tenth Circuit Questions for the Record
Submitted September 27, 2017**

QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”

a. Do you agree with Justice Roberts’s metaphor? Why or why not?

Response: Yes. It is the responsibility of a judge to interpret the law, not make the law.

b. What role, if any, should the practical consequences of a particular ruling play in a judge’s rendering of a decision?

Response: It is up to the legislative branch to consider the practical consequences of laws it enacts.

2. In your confirmation hearing, you acknowledged that judges will sometimes refuse to construe a statute in a way that leads to an absurd result.

a. Do you agree that whether a particular result is “absurd” is necessarily a subjective determination?

Response: The “absurd results doctrine” I referenced in my hearing is a well-established canon of statutory construction that holds that a court should apply the plain meaning of a statute except in rare cases where the plain meaning would provide a result that is clearly at odds with the intent of the drafters. See, e.g., *United States v. Ron Pair Enters., Inc.*, 489 U.S. 225, 243 (1989). The determination that a particular result is “absurd” is not the subjective determination of the reviewing judge, rather it is based on a comparison between the drafter’s intent and the plain text of a statute.

b. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you agree that determining whether there is a “genuine dispute as to any material fact” requires a judge to make a subjective determination?

Response: Federal Rule of Civil Procedure 56 requires a judge to determine whether a genuine dispute as to any material fact exists. A judge does not make a subjective determination (i.e., one guided by the feelings or intuition of the judge) that such a dispute exists. Rather, a judge evaluates the allegations and factual assertions made by each party, takes into consideration precedent and prior decisions involving analogous facts, and decides whether summary judgment is

appropriate based on this evaluation

3. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

a. What role, if any, should empathy play in a judge's decision-making process?

Response: None.

b. What role, if any, should a judge's personal life experiences play in his or her decision-making process?

Response: None.

c. Do you believe you can empathize with "what it's like to be a young teenage mom," or understand what it's like to be "poor or African-American or gay or disabled or old"? If so, what life experiences do you draw on that lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

Response: It is not appropriate to allow personal feelings to influence my judicial determinations.

4. In response to a question from Senator Grassley about how your involvement in the community has impacted your view as a judge, you responded that judges also wear an "administrative hat where we are really looking at the system and we're looking at how the system impacts people's lives." In response to a question I asked, you suggested that it would be inappropriate for a judge to consider the practical consequences of a decision, and should leave that task to the legislature.

a. If it is inappropriate for a judge to consider the practical consequences of his or her decisions, why is it appropriate for a judge to wear an "administrative hat" and "look[] at the system and . . . how the system impacts people's lives"? How do you reconcile those positions?

Response: In my response to Senator Grassley, I was referring to my administrative assignments as a justice on the Colorado Supreme Court. As a justice I serve as liaison to a number of Colorado Supreme Court committees including committees responsible for drafting rules of practice and procedure utilized by Colorado courts. When drafting such rules it is appropriate to evaluate the practical consequences of the proposed rules.

b. In your dissent in *Taxpayers for Public Education v. Douglas County Board of Education*, a case regarding parents' use of school vouchers for religious education, you wrote that the plurality's interpretation was "so broad that it would invalidate the use of

public funds to build roads, bridges, and sidewalks adjacent to such [religious] schools, . . . as such schools ‘rely on’ state-paid infrastructure to operate their institutions.” Would you agree that your dissent is an example of you considering a decision’s impact on peoples’ lives in reaching your legal conclusion?

Response: In *Emerson v. Board of Educ. of Ewing Tp.*, 330 U.S. 1, 17-18 (1947), the United States Supreme Court noted that it is “obviously not the purpose the First Amendment” to require states to deprive religious schools of “general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks.” As I stated in my dissent in *Taxpayers for Public Education v. Douglas County Board of Education*, I believe that the plurality’s interpretation would have done just that.

