

Senator Chuck Grassley

Follow-up Questions for the Record

William H. Orrick III

Nominee, U.S. District Judge for the Northern District of California

You did not provide responsive answers to a number of my questions. The questions at issue and your responses to them are set forth below.

A. Question 3(a) and (b)

In his concurring/dissenting opinion in the *Arizona* case, Justice Scalia addressed the Obama administration's questionable claim that its pre-emption argument was supported by the need to allocate scarce immigration enforcement resources. Specifically, he wrote:

The brief for the Government in this case asserted that 'the Executive Branch's ability to exercise discretion and set priorities is particularly important because of the need to allocate scarce enforcement resources wisely.'

...

.... It has become clear that federal enforcement priorities—in the sense of priorities based on the need to allocate 'scarce enforcement resources'—is not the problem here. After this case was argued and while it was under consideration, the Secretary of Homeland Security announced a program exempting from immigration enforcement some 1.4 million illegal immigrants under the age of 30.

...

The husbanding of scarce enforcement resources can hardly be the justification for this, since the considerable administrative cost of conducting as many as 1.4 million background checks, and ruling on the biennial requests for dispensation that the nonenforcement program envisions, will necessarily be *deducted* from immigration enforcement.

- a. What is your reaction to Justice Scalia's analysis quoted above?

Response: As an employee of the Department of Justice and a prospective federal judge, I do not believe it would be appropriate for me to express any personal views on the Department of Homeland Security policies discussed in Justice Scalia's opinion.

- b. The Obama administration justifies its immigration priorities and its refusal to deport illegal aliens due to the alleged need to allocate scarce enforcement

resources. Please explain how scarce “enforcement” resources are utilized by DOJ and DHS employees reviewing files for the awarding of *de facto* amnesty under the prosecutorial discretion initiative, as opposed to enforcing the immigration laws as enacted by Congress.

Response: As an employee of the Department of Justice and a prospective federal judge, I do not believe it would be appropriate for me to express any views on the enforcement resource issues other than those related to the work of Office of Immigration Litigation, about which I have direct knowledge. Whether a case might warrant the exercise of prosecutorial discretion is always an issue when it is reviewed by the Office of Immigration Litigation, so the review that occurred as a result of the initiative sped up an analysis that would have occurred later. Therefore, it did not cause a material difference in the expenditure of OIL’s resources, and to the extent ICE exercises prosecutorial discretion in any of those cases, OIL’s law enforcement resources would be utilized in other, higher priority cases.

B. Question 6

In 2011, President Obama acknowledged that he did not have the authority to unilaterally order a program such as the one he announced on June 15, 2012. Describe in detail the constitutional authority that allegedly authorizes the program announced by President Obama on June 15, 2012?

Response: As I indicated above, I did not have any role in developing this policy nor did I participate in any discussions concerning it prior to its announcement. Moreover, this issue is one which could come before me in court, if I am confirmed. As a result, I am hesitant to comment. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

C. Question 14

If a panel of a federal circuit court has affirmed a removal order in an immigration case, do you believe it would be a violation of the separation of powers for the Executive Branch to disregard the mandate and allow the illegal alien to remain in the United States? If not, explain your answer in detail.

Response: I am not aware that any case has raised this issue during my tenure with the Department of Justice and I have never researched it. This issue is one which could come before me in court, if I am confirmed. As a result, I am hesitant to comment. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

D. Question 15

If confirmed, what will be your recusal policy for cases involving the Department of Justice?

Response: If confirmed, I would recuse myself from cases which were pending in OIL while I was Deputy Assistant Attorney General, whether or not I was aware of them at the time, because of the appearance of a conflict. I would also recuse myself from any other case in which I had any involvement during my time with the Department, and from any other case as required by the Code of Conduct for United States Judges as well as other relevant Canons and statutory provisions.

E. Question 16

If confirmed, what will be your recusal policy for cases involving other federal agencies?

Response: If confirmed, I would recuse myself from any case in which I had any involvement during my time with the Department, and from any other case as required by the Code of Conduct for United States Judges as well as other relevant Canons and statutory provisions.

F. Question 17

If confirmed, what will be your recusal policy for cases involving immigration issues?

Response: If confirmed, I would recuse myself from any case that was pending in OIL while I was Deputy Assistant Attorney General and from any other case as required by the Code of Conduct for United States Judges as well as other relevant Canons and statutory provisions.

G. Question 20(c)

As part of your speech to ICE, you stated that federal judges had asked you or asked DOJ “[w]hy is the rate of removals after we order removal so low? Does that say something about the failure to choose the right cases to bring to the Court’s attention?”

- c. After a federal circuit court issues a mandate and orders removal, do you maintain that the executive branch has the authority to effectively vacate that order or judgment by not deporting the individual?

