

**Senator Chuck Grassley
Questions for the Record**

**Nancy L. Moritz
Nominee, U.S. Circuit Judge for the Tenth Circuit**

- 1. In your hearing I asked you how you would distinguish between a fundamental right and a fundamental liberty interest. You made this distinction in *Harrison v. Tauheed*, 235 P.3d 547 (2010). I am not asking you to discuss that particular case, but would you please elaborate on these two concepts?**

Response: In my dissent in *Harrison v. Tauheed*, 235 P.3d 547 (Kan. App. 2010), I did not intend to distinguish between a fundamental right and a fundamental liberty interest. Instead, I attempted to point out that because both an individual's right to the free exercise of religion and a parent's right to make decisions concerning the care, custody, and control of children have been recognized as fundamental, both rights should have been considered by the trial court in that particular custody case in determining the best interests of the child. *See* 235 P.3d at 564-65 ("Further, the majority has essentially judicially mandated a preference for one parent's fundamental right to the free exercise of religion over another parent's fundamental liberty interest in exercising the care, custody, and control of the child. This cannot be the import of our case law on this difficult issue."). In *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000), the Supreme Court characterized the right of parents to make decisions concerning the care, custody and control of their children both as "the oldest of the fundamental liberty interests recognized by this Court," and as a "fundamental right." *See also Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (noting that in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause of the Fourteenth Amendment includes the right to direct the education and upbringing of one's children).

- 2. From a judge's perspective, what is the appropriate manner to evaluate religious beliefs of an individual when considering the best interests of a child? What factors are considered and what weight do you give to those factors?**

Response: An individual's religious beliefs, standing alone, should not be evaluated in considering a custody dispute involving the best interests of the child. Instead, in determining issues of child custody, residency and parenting time, courts generally consider all relevant factors. Those relevant factors may include religiously motivated behavior which impacts on a child's welfare. *See, e.g., Harrison v. Tauheed*, 256 P.3d 851, 864-65 (Kan. 2011) (recognizing that "[d]isapproval of mere *belief or nonbelief* cannot be a consideration in a

custody determination . . . Yet consideration of religiously motivated *behavior* with an impact on a child's welfare cannot be ignored.") (emphasis in original).

3. You once wrote an article on the admissibility of hypnotically refreshed testimony in court.

a. What is your understanding of the admissibility of hypnotically refreshed testimony in court?

Response: This question references a law journal case comment assigned to me in 1984 concerning *People v. Hughes*, 59 N.Y. 2d 523, 453 N.E. 2d 484, 466 N.Y.S. 2d 555 (1983). See Comment, *Evidence: Placing Limits on the Admissibility of Hypnotically Refreshed Testimony*, 24 WASHBURN L.J. 697 (1984). Presently, my understanding of the admissibility of hypnotically refreshed testimony is that it depends, as it did in 1984, upon the jurisdiction as well as the context in which such testimony is offered.

b. What would your approach be as a federal trial judge, if confirmed, in dealing with hypnotically refreshed testimony?

Response: If I am confirmed as a federal circuit judge, and am presented with a question concerning a federal trial judge's admission or denial of admission of hypnotically refreshed testimony, I would apply the precedent of the United States Supreme Court and the Tenth Circuit. See *Rock v. Arkansas*, 483 U.S. 44, 60-61 (1987); *Robison v. Maynard*, 829 F.2d 1501, 1508 n.8 (10th Cir. 1987) *overruled on other grounds by Romano v. Gibson*, 239 F.3d 1156 (10th Cir. 2010).

4. On page 7 of your questionnaire, section 12c, you provided a link to an evaluation form to the Kansas Commission on Judicial performance for the Spring of 2010. The link no longer seems to be valid. Will you please provide the Committee a copy of that evaluation?

Response: I have attached to these responses a copy of the narrative profile of my self-evaluation for the Kansas Commission on Judicial Performance, which I referred to in my response to Question 12c.

5. Do you believe that a judge's gender, ethnicity, or other demographic factor has any or should have any influence in the outcome of a case? Please explain.

