

**Senator Grassley
Questions for the Record**

**E. Scott Frost,
Nominee, U.S. District Judge for the Northern 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 effect of the amendment is to make proportionality a priority in determining the appropriate scope of discovery. The amendment requires the parties to consider whether a potential discovery request is appropriate and proportional within the context of the specific case, or as phrased by Chief Justice Roberts, “as a fundamental principle, [] lawyers must size and shape their discovery requests to the requisites of a case.” If followed, the Rule should result in reduced objections from responding parties, and less need for judicial intervention.

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

Response: In assessing proportionality in the context of a discovery request, I would consider the factors set out in amended Rule 26(b)(1): 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. These are the factors I now utilize in my capacity as magistrate judge in resolving discovery disputes, and would continue to utilize if confirmed as district judge.

- 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: Recognizing that the amendment essentially moved consideration of proportionality from Rule 26(b)(2) to Rule 26(b)(1), and eliminated the provision which allowed courts to order discovery of “any matter relevant to the subject

matter” and “reasonably calculated to lead to the discovery of admissible evidence,” my assessment now depends instead on whether the information was relevant to a party’s claim or defense and proportional to the needs of the case, as well as the other factors carried over from the previous version of Rule 26(b)(1). This narrowed approach, contrasted with the prior more open-ended approach, elevates the role that judges play in case management and resolving conflicts, and requires them to be proactive in controlling the pace and conduct of litigation. In my capacity as magistrate judge, I have utilized this approach in resolving discovery disputes, and would continue to do so if confirmed as district judge.

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, I will continue to manage cases by ensuring that all parties understand that Rule 16(b)(2) will be followed, by being actively engaged in case management, by encouraging the parties to meet and confer as soon as possible, by utilizing early scheduling conferences in which issues such as scope of discovery are discussed, and by emphasizing my availability for conferences to resolve discovery issues prior to filing formal motions. I would also continue to use all available electronic case management tools in my district, and utilize magistrate judges by making appropriate referrals to them.

- 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: If confirmed, my goal in any case would be to handle all matters before me as efficiently as possible. The 2015 amendments emphasize the importance of effective case management, which requires judges to have an active role in controlling the pace and conduct of litigation. I will continue to actively monitor cases, ensure the parties are aware of my willingness to become involved when necessary, encourage counsel and parties to cooperate during discovery, explore informal discovery dispute resolution when appropriate, and use technology, such as the electronic case management tools of my district, in order to reduce the cost of litigation whenever possible.

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 a cost-allocation mechanism was included in a proposed protective order, I would acknowledge that amended Rule 26(c)(1)(B) expressly recognizes such protective orders may allocate expenses for disclosure or discovery. Assuming an objection was made by a party, I would review the positions of both sides to determine if good cause exists to issue a protective order which allocates expenses in order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” See Rule 26(c)(1).

- 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: I would consider ordering allocation of expenses only to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, keeping in mind that the producing party ordinarily bears the costs of production in response to discovery requests. If the party resisting production makes a showing that the discovery requested is somehow improper, then it becomes the burden of the moving party to show that the information is relevant and necessary to proving their case.

- 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: I do not believe that the amendment of Rule 26(c)(1)(B) confers new authority or obligation, but instead includes an express recognition of protective orders that allocate expenses for disclosure or 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: Both Rule 26(c)(1)(B) and Rule 37 encourage parties to engage in reasonable discovery practices. For example, when a party fails to take reasonable steps to preserve electronically stored information that should have been preserved, and the information is lost as a result of failure to preserve, Rule 37(e) focuses on whether lost information can be restored or replaced through additional discovery. A judge may utilize Rule 26(c)(1)(B) to allocate expenses which may be pertinent to curing any prejudice.

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

Response: I believe the most important attribute of a judge is to have a commitment to the rule of law, which means the ability to approach every case with an open mind, and to impartially consider the facts and apply relevant and binding precedent to those facts without consideration of any personal opinions or beliefs. I believe I have demonstrated this ability during my tenure as a magistrate judge for the past five years, and will continue to follow the rule of law if confirmed as district 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: A judge should have patience and respect for all who come before the court. He or she must be humble, even-tempered, and open-minded, but well-prepared, and decisive. The judge must be a good listener, and be able to convey to the parties that he considers their case important. As a magistrate judge, I believe that I have demonstrated these attributes, and would continue to do so if I am confirmed as 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: As a magistrate judge, I have faithfully followed all precedents from the Supreme Court and the Fifth Circuit, without exception, and without any regard to any personal opinions or views I might have. If confirmed, I would continue to follow such precedents, regardless of whether or not I agree with the decisions.

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 any case of first impression, I first focus on the plain language of the statute, regulation, or rule. If the language is clear and unambiguous, I follow its plain meaning and apply the law to the facts of the case. If the language is ambiguous, I look to Supreme Court and Fifth Circuit cases in which those courts interpreted similar or analogous language. If there is no analogous authority from the Supreme Court or Fifth Circuit, I look for persuasive authority from other federal circuits or district courts.

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: I would follow the precedent of the Supreme Court and the Fifth Circuit without regard to any opinion I might have as to whether it was decided correctly. As magistrate judge, I am bound by and follow the precedents of the Supreme Court and Fifth Circuit, and would continue to do so if confirmed as district judge.

