

**Senator Grassley
Questions for the Record**

**Responses of David C. Nye,
Nominee, U.S. District Judge for the District of Idaho**

- 1. The majority of your legal career has been at the state level, both as a judge and as a litigator. How are you prepared to make the transition, if confirmed, to the federal courts?**

Response: Although the majority of my legal career has been at the state level, I have had many cases that have involved federal issues both as a lawyer and as a judge. Particularly, as a judge I regularly handle criminal cases involving issues of constitutional rights such as due process, warrantless searches, and equal protection. I have also handled civil cases involving constitutional issues such as claims arising under Section 1983, governmental takings, trademarks, patents, and freedom of speech. The Idaho Rules of Civil Procedure and the Idaho Rules of Evidence are patterned after the federal rules so I already have a working knowledge of the procedural and evidentiary rules that are used in federal court. Additionally, I have already begun reviewing the Federal Sentencing Guidelines and the Federal Rules of Criminal Procedure. I will participate in educational programs offered by the Administrative Office of the United States Courts. I will also shadow, study, and consult with judicial colleagues on the federal bench. I recognize that it is my responsibility to be fully equipped to handle all of my duties as a federal district judge and I am committed to doing any and all work that is necessary to ensure that I am so equipped.

- 2. According to your questionnaire, you have had minimal experience in criminal matters. As a district judge, you will have to preside over both civil and criminal matters.**

a. Please describe your experience in matters of criminal law.

Response: While it is true that as a practicing lawyer I had minimal experience in criminal matters, I have had experience with criminal law during my time as a state judge. During the almost ten years that I have been a judge I have presided over approximately 1260 cases. At least 700 of those cases were criminal cases. They all involved felonies, including several murder cases. I have presided over criminal jury trials and I have decided hundreds of motions to dismiss or suppress on constitutional grounds. Idaho does not have sentencing guidelines or mandatory minimums for most crimes; however, I have rarely been reversed on any sentences that I have imposed. For the last several years, the Idaho Supreme Court has had me serve on the Idaho Felony Sentencing Committee. That committee was created to help foster uniform criminal sentences throughout the state. I also have trained new judges for the past four years on criminal law. I believe that the transition from state criminal cases to federal criminal cases will be smooth.

b. If confirmed, what steps will you take to familiarize yourself with federal criminal law and procedure?

Response: I have already begun reviewing the Federal Sentencing Guidelines and the Federal Rules of Criminal Procedure. If I am fortunate enough to be confirmed, I will participate in educational programs offered by the Administrative Office of the United States Courts. I will also shadow, study, and consult with judicial colleagues on the federal bench. I recognize that it is my responsibility to be fully equipped to handle all of my duties as a federal district judge and I am committed to doing any and all work that is necessary to ensure that I am so equipped.

3. 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: Rule 26(b)(1) now directly encourages counsel and the courts to focus discovery on what is reasonably necessary to resolve the case, and by doing so, to minimize or eliminate discovery that is not reasonably focused on a fair and efficient resolution of the case. It does away with the historical “boilerplate” discovery demands and requires discovery to be case specific and proportional to the needs of the case.

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

Response: In assessing whether a discovery request is “proportional to the needs of the case”, I would review that request in light of the six factors set forth in the rule: the importance of the issues at stake, 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. This would be done by engaging counsel early and often in the litigation, listening to their arguments about the costs and benefits of the requested discovery, and striking a balance between interests and needs. This will require parties to be transparent and cooperative in their discovery demands and responses and increase active case management by the court.

- 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: I believe that the amendment moves the implicit to the explicit. That is, I believe that the prior rule attempted to facilitate discovery in a fair and equitable manner and that courts have always had the authority to balance the benefits and costs of discovery under the language “reasonably calculated to lead to the discovery of admissible evidence” and through the use of protective orders to prevent overly burdensome discovery. However, the amendment now explicitly requires counsel to craft their discovery demands to the specific case using the six factors added to the rule. This gives the judge a firmer position in ensuring the just, speedy, and inexpensive determination of the action. Specifically, the judge and the parties can focus discovery on key issues, promoting the use of cost-saving measures such as phased discovery orders and cost shifting.

4. **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: As a state judge who has presided over many civil and criminal cases, I have significant experience with case management. If I am confirmed, I will bring with me to the federal bench the same tools that I now use on the state bench. I would engage the parties early and often in the litigation to set the tone of a reasonable and expeditious resolution. I would impose clear discovery deadlines and then follow up the imposition of those deadlines with frequent status conferences or conference calls. I would work with the parties to set a prompt and firm trial date, and then do everything I reasonably could to hold them to that date.

- 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 philosophy about case management would remain the same as it has been while I have been a state judge and as described above. The changes in the rules simply make my philosophy that much easier to enforce and I will use all of those changes.