Response: No. The outcome of every case is dependent upon an application of the law to the facts at hand. A judge's gender, ethnicity, and other demographic factors have no role in that process.

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

Response: A judge's most important attribute is the ability to approach each case independently and with an open mind. I believe I possess that trait, and have demonstrated it throughout my nine years as an appellate court judge.

7. 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 be courteous, engaged, humble, fair-minded, intellectually honest, and have an abiding respect for the rule of law. The elements I consider most essential are fair-mindedness and a commitment to the rule of law. I believe I have demonstrated these traits during my nine-year tenure as an appellate jurist.

8. In general, Supreme Court precedents are binding on all lower federal courts. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Yes.

9. 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: I would first examine the text of any relevant statute or provision. For example, if it is a question of first impression as to statutory interpretation, I would begin by considering the text of the entire statute, not just the provision at issue. If the statute is clear and unambiguous, my analysis would end there. If the statute is ambiguous on its face, I would apply rules of statutory construction and would look for guidance in analogous Supreme Court and Tenth Circuit precedent. Finally, I would consider any legislative history to discern the meaning of the statute.

10. 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: If confirmed as a federal circuit judge, I would be obligated to follow the precedent of the Supreme Court and Tenth Circuit regardless of my view of the correctness of the decision. The only possible exception would be the rare occasion in which the Tenth Circuit hears a case *en banc*, when the court could overturn its own precedent. In deciding whether to vote for *en banc* consideration, I would be guided by Fed. R. App. Proc. 35(a), which provides that *en banc* consideration is not favored unless: (1) it is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance.

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

Response: Federal statutes are presumed constitutional. But if faced with an unavoidable constitutional issue, a federal court can declare a statute unconstitutional if Congress exceeds its authority under the Constitution or acts contrary to a constitutional provision.

12. Please describe your understanding of the workload of the Tenth Circuit. If confirmed, how do you intend to manage your caseload?

Response: I am not familiar with the specific caseload of the Tenth Circuit, but I expect it to be both demanding and constant. If confirmed as a federal circuit judge, I would initially confer with my colleagues to determine "best practices" in managing the caseload in order to give each case appropriate attention while expeditiously issuing decisions. I would also utilize procedures and practices I have implemented as a state appellate court judge to achieve these goals.

13. 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: I am not aware of any circumstance in which it would be appropriate to consider foreign law or views of the "world community" in interpreting the Constitution.

14. 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: I have served for nine years on the Kansas appellate bench, the last three of those years on Kansas' highest court. Throughout that time, I have never allowed my decisions to be influenced by political ideology or motivation, nor would I allow such factors to influence my decision-making if I am confirmed as a federal circuit judge.

15. 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: I can point to my record of decision-making in nine years as a Kansas appellate court judge as evidence for the Committee and future litigants that I can successfully put aside any personal views I might have and that I am fair to all who appear before me. If confirmed as a federal circuit judge, I would remain firmly committed to the concept of a fair and independent judiciary.

16. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?

Response: A federal circuit can overturn its own precedent only in the rare circumstance in which the court sits *en banc*. As a federal circuit judge, I would vote in favor of *en banc* consideration only as permitted by Fed. R. App. Proc. 35: (1) to secure or maintain uniformity of the court's decisions; or because (2) the proceeding involved a question of exceptional importance. If an *en banc* rehearing is granted, I would consider the parties' arguments and relevant precedent, and carefully contemplate the importance of *stare decisis* before rendering a decision.

17. You have spent your judicial career as a state court judge. What do you expect to be most difficult part of this transition to being a federal judge for you?

Response: Because of my prior experience as a law clerk to a federal district court judge, a civil litigator in private practice, and as an Assistant United States Attorney specializing in civil litigation and appellate practice, I am familiar with federal evidentiary and procedural rules. While I would expect to update and refresh my knowledge of those rules, I anticipate my more difficult task will be to familiarize myself with substantive areas of federal law as well as the substantive law of the other five states in the Tenth Circuit. I anticipate that I would undertake this task gradually but thoroughly, on a case-by-case basis. As a state appellate judge the last nine years, I am familiar with the process of learning different areas of the law depending upon the circumstances that an individual case presents, and am confident in my ability to work hard.