Response: I am not aware that any case has raised this issue during my tenure with the Department of Justice and I have never researched it. This issue is one which could come before me in court, if I am confirmed. As a result, I am hesitant to comment. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

H. Question 26

During the hearing, you were asked by Sen. Coons to describe your judicial philosophy. You replied,

Senator, I am not sure I have a judicial philosophy. I revere the rule of law, and I believe it is my role to understand the facts and then apply the law to them. I would follow precedent directly.

I later asked you about the District Court's decision in *Lui v. Holder* to uphold the binding precedent set by the Ninth Circuit in *Adams v. Howerton*. Specifically, I asked "If confirmed would you [Mr. Orrick] follow the *Adams* precedent?"

You responded, "I will follow controlling precedent wherever it exists."

- a. Do you believe that *Adams* is the controlling case in the Ninth Circuit involving challenges to the government's refusal to grant a I-130 petition, even when plaintiffs are challenging the definition of marriage as defined by DOMA? Please explain why or why not.

Response: I am reluctant to comment on this question as this is a matter which may come before me if I am fortunate enough to be confirmed. As I indicated in my testimony, if I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

- b. If faced with a similar case, as a district court judge in the Northern District of California, would you follow the *Adams* precedent, deferring to the parties to appeal to the Ninth Circuit, as did Judge Wilson in *Lui*? Please explain why or why not.

Response: I am reluctant to comment on this question as this is a matter which may come before me if I am fortunate enough to be confirmed. As I indicated in my testimony, if I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

FOLLOW-UP and SUPPLEMENTAL QUESTIONS:

1. **Your involvement with the enforcement of the Obama administration's immigration policies via lawsuits against Arizona, Alabama, South Carolina and Utah and your involvement with the implementation of the so-called prosecutorial discretion initiative, gives you personal knowledge of the issues which are the subject of the question. Accordingly, please provide a responsive answer to question 3(a).**

Response: In announcing the deferred action policy discussed by Justice Scalia, the Department of Homeland Security stated that its action would "further enhance[] the Department's ability to focus on...priority removals," such as "individuals who pose a

national security or public safety risk, including immigrants convicted of crimes, violent criminals, felons, and repeat immigration law offenders.” I did not have any role in developing this policy nor do I have any knowledge of the associated costs to which Justice Scalia referred. As a result, I am not in a position to express an opinion on Justice Scalia’s comments.

2. **Question 3(b) was a reasonable question. It calls for a common sense answer. Contrary to your response, your employment by the Department of Justice does not immunize you from having to answer the question. Indeed, as a result of your involvement with the enforcement of the Obama administration’s immigration policies via lawsuits against Arizona, Alabama, South Carolina and Utah and your involvement with the implementation of the so-called prosecutorial discretion initiative, you have personal knowledge of the issues which are the subject of the question. Similarly, your status as a nominee for a federal judgeship does not immunize you from having to answer questions, especially about a policy you were involved in implementing. Accordingly, provide a detailed answer to question 3(b).**

Response: It is my understanding that the purpose of the review of the pending immigration cases at the Executive Office for Immigration Review is to remove low priority cases from the active dockets of the immigration courts so that the higher priority cases on the detained docket will move more quickly and that ICE will be able to concentrate its law enforcement resources on the higher priority aliens. As explained above, however, I do not have any personal knowledge of the costs associated with the prosecutorial discretion initiative at the Department of Homeland Security or Department of Justice, except for the impact on OIL that I previously described.

3. **As noted above, your responses to questions 6, 14, and 20(c) suggest that you believe that, if confirmed, you can hear cases involving issues related to the Obama Administration’s immigration policies.**

You are a senior political appointee in the Obama Justice Department. Indeed, you are the head of the Office of Immigration Litigation and have been handling immigration issues since at least May 2010. Given your involvement with the enforcement of the Obama administration’s immigration policies via lawsuits against Arizona, Alabama, South Carolina and Utah and your involvement with the implementation of the so-called prosecutorial discretion initiative, common sense and an objective analysis would dictate that, if confirmed, you should be disqualified from hearing any case that involved the Obama administration’s immigration policies. This should be so regardless of whether you were personally involved in the case or whether it was commenced after you left the Department of Justice.

- a. **Contrary to your response, Question 6 does not involve an issue that could come before you as a judge. And any purported concern you might have is not a basis for refusing to answer the question. Accordingly, provide a detailed answer to Question 6.**

Response: As I indicated before, I was not involved in developing this policy in any manner and I have not researched the President's constitutional authority with respect to it. I am aware that litigation has recently been filed concerning the Obama administration's policy, and although the Office of Immigration Litigation is not responsible for it, I agree that in the event I were confirmed and similar litigation would be initiated in my court, I would be obligated to recuse myself. But the same issue could also arise in a challenge to a different administration's immigration policies, and related issues concerning the scope of the Executive Branch's prosecutorial discretion could also arise in non-immigration contexts. Because I would not necessarily be recused in such cases, I believe it would be inappropriate for me to express any personal views on these matters.