5. **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: I would evaluate cost-allocation mechanisms by using the six factors included in the amendments. In doing so, I would review the proposed protective orders to use cost-allocation to curb abusive discovery practices which are intentionally used to drive up the costs of litigation and to force parties to carefully evaluate their discovery requests by potentially connecting the expense of the discovery to their benefit of the discovery.

- 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 rarely consider allocation of expenses absent suggestion by the parties. However, if I did consider ordering allocation of expenses, I would follow the proportionality analysis dictated by the amendments and I would apply the six listed factors to reach a decision.

- 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 the amendment confers any new authority or obligation on the district court; however, I do believe that it clarifies and emphasizes the court's authority to manage discovery costs through cost-allocation.

- 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: I do not believe the cost-allocation provisions of Rule 26 relate directly to those found in Rule 37. Cost-allocation under Rule 26 is a matter of proportionality (cost vs. benefit) designed to protect a party from whom discovery is sought from undue harm while still allowing the discovery to occur. Cost-allocation under Rule 37 is punitive, designed to punish a party for discovery abuse that is prejudicial or harmful to the other party.

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

Response: I believe that a judge's most important attribute is integrity. By integrity, I mean the ability to fairly and impartially apply the rule of law to the facts in the case, to treat the parties and counsel with dignity and respect, and to always act with impartiality and

without regard to one's personal beliefs or opinions. I believe that my record as a state judge for almost ten years demonstrates that I possess this integrity.

- 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: Appropriate judicial temperament requires that the judge be impartial, open-minded, and free from bias or prejudice. It requires diligence, patience, and the ability to firmly and fairly control the courtroom proceedings. I believe my record as a state district court judge demonstrates that I have the appropriate judicial temperament and I will continue to hold that temperament if I am confirmed as a federal district judge.

- 8. 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: For almost ten years as a state district judge I have demonstrated my commitment to follow the precedents of higher courts faithfully and to give those precedents full force and effect even if I personally disagree with them. I believe my record in this regard speaks for itself and I am committed to continue to follow the Supreme Court precedents and my circuit court's precedents if confirmed.

- 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: In a case involving a constitutional provision, statute, or regulation, I would first look to the language of the provision, statute, or regulation to determine its plain meaning. If there is an ambiguity, I would look at the language of the statute internally and in conjunction with other statutes in the same act. If that does not resolve the ambiguity, I would look at cases from other jurisdictions for their persuasiveness.

- 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, I would apply the law of the Supreme Court and Court of Appeals. As a state district judge, I have not replaced my judgment for that of the Idaho Supreme Court or Court of Appeals and I would not do so as a federal district judge.

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

Response: Statutes enacted by Congress are presumed to be constitutional. A district court should attempt to resolve a case without addressing constitutional issues if at all possible. However, a court is empowered to declare a statute unconstitutional when it is clear that the statute is in conflict with the Constitution or exceeds congressional authority. There is extensive Supreme Court case law regarding the issue of whether a statute violates constitutional principles, and I would follow that case law.

12. 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. Judges should apply the Constitution, the laws enacted by Congress, and binding precedent from the Supreme Court and controlling Court of Appeals. Foreign law or the views of the “world community” have no role in the interpretation of the Constitution.

13. 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: As a state judge for almost ten years, I have demonstrated my commitment to the rule of law. I firmly believe that such commitment is necessary for our judicial system to provide justice in a fair and equitable manner. Justice does not occur if a judge has a personal agenda or is motivated by any political ideology.

14. 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 believe that a review of my career, both in private practice and as a state judge, would show that I have always adhered to the law and to principles of basic fairness, even when not necessarily in conformance with my personal views. The rule of law is greater than any person, case, or personal view. If confirmed, I will continue to put aside any personal views and decide matters before me based upon the rule of law as applied to the facts. I will also continue to treat each party and attorney before me with respect and fairness.

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

Response: If confirmed, I will bring with me to the federal bench the same practices and tools that I have used on the state bench for almost ten years. Additionally, I will rely on the procedures and practices already in place in the District of Idaho. I will take an active role in managing my docket in a just, efficient, and effective manner. I will impose firm and reasonable deadlines and I will issue decisions in a reasonable and prompt manner. I will make appropriate use of Magistrate Judges and I would rely on guidance from current and senior judges and staff.

- 16. 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: I believe that judges play the central role in controlling the pace and conduct of litigation. If confirmed, I would take the lead in setting a tone that cases need to be handled proactively rather than reactively, by regularly engaging with counsel in status conferences and scheduling conferences, and by promptly resolving motions and issues.