18. 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: Before deciding a case with my colleagues, I read the briefs and review the record, paying particular attention to the lower court decision, how the issues were raised and ruled upon below, and any jurisdictional or other issues which may prevent the court from reaching the merits. Before oral argument, I also review any memoranda or work product prepared by court staff, and any relevant statutes and case law. I fully participate in the decision-making process, while striving to remain open-minded and respectful of the views of my colleagues. If I am the authoring judge, I seek to write a concise and cogent decision that is understandable regardless of the audience.

19. Do you think that collegiality is an important element of the work of a Circuit Court? If so, how would you approach your work and interaction with colleagues on the Court, if confirmed?

Response: Yes. Because members of a circuit court work collectively, collegiality is an essential element of that work. If confirmed, I would approach my interaction with my new colleagues as I have approached interaction with colleagues on the Kansas appellate bench – *i.e.*, eager to collectively work to achieve the correct result, respectful of their views, and determined to maintain the integrity and honor of the bench.

20. At a speech in 2005, Justice Scalia said, “I think it is up to the judge to say what the Constitution provided, even if what it provided is not the best answer, even if you think it should be amended. If that’s what it says, that’s what it says.”

a. Do you agree with Justice Scalia?

Response: I am unfamiliar with the speech referred to or the context in which Justice Scalia made the above-quoted statement, but I agree that when faced with interpreting a constitutional provision, a judge begins by examining the text of the Constitution. Further, I agree that any personal views I may or may not have about what the Constitution should say are irrelevant to that analysis.

b. Do you believe a judge should consider his or her own values or policy preferences in determining what the law means? If so, under what circumstances?

Response: No.

21. Do you think judges should consider the “current preferences of the society” when ruling on a constitutional challenge? What about when seeking to overrule longstanding Supreme Court or circuit precedent?

Response: No, judges should not consider society's preferences when ruling on constitutional challenges. Rather, they should look to binding precedent. If confirmed as a federal circuit judge, I would never be permitted to overrule Supreme Court precedent, and on the rare occasion when the Tenth Circuit considers an issue *en banc*, the current preferences of society should not be considered in deciding whether to overrule circuit precedent.

22. What is your judicial philosophy on applying the Constitution to modern statutes and regulations?

Response: The Constitution can and must be applied to modern statutes and regulations, even though they may concern matters the Framers could never have anticipated. The Supreme Court recently reiterated the Constitution's continuing application to current concepts in *United States v. Jones*, 132 S. Ct. 945, 952 n.3 (2012), when it concluded that law enforcement's installation of a GPS tracking device to monitor the defendant's vehicle implicated the Fourth's Amendment's protection against unreasonable searches and seizures. In so holding, the Court found it "irrelevant whether there was an 18th-century analog" and concluded "[w]hatever new methods of investigation may be devised, our task, *at a minimum*, is to decide whether the action in question would have constituted a 'search' within the original meaning of the Fourth Amendment." (emphasis in original). Thus, if presented with an issue concerning the Constitution's application to modern statutes or regulations, I would look to the text and history of the Constitution and controlling Supreme Court and Tenth Circuit precedent.

23. What weight or consideration should a judge give to evolving norms and traditions of our society in interpreting the written Constitution?

Response: Generally, a judge should not consider societal norms and traditions in interpreting the text of the Constitution. The only circumstance in which I am aware that the Supreme Court has considered societal norms is in evaluating "evolving standards of decency" in the Eighth Amendment context. See, e.g., *Graham v. Florida*, 560 U.S. 48, 58 (2010). I would adhere to that Supreme Court precedent as I would all other Supreme Court precedent.

24. What is your understanding of the current state of the law with regard to the interplay between the establishment and free exercise clause of the First Amendment?

