

Senator Grassley
Questions for the Record

James Wesley Hendrix
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 Advisory Committee Notes to Federal Rule of Civil Procedure 26 explain that “[i]nformation is discoverable under revised Rule 26(b)(1) if it is relevant to any party’s claim or defense and is proportional to the needs of the case.” Fed. R. Civ. P. 26 advisory committee’s note (2015 amend.). The amendment “restores the proportionality factors to their original place [in Rule 26(b)(1)] in defining the scope of discovery,” and it “reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.” *Id.* The amendment “does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.” *Id.* The court and parties have “a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes,” and the amendment “again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management.” *Id.*

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

Response: Many uncertainties regarding the proper scope of discovery “should be addressed and reduced in the parties’ Rule 26(f) conference and in scheduling and pretrial conferences with the court.” Fed. R. Civ. P. 26 advisory committee’s note (2015 amend.). When parties cannot resolve a discovery dispute, “[a] party claiming undue burden or expense ordinarily has far better information—perhaps the only information—with respect to that part of the determination.” *Id.* In contrast, “[a] party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that

party understands them.” *Id.* To resolve the dispute, “[t]he court’s responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.” *Id.*

- 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: Although the Advisory Committee Notes make clear that the amendment “does not change the existing responsibilities of the court and the parties to consider proportionality,” the amended rule reinforces the importance of proportionality in conducting and managing discovery. Fed. R. Civ. P. 26 advisory committee note (2015 amend.).

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 would diligently and actively manage my caseload, and I would make myself available to parties to resolve pretrial disputes. To help cases proceed efficiently, I would conduct pretrial conferences, issue and enforce reasonable scheduling orders, and issue rulings as promptly as possible. I would utilize applicable rules designed to assist the parties and the court avoid unnecessary delay and cost, including Federal Rules of Civil Procedure 16 and 26(f), and the Northern District of Texas’s local rules. Additionally, I would utilize magistrate judges to help process cases and resolve disputes. Finally, if confirmed, I would meet with other district court judges and the clerk of court to ensure that I employ best practices in case management.

- 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: My approach to case management is described above, and it accounts for the amendments to the Federal Rules of Civil Procedure. Through my approach and the amended rules, I would endeavor to resolve cases fairly, efficiently, and correctly.

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: The amended rule’s explicit recognition of a court’s ability to allocate expenses “will forestall the temptation some parties may feel to contest this authority.” Fed. R. Civ. P. 26 advisory committee note (2015 amend.). If confirmed, my evaluation would start with the assumption that “a responding party ordinarily bears the costs of responding.” *Id.* Nevertheless, if a party established good cause through specific facts for an order to protect it from undue burden or expense, Rule 26(c) authorizes a protective order.

- 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: Without a request from a party to allocate expenses and a showing of good cause, I would be unlikely to shift costs.

- 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.

- 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: Generally, the rules serve different purposes. Rule 26(c)(1)(B) permits cost-shifting in responding to discovery upon a showing of good cause. Rule 37 requires a court to award reasonable expenses to a party who successfully moves to compel discovery that has been withheld, unless (1) the movant failed to make a good-faith effort to obtain the discovery without court action; (2) the opposing party’s position was substantially justified; or (3) other circumstances make an award of expenses unjust. When, however, a motion to compel is denied in whole or part, Rule 37(a)(5)(B) & (C) permit a court to issue a protective order authorized under Rule 26(c).

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

Response: The most important attribute of a judge is to be fair and impartial in resolving all matters and applying the law. As an Assistant United States Attorney and Appellate

Chief of the Northern District of Texas's U.S. Attorney's Office, I am committed to the rule of law, and I have seen first-hand the importance of an independent, impartial judiciary. If confirmed, I would approach each case with an open mind and be committed to fairly and impartially administering the law.

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: An appropriate judicial temperament requires (1) patience; (2) respect for the parties, witnesses, and juries; (3) humility to recognize the important, but limited role a judge plays; and (4) diligence in managing and processing the docket. I endeavor to exhibit these qualities as an Assistant United States Attorney and Appellate Chief, and if confirmed, I would commit myself to them as a 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, I would be fully committed to following the precedents of higher courts and giving them full force and effect.

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: Absent controlling precedent from the Supreme Court or Fifth Circuit, I would start my analysis with the plain language of the statute, regulation, provision, or contract at issue. If the plain language clearly resolved the issue, then my analysis would stop there. If the text were ambiguous, I would apply accepted canons of statutory construction to determine its meaning. If additional guidance were needed, I would look to the Supreme Court's and Fifth Circuit's analysis of analogous provisions, as well as to other circuits' interpretation of the text at issue as persuasive authority.

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 apply the Supreme Court's and the Fifth Circuit's binding precedent.

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

Response: Federal courts should rarely conclude that a statute is unconstitutional. Statutes are presumed to be constitutional, and courts should, when possible, resolve cases in a way that avoids findings of unconstitutionality. Nevertheless, where there is no alternative basis to resolve the case and Congress exceeded its authority or the statute violates the Constitution, courts must conclude that a statute is 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, I would not rely on foreign law or the views of the “world community” in construing the Constitution. I would rely on Supreme Court precedent, Fifth Circuit case law, and established methods of constitutional interpretation.