5. In response to a question from Senator Coons, you testified that the primary focus of your dissent in *Taxpayers for Public Education v. Douglas County Board of Education* was a critique of the majority for applying plain meaning analysis when interpreting the “no aid to religious schools” provision of the Colorado Constitution. You explained at your confirmation hearing that “You can’t in a religious clause case simply apply the plain meaning; you have to go behind the words . . . you have to look at what’s going on here and what’s the intent behind the words.”

a. As a general matter, do you believe that judges should resolve legal questions by interpreting the plain meaning of the relevant constitutional or statutory text?

Response: Yes.

b. Why, in your view, can’t the “no aid to religious schools” provision of the Colorado Constitution be resolved through a plain meaning analysis?

Response: In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the United States Supreme Court directed courts that the “facial neutrality” of a statute or constitutional provision does not end the analysis of whether that statute or constitutional provision violates the Free Exercise Clause of the Constitution.

c. As a general matter, do you believe laws should be interpreted and applied in context?

Response: Yes.

d. Considering that law is often framed in very broad terms, when is it appropriate for judges to move away from strict textualism?

Response: A judge should always look first to the plain language of a statute. A judge should utilize other tools of interpretation including, for example, the canons of statutory construction in the event that the text alone does not resolve the legal issue at hand.

e. When analyzing the intent of constitutional text, what point in time do you use to interpret the text's meaning? Do you believe that our understanding of the Constitution's meaning evolves over time?

Response: The Supreme Court has held that certain provisions of the Constitution are to be interpreted according to the public meaning of a provision at the time it was enacted and has, for other provisions, suggested that a court evaluate post-enactment considerations. If confirmed I would follow the precedent of the Supreme Court and the Tenth Circuit regarding the methods to be employed when interpreting the Constitution.

6. President Trump claimed that his list of potential nominees for the Supreme Court, on which you were included, was decided based on who would "automatically" overturn *Roe v. Wade*.

a. Given President Trump's comments, what in your record do you believe led the President to believe you would "automatically" overturn *Roe* if given the opportunity?

Response: I do not know. At no time during this process has anyone asked me to make any commitments with respect to how I would rule on any case that were to come before me.

b. Would you follow *Roe* as it stands today if you are confirmed?

Response: If I am confirmed I will faithfully follow *Roe v. Wade* and all other Supreme Court precedent.

c. Whether or not you would follow *Roe*, do you believe *Roe* was correctly decided?

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 whether *Roe v. Wade* was correctly decided.

d. Do you agree that there is a right to privacy under the U.S. Constitution and that this right limits the ways in which government can restrict individual rights?

Response: The Supreme Court has recognized such a right and I would faithfully apply all precedents where that right has been recognized.

e. Do you agree with the analysis of the majority of the Supreme Court in *Roe v. Wade* that the constitutional right to privacy encompasses a woman's decision whether or not to continue a pregnancy?

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 whether *Roe v. Wade* was correctly decided. If I am confirmed I will faithfully follow *Roe* and all other Supreme Court precedent.

f. Have you been affiliated with any organization that has taken a public stance in opposition to *Roe v. Wade*?

Response: Not to my knowledge.

g. Do you believe any of the later cases relying on *Roe*, including *Casey*, *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), were rightly decided?

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 whether these cases were correctly decided. If I am confirmed I will faithfully follow these precedents.

7. In *Lawrence v. Texas*, the Supreme Court held that the right to liberty under the Due Process Clause gives individuals the right to engage in private, adult, consensual sex without interference by the government. Your former boss, Justice Thomas, dissented from that decision, and indicated that he could find no “general right of privacy” or relevant liberty in the Constitution that would support the petitioner’s claim. Justice Scalia in his dissent likewise accused the Court of inventing a brand-new constitutional right. Do you share either Justice Thomas’ or Justice Scalia’s view of how the Court decided *Lawrence*?

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 Scalia and Justice Thomas’ dissents in *Lawrence v. Texas*. If I am confirmed I would faithfully apply *Lawrence* and all other Supreme Court precedent.