Response: While I have not had an opportunity to study or consider the scope of the "interplay" between the establishment and free exercise clauses of the First Amendment, my understanding is that the Supreme Court in *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) reaffirmed that there was "room for play in the joints" between these two clauses. If I am confirmed as a federal circuit judge, and if a case came before me that presented this issue, I would study and apply Supreme Court and Tenth Circuit precedent regarding the nature and scope of the interplay between these two clauses to the facts in that particular case.

25. Do you believe that the death penalty is an acceptable form of punishment?

Response: The Supreme Court has consistently found the death penalty to be an acceptable form of punishment with only a few limited exceptions. If confirmed I would faithfully apply that precedent.

26. Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?

Response: I do not see the Constitution itself as a living or constantly evolving document. Instead, I think the beauty of the Constitution is that it was crafted such that it can apply to changing times and circumstances never anticipated by the drafters. *See, e.g., United States v. Jones*, 132 S. Ct. 945 (2012) (applying Fourth Amendment protection against "unreasonable searches and seizures" to government's attachment and use of GPS device to monitor defendant's vehicle).

27. Do you believe there is a right to privacy in the U.S. Constitution?

Response: The Supreme Court has held that various guarantees in the Constitution create zones of privacy, including the First Amendment right of association, the Fourth Amendment's protection of the right of the people to be secure in their persons, houses, papers and effects from unreasonable searches and seizures, and the Fifth Amendment's Self-incrimination Clause. Further, the court has found that encompassed within the Fourteenth Amendment's Due Process Clause is a right to privacy that protects certain personal decisions relating to "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). I would follow this precedent.

a. Where is it located?

Response: Please see answer to Question 27.

b. From what does it derive?

Response: Please see answer to Question 27.

c. What is your understanding, in general terms, of the contours of that right?

Response: Please see answer to Question 27.

28. In *Griswold*, Justice Douglas stated that, although the Bill of Rights did not explicitly mention the right to privacy, it could be found in the “penumbras” and “emanations” of the Constitution.

a. Do you agree with Justice Douglas that there are certain rights that are not explicitly stated in our Constitution that can be found by “reading between the lines”?

Response: If confirmed as a federal circuit judge I would interpret the meaning of the Constitution by considering Supreme Court and Tenth Circuit precedent rather than by "reading between the lines."

b. Is it appropriate for a judge to go searching for “penumbras” and “emanations” in the Constitution?

Response: No. If confirmed as a federal circuit judge, I would have no occasion or basis to search the Constitution for additional, unrecognized rights. Rather, my role would be to consider the text of the Constitution and applicable Supreme Court and Tenth Circuit precedent.

29. In *Brown v. Entertainment Merchants Association*, Justice Breyer supplemented his opinion with appendices comprising scientific articles on the sociological and psychological harm of playing violent video games.

a. When, if ever, do you think it is appropriate for appellate judges to conduct research outside the record of the case?

Response: As an appellate judge, in considering the facts of a particular case and in applying the rule of law to those facts, I am limited to consideration of items included in the record on appeal as designated by the parties and as limited by applicable procedural rules.

b. When, if ever, do you think it is appropriate for appellate judges to base their opinions psychological and sociological scientific studies?

Response: Generally, if a psychological or sociological study is outside the appellate record, it would be inappropriate for an appellate judge to base a decision on such a study. If presented with circumstances in which a psychological or sociological study has been admitted into evidence below or is relevant to an issue on appeal, I would look to Supreme Court and Tenth Circuit precedent to guide me in considering the import of that study.

30. What standard of scrutiny do you believe is appropriate in a Second Amendment challenge against a Federal or State gun law?

Response: The Supreme Court has not specifically determined the appropriate standard of scrutiny to be applied to a challenge to a federal or state gun law. However, in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) and *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court ruled out application of a rational basis standard, thereby leaving either strict scrutiny or intermediate scrutiny as the permissible levels of scrutiny. In *United States v. Reese*, 627 F.3d 792, 801-802 (10th Cir. 2010), the Tenth Circuit applied intermediate scrutiny to an as-applied challenge to a statute prohibiting the possession of firearms by a person subject to a domestic protection order, although it appeared to leave open the possibility that a different level of scrutiny could apply depending on the type of law challenged and the type of restriction. 627 F.3d at 802-805. If confirmed as a federal circuit judge and faced with a Second Amendment challenge, I would interpret and apply Supreme Court and Tenth Circuit precedent to determine the appropriate level of scrutiny.