- 17. 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: I begin by carefully reviewing the pleadings that have been filed to understand the claims and issues that have been raised. I then review the motions that have been filed by the parties along with any supporting or opposing memoranda, affidavits, and exhibits. I then determine whether there is any binding precedent from the State Supreme Court or the Appellate Court. If binding precedent exists, I apply it to the facts of the case. If there is no binding precedent, I look at the relevant statute, regulation, or contract to determine whether its language is plain and unambiguous. If it is plain and unambiguous, I decide the case by applying that language. If it is ambiguous, I look to case law from the Supreme Court or other higher courts for an interpretation of analogous statutes or provisions. I also look at decisions from other district courts or other circuit courts, which could provide persuasive, non-binding guidance. If none of those steps succeed, I might look at legislative history for guidance where appropriate. If still unable to resolve the case, I would send it to the jury if it is a jury case.

- 18. 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 President Obama’s statement. As a state judge I decide cases based on the rule of law and not based on any personal feelings about the issues or parties involved in the case. If confirmed, I would continue to apply the rule of law rather than any personal feelings even in “truly difficult” cases.

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

Response: The questions were emailed to me on June 28, 2016 from the Office of Legal Policy of the Department of Justice. I personally prepared my responses and submitted my draft responses on June 29, 2016, to the Office of Legal Policy. After discussing my answers with the Office of Legal Policy staff, I finalized my answers and authorized the Office of Legal Policy to submit them on my behalf.

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

Response: Yes.

Questions for the Record
Senate Committee on the Judiciary
Senator Thom Tillis

Responses of David C. Nye,
Nominee, U.S. District Judge for the District of Idaho

- 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: I do not subscribe to this point of view. I believe it is in direct conflict with the doctrine of judicial restraint and with the rule of law. A judge should interpret the Constitution according to the meaning of the words used as intended by the Framers and as interpreted by the Supreme Court and applicable Circuit Court. Binding precedent is to be followed without regard to a judge’s personal values and philosophies and without regard to societal changes. If confirmed, I would adhere strictly to the constitutional interpretations of the United States Supreme Court and the applicable Court of Appeals.

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

Response: None. I would uphold the rule of law and apply binding precedent in every case without regard to my personal views, societal pressure, or popular opinion.

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

Response: While varying definitions exist, I believe judicial activism occurs when a judge injects his or her own personal ideology, sympathies, and/or opinions into decisions. I do not believe that judicial activism is ever appropriate. If confirmed, I would not exercise judicial activism but rather judicial restraint by basing decisions on the law and the facts without regard to my personal views.

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

Response: Statutes enacted by Congress are presumed to be constitutional. A district court should attempt to resolve a case without addressing constitutional issues if at all possible. However, a court is empowered to declare a statute unconstitutional when it is clear that the statute is in conflict with the Constitution or exceeds congressional authority. There is extensive Supreme Court case law regarding the issue of whether a statute violates constitutional principles, and I would follow that case law.

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

Response: Fundamental rights are those rights protected by the Due Process Clause of the Constitution. The Supreme Court has defined “fundamental rights” as those rights “deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty” so that “neither liberty nor justice would exist if they were sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations and quotations 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 constitutional right to free exercise of religion is a fundamental right. On rare occasions, that right can conflict with other fundamental rights. There is case law from the United States Supreme Court that has considered this issue in several recent cases, including *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The Court affirmed that private citizens and businesses shall not be substantially burdened in the exercise of their sincerely held religious beliefs. *Burwell*, at 2779-81. If confirmed, I would apply binding precedent from the Supreme Court and the Circuit Court regarding this issue.

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: The United States Supreme Court has held that Second Amendment rights are fundamental rights. *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010). As such, a heightened level of scrutiny is required when a statute or regulation related to firearms is challenged.

8. Do you believe it is constitutional for states to require voters to show photo identification before being eligible to cast their vote?

Response: The United States Supreme Court has held that a state election law requiring photo identification is constitutional. See *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). If confirmed, I would faithfully follow the binding precedents of the United States Supreme Court and the Court of Appeals.

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: I would manage my caseload in accordance with the federal rules of procedure, guided by the practices and local rules for the District of Idaho. If confirmed, I will bring with me to the federal bench the same practices and tools that I have used on the state bench for almost ten years. Additionally, I will rely on the procedures and practices already in place in the District of Idaho. I will take an active role in managing my docket in a just, efficient, and effective manner. I will impose firm and reasonable deadlines and I will issue decisions in a reasonable and prompt manner. I will make appropriate use of Magistrate Judges and I would rely on guidance from current and senior judges and staff.

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

Response: Yes, the United States Supreme Court has determined that the death penalty is constitutional. If confirmed, I would faithfully apply controlling precedent on this issue and would not have a problem presiding in cases where the jury determines that the death penalty should be imposed. Currently, as a state judge, I am presiding over a case in which the death penalty is a possibility.