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

Response: Statutes passed by Congress and signed into law by the President are presumptively valid. Only in cases where Congress has exceeded its authority under the Constitution or enacted a law that is contrary to the Constitution should a statute be held unconstitutional, and only then if resolution of the case requires reaching the constitutional question. A district court should attempt to resolve a case without addressing constitutional issues if there is another way to decide the case.

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 on 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 evidences my commitment to following precedent and to refrain from making decisions based on political ideology or motivation. If confirmed as district judge, I would continue to follow this practice and the rule of law.

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 would be the best evidence that I treat all litigants who appear before me fairly, and that I follow the rule of law and do not make decisions based upon any personal views. I pledge to do the same if confirmed as a district judge.

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

Response: As a magistrate judge, I am accustomed to managing heavy dockets and have worked diligently to do so effectively. If confirmed, I will utilize scheduling conferences and establish firm but reasonable deadlines for the efficient disposition of cases. I will work hard and issue decisions promptly, but only after careful consideration, to promote the steady progress of each case. I will utilize magistrate judges by referring appropriate

matters to them, and use all available electronic case management tools in the Northern District of Texas.

- 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: Yes, I believe that judges have a role in controlling the pace and conduct of litigation. My experience as a magistrate judge has taught me the value of maintaining control over the docket and ensuring that all cases are progressing efficiently. If confirmed, I will utilize early status conferences with counsel to identify potential issues and to discuss the contents and timeframe for a scheduling order. Once reasonable deadlines are set for discovery, motions, and trials, I will enforce those deadlines, while being cognizant of the needs of the parties.

- 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: As magistrate judge, I first review all the briefing and familiarize myself with case law cited by the parties. I make a fair and impartial evaluation of the facts, then conduct independent research on controlling authority from the Supreme Court and Fifth Circuit. I apply the law to the facts to reach a decision, and ultimately draft a clear and concise opinion that explains the issue and sets forth the reasoning for my decision.

- 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: I am not familiar with the context of this statement. However, I believe that judges should impartially consider the facts of a case and apply the relevant precedent to those facts without consideration of any personal beliefs or opinions.

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

Response: I received these questions from the Department of Justice, Office of Legal Policy on September 14, 2016. I reviewed the questions and drafted my responses, which were submitted to the Office of Legal Policy for review. I then finalized my answers for submission 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

E. Scott Frost,
Nominee, U.S. District Judge for the Northern 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: The United States Constitution is altered only by amendment under Article V, and I would decide any constitutional questions according to binding precedent from the Supreme Court and Fifth Circuit.

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

Response: As a United States Magistrate Judge, I follow only the plain language of the relevant text and binding precedent from the Supreme Court and the Fifth Circuit, and would continue to do so if confirmed.

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

Response: Judicial activism occurs when a judge injects his personal beliefs or agenda into the decision-making process, or makes decisions based on what he feels should be the result, as opposed to approaching each case with an open mind and fairly and impartially applying applicable law and binding precedent to the facts of the case. I do not believe that judicial activism is ever appropriate.

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

Response: Statutes passed by Congress and signed into law by the President are presumptively valid. Only in cases where Congress has exceeded its authority under the Constitution or enacted a law that is contrary to the Constitution should a statute be held unconstitutional, and only then if resolution of the case requires reaching the constitutional question. A district

court should attempt to resolve a case without addressing constitutional issues if there is another way to decide the case.

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

Response: Fundamental rights, which derive from the Due Process Clause of the United States Constitution, are those “fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’” and that are “‘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, 720-21 (1997) (internal citations omitted). I would follow Supreme Court and Fifth Circuit precedent in deciding issues regarding fundamental rights if confirmed.

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: In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court held that under the Religious Freedom Restoration Act of 1993, private citizens and businesses could not be substantially burdened when exercising a sincerely held religious belief. If confirmed, I would faithfully follow this and all other binding precedent from the Supreme Court and Fifth Circuit.

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 recognized a personal right to bear arms derived from the Second Amendment, and stated that some higher level of scrutiny than rational-basis review was required for deciding cases regarding that right. If confirmed, I would follow this and all binding 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: If confirmed, I would faithfully apply the Supreme Court precedent which finds that states may require voters to present photo

identification before casting ballots. *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). *But see Veasey v. Abbott*, No. 14–41127, __ F.3d __, 2016 WL 3923868 (5th Cir. July 20, 2016) (en banc) (partially striking down Texas Voter ID law, finding that Senate Bill 14 violates Section 2 of the Voting Rights Act through its discriminatory effects).

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: If confirmed, I will continue to manage cases by ensuring that all parties understand that the applicable Rules of Civil Procedure will be followed, by being actively engaged in case management, by encouraging the parties to meet and confer as soon as possible, by utilizing early scheduling conferences in which issues such as scope of discovery are discussed, and by emphasizing my availability for conferences to resolve discovery issues prior to filing formal motions. I would also continue to use all available electronic case management tools in my district, and utilize magistrate judges by making appropriate referrals to them.

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

Response: In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court held that capital punishment is constitutional, and I would apply the precedent and settled law in this area if confirmed.