8. In *United States v. Windsor*, Justice Scalia wrote a dissent that Justice Thomas joined, in which he said that the Supreme Court had “no power under the Constitution” to invalidate a democratically adopted law limiting federal marital benefits to heterosexual couples. He expressed similar outrage over the Court’s decision in *Obergefell*, which struck down state laws preventing same-sex couples from marrying. Do you agree that the question of same-sex couples’ right to marry is one that should have been left to the democratic process?

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 Scalia’s dissent in *United States v. Windsor*. If I am confirmed I would faithfully apply *Windsor* and all other Supreme Court precedent.

9. You have written in support of “New Federalism,” a legal theory that advances a limited view of federal legislative authority.

a. Which areas of the law do you believe the federal government should legislate?

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 an opinion as to which areas of the law the federal government should legislate.

b. You've argued that tort reform should be handled at the state level, but also supported President George W. Bush's efforts to pass federal tort reform legislation. How do you reconcile those views?

Response: My academic work regarding tort reform predates my time as a justice on the Colorado Supreme Court. 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 an opinion on tort reform legislation.

c. You suggest in your article *The Property Clause and New Federalism* that "New Federalism" limits the federal government's ability to involve itself in environmental protection, even praising the Supreme Court for striking down the EPA's migratory bird rule in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*. What role, if any, do you believe the federal government can have in enacting environmental legislation under principles of New Federalism?

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 an opinion as to what environmental legislation the federal government can enact.

d. Do you believe the federal hate crimes statutes (e.g., 18 U.S.C. 247, 18 U.S.C. 249) are a legitimate exercise of Congress's Commerce Clause power?

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 an opinion as to whether any statutes are a legitimate exercise of Congress's Commerce Clause power.

e. How do you reconcile your views on Federalism with your ruling against state medical marijuana laws? Why do you believe federal law should preempt state law when it comes to the use of medical marijuana?

Response: As a member of Colorado's Supreme Court, I have considered cases involving Colorado's Medical Marijuana Amendment, Colo. Const. art. XVIII, § 14. In each case I have considered the Amendment's text as well as the Supremacy Clause of the United States Constitution. I have also considered and applied relevant precedent of the Colorado Supreme Court and precedent of the United States Supreme Court. Beyond the reported decisions of the Colorado Supreme Court in which I have participated, I believe it would be inappropriate for me to offer my view as to the relationship between federal law and Colorado law on this or any other subject matter.

f. In a 2001 article entitled *A Spotlight on Structure*, you suggest that *Baker v. Carr*, 369 U.S. 186 (1962) (finding jurisdiction over legislative apportionment issues) and *Reynolds Sims*, 377 U.S. 533 (1964) (requiring one-person-one-vote under the Equal Protection Clause) improperly paved the way for judicial intervention in elections. What role, if any, do you believe the judiciary should play in securing voting rights and ensuring fair elections?

Response: The appropriate role for a federal court in voting-rights matters is to resolve all cases and controversies that are properly before it consistent with the United States Constitution, federal law, relevant precedent of the United States Supreme Court, and any binding precedent of lower courts.

g. How do you believe the Court should approach redistricting cases?

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 an opinion as to how the United States Supreme Court should approach redistricting cases.

h. Which factors should be most heavily weighed by courts in analyzing redistricting plans?

Response: As in every case, when analyzing redistricting plans, a lower court should apply all relevant statutes, precedent of the United States Supreme Court, and any binding precedent of lower courts.

10. You have consistently ruled against the exercise of eminent domain; the one exception seems to be the dissent you wrote in *Larson v. Sinclair Transportation Company*, where you argued that an oil company should be allowed to exercise eminent domain to build a petroleum pipeline. How do you reconcile your position in that case with your consistent opposition to government takings?

Response: In considering cases involving eminent domain I have sought to faithfully apply precedent of the United States Supreme Court and the Colorado Supreme Court.