- b. Question 14 does not involve an issue that could come before you as a judge. And any purported concern you might have is not a basis for refusing to answer the question. Accordingly, provide a detailed answer to question 14.**

Response: It is a violation of the separation of powers for the United States to refuse to comply with the final order of a federal court. This is not a question that I have researched, but in the context of deportations, the answer to the question would depend on what the court ordered and what DHS did in response to it. Broad discretion on how to allocate resources to effectuate removals is vested in the Secretary of the Department of Homeland Security, and it can be difficult or impossible to remove some aliens to their home countries. The presence of an alien in the country after a final order does not necessarily evidence a disregard of the court's order, no matter how the order is phrased.

- c. Please provide a responsive answer to Question 20(c).**

Response: My answer is the same as to the question above.

- 4. Your answer to question 15 is incomplete. While you discuss recusing yourself from "cases which were pending in OIL while [you were] Deputy Assistant Attorney General," you do not address cases from other units of the Justice Department. Nor do you address cases that were in the planning stages while you were at the Department or cases which involve issues, policies or initiatives developed by the Justice Department while you were employed by the Department. Accordingly, provide a complete answer to question 15.**

Response: As I explained in my original answer, I would recuse myself from cases in which I had any involvement--direct or indirect--while I was employed at the Department of Justice. There would be no distinction based on the branch or division in which such a case arose. This would be true for cases in the planning stages, and cases involving issues, policies or initiatives in which I had a direct or indirect involvement. I would also

recuse myself from any other case as required by the Code of Conduct for United States Judges as well as other relevant canons and other statutory provisions.

- 5. Your answer to question 16 is incomplete. You do not address cases which involve issues, policies or initiatives developed by the Obama administration while you were employed by the Department of Justice as a senior political appointee. Accordingly, provide a complete answer to question 16. In particular, do you maintain that you could preside over a case involving the Obama administration's prosecutorial discretion initiative or another one of the administration's immigration policies?**

Response: I would recuse myself from cases involving issues, policies or initiatives developed by the Obama administration while I was employed at the Department of Justice in which I had direct or indirect involvement. This would include cases challenging the prosecutorial discretion initiative and recent deferred action policy discussed earlier. I would also recuse myself from any other case as required by the Code of Conduct for United States Judges as well as other relevant canons and other statutory provisions.

- 6. With regard to Question 17 – If confirmed to be a United States Judge, would you be disqualified or would you recuse yourself from hearing a case that involved the Obama administration's immigration policies? If you maintain that you could hear a case involving the Obama administration's immigration policies, explain in detail how you could preside over such a case in compliance with the Code of Conduct for United States Judges as well as other relevant Canons and statutory provisions.**

Response: As I stated above, I would recuse myself from cases in which I had direct or indirect involvement, including those involving immigration policies developed by the Obama administration while I was employed in the Department of Justice and any other policies that may have been in the discussion stage during my employment of which I was aware. I would also recuse myself from any other case as required by the Code of Conduct for United States Judges as well as other relevant canons and other statutory provisions.

- 7. Your involvement with the administration's refusal to enforce the Defense of Marriage Act (DOMA), common sense and an objective analysis would dictate that, if confirmed, you should be disqualified from hearing any case that involved the Obama administration's immigration policies or DOMA. This should be so regardless of whether you were personally involved in the case or whether it was commenced after you left the Department of Justice.**

- a. Thus, contrary to your response, Question 26(a) does not involve an issue that could come before you as a judge. And any purported concern you might have is not a basis for refusing to answer the question. Accordingly, provide a detailed answer to Question 26(a).**

Response: Under my oversight and supervision, lawyers at the Office of Immigration Litigation have argued in support of the constitutionality of Section 3 of DOMA, and against it. They have argued that *Adams* is controlling, and that it is not. I agree with the observation that I should recuse myself from cases challenging the constitutionality of Section 3 of DOMA but it is also possible that a question about the precedential effect of the *Adams* case could arise in a different context in which I would not be recused, and for that reason I do not think it would be appropriate for me to express any personal opinion on this question.

- b. Please provide a responsive answer to Question 26(b). Would you or would you not follow the *Adams* precedent? Explain your response.**

Response: Please see my response to question 7a, above.

- c. In addition, please confirm that you agree that, if confirmed as a judge, you would be disqualified from hearing a case that involved the Obama administration's immigration policies or DOMA. If you maintain that you could hear a case involving the Obama administration's immigration policies or DOMA, explain that position in detail.**

Response: I would recuse myself from challenges to the immigration policies developed in the Obama administration while I have been employed by the Department of Justice in which I had direct or indirect involvement, and I would recuse myself from cases in which the constitutionality of Section 3 of DOMA is at issue. I would also recuse myself from any other case as required by the Code of Conduct for United States Judges as well as other relevant canons and other statutory provisions.