31. What would be your definition of an “activist judge”?

Response: To me, the term "activist judge" describes a judge who steps outside of his or her limited judicial role and allows personal views to influence the decision-making process or the outcome of the case.

32. What weight should a judge give legislative intent in statutory analysis?

Response: If the text of a statute is unambiguous, a court should give legislative intent no weight. If the text of a statute is ambiguous, the court should apply rules of statutory construction and consider applicable precedent to arrive at the meaning of the statute and should consider legislative intent only if other tools are not useful.

33. According to the website of American Association for Justice (AAJ), it has established a Judicial Task Force, with the stated goals including the following: “To increase the number of pro-civil justice federal judges, increase the level of professional diversity of federal judicial nominees, identify nominees that may have an anti-civil justice bias, increase the number of trial lawyers serving on individual Senator’s judicial selection committees”.

- a. Have you had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding your nomination? If yes, please detail what individuals you had contact with, the dates of the contacts, and the nature of the communications.**

Response: No.

- b. Are you aware of any endorsements or promised endorsements by AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ made to the White House or the Department of Justice regarding your nomination? If yes, please detail what individuals or groups made the endorsements, when the endorsements were made, and to whom the endorsements were made.**

Response: No.

34. Please describe with particularity the process by which these questions were answered.

Response: After receiving the written questions I drafted my responses and submitted them to a Department of Justice attorney for review. After receiving his comments, I made additional final revisions to the draft and submitted it to the Department of Justice for submission to the Committee.

35. Do these answers reflect your true and personal views?

Response: Yes.

Kansas Commission on Judicial Performance



Honorable Nancy Landis Caplinger

2010 Review

Court of Appeals

The Kansas Commission on Judicial Performance recommends that Judge Nancy Landis Caplinger BE RETAINED.

Judge Caplinger was appointed to the Kansas Court of Appeals in 2004. Before her appointment to the bench, she served as Assistant United States Attorney for the District of Kansas from 1995 to 2004 and engaged in the private practice of law from 1989 to 1995. She has also worked as a law clerk for a United States District Court judge and as a research attorney for a Kansas Supreme Court Justice. Judge Caplinger is a graduate of Washburn University and Washburn University School of Law.

Judge Caplinger served on the Board of Editors of the Kansas Bar Association for nearly 20 years, including two years as Chair. She has co-authored three published articles for the KBA Journal and received the KBA's Outstanding Service Award. She has also served on the Kansas CLE Commission and the Board of Governors of the Washburn Law School Association. Judge Caplinger enjoys participating in professional educational activities, making presentations for numerous bar associations and schools. Her primary community involvement is focused on volunteering at and supporting her daughters' schools and their activities. Also, she has delivered Meals on Wheels for more than six years.

Judge Caplinger believes her greatest strengths are that she writes clear and concise opinions and respects the rule of law. She states that she comes prepared for oral argument and enjoys the "give and take" of that process. She also respects her colleagues on the bench and the attorneys who appear before her. Judge Caplinger acknowledges that she sometimes adopts an adversarial position with counsel at oral argument and with her colleagues during case conferences, and that she does not always use her time as effectively as possible especially when it comes to reviewing the large volume of briefs each month. Her professional goals are to consistently exhibit an appropriate demeanor on the bench, to more effectively manage her time, and to continue to be an emissary for the judiciary particularly with our youth across the state.

The Commission received survey responses from 59 attorneys and 128 district judges. Survey results showed that 92% of attorneys and 96% of district judges recommended that Judge Caplinger be retained in office. Judge Caplinger received an overall average score from attorneys of 3.64 on a 4.0 scale and an overall average score from district judges of 3.62. Judge Caplinger's scores exceed the required minimum average grade of 2.0 from each category of respondents. The Commission recommends that she BE RETAINED.