- 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: The rule of law and our Constitution’s separation of powers are bedrock American principles that set us apart and help sustain our democracy. They depend on judges’ ability to resolve cases based on precedent and the text of the applicable law, rather than political ideology or personal motivation. I have seen the importance of these principles while in private practice and while serving as an Assistant United States Attorney. If confirmed as a district court judge, I would not allow them to erode by violating this trust. I would fairly and impartially resolve cases based on precedent, the plain language of the applicable law, and any other relevant legal principles and authorities.

- 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: Please see my response to Question 11.

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

Response: Please see my response to Question 2(a).

- 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 judges should help control the pace and conduct of litigation. Judges should expect parties to conduct themselves with civility and professionalism—and afford parties the same treatment. Regarding the specific steps I would take to control my docket, if confirmed, please see my response to Question 2(a).

- 15. 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?

Response: To resolve cases that come before me, I would carefully consider the parties' briefing, read the text of the any provision at issue, and analyze applicable precedent. If the proper resolution of an issue were unclear, or when evidence was necessary, I would conduct hearings to hear more from the parties and consider admissible evidence. As a district court judge, I would of course be bound by Supreme Court and Fifth Circuit precedent, and I would faithfully apply it in resolving my cases. Throughout the process, I would remain impartial and approach each case with an open mind.

Given that it has been some time since I left private civil practice to serve as an Assistant United States Attorney, the most difficult part of transitioning to the bench would be civil procedure. But I am confident that my prior civil experience, work ethic, and dedication to preserving the reputation of federal courts would allow me to meet and overcome this challenge.

- 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: No. I believe that a judge’s personal beliefs and perspectives should not impact or alter the fair and impartial application of the law in resolving cases. Judges should treat the litigants before the court with dignity and respect, and they should approach their role with humility and an appreciation of the power and trust placed in the court.

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

Response: I read and considered the questions, conducted legal research when necessary, and drafted answers. After reviewing and editing my answers, I sent my draft answers to the Office of Legal Policy at the Department of Justice. I discussed my answers with attorneys in that office and then revised and finalized my answers for the 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

Questions for Mr. James Wesley Hendrix

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.

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

Response: None.

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

Response: Judicial activism is when a judge decides a case or resolves an issue based on his or her personal views or policy preferences instead of applying the applicable law. Judicial activism is not appropriate.

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

Response: Federal courts should rarely conclude that a statute is unconstitutional. Statutes are presumed to be constitutional, and courts should, when possible, resolve cases in a way that avoids findings of unconstitutionality. Nevertheless, where there is no alternative basis to resolve the case and Congress exceeded its authority or the statute violates the Constitution, courts must conclude that a statute is unconstitutional.

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

Response: As explained by the Supreme Court, the Due Process Clause “protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition and 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 quotation marks and citations omitted).

- 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: The First Amendment protects the free exercise of sincerely held religious beliefs. The Supreme Court has provided guidance on how to resolve a claim that a law or regulation infringes religious rights, and I would faithfully apply that precedent. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (explaining that “[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons”); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (explaining that private citizens and businesses shall not be substantially burdened in their exercise of sincerely held religious beliefs under the Religious Freedom Restoration Act).

- 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: Although the Supreme Court has not specified what level of scrutiny applies when a statute or regulation related to firearms is challenged under the Second Amendment, it has made clear that the scrutiny is higher than rational-basis review. *See District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008). The Fifth Circuit has held that “[a] regulation that threatens a right at the core of the Second Amendment—for example, the right of a law-abiding, responsible adult to possess and use a handgun to defend his or her home and family—triggers strict scrutiny.” *National Rifle Ass’n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 195 (5th Cir. 2012) (internal citation omitted). For “[a] less severe regulation—a regulation that does not encroach on the core of the Second Amendment,” there is “a less demanding means-ends showing” that “requires the government to demonstrate a ‘reasonable fit’ between the challenged regulation and an ‘important’ government objective.” *Id.* If confirmed as a district court judge, I would be bound by and faithfully apply Fifth Circuit and Supreme Court 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: Supreme Court precedent provides guidance on how to determine whether a statute or regulation affecting voting rights is unconstitutional, and the Fifth Circuit recently addressed the issue. *See Crawford v. Marion*

County Election Bd., 553 U.S. 181 (2008); *Veasey v. Abbott*, __ F.3d __, 2016 WL 3923868 (5th Cir. July 20, 2016) (en banc). As a district court judge, I would be bound by and faithfully apply Supreme Court and Fifth Circuit precedent.

- 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, it would be my responsibility as a judge to ensure that all litigants are afforded due process. I would balance that obligation with the need for judicial efficiency by employing a diligent work ethic and active case-management practices, and I would make myself available to parties to resolve pretrial disputes. Other than prioritizing criminal cases as required by the Speedy Trial Act, I would process and resolve cases as they arrived.

To help cases proceed efficiently, I would conduct pretrial conferences, issue and enforce reasonable scheduling orders, and issue rulings as promptly as possible. I would utilize applicable rules designed to assist the parties and the court avoid unnecessary delay and cost, including Federal Rules of Civil Procedure 16 and 26(f), and the Northern District of Texas's local rules. Additionally, I would utilize magistrate judges to help process cases and resolve disputes. Finally, if confirmed, I would meet with other district court judges and the clerk of court to ensure that I employ best practices in case management.

- 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, except for minors and the intellectually disabled, the death penalty is constitutional. If confirmed as a district court judge, I would be bound by and faithfully apply Supreme Court and Fifth Circuit precedent.