

**Response of Gregory Alan Phillips
Nominee to be United States Circuit Judge for the Tenth Circuit
to the Written Questions of Senator Chuck Grassley**

- 1. As Wyoming Attorney General in 2012, you defended a city's Mayor and Police Chief against a First Amendment Challenge by an 86-year-old former State Senator. In that case, the individual had approached the Mayor following a budget hearing to comment further and ask questions. An officer interpreted this behavior as aggressive and asked the individual to leave. The individual later received a letter from the Police Chief who remarked that his behavior was harassing, and that he would be charged with criminal trespassing if he entered any public buildings until the city approved its budget. The Plaintiff won \$25,000 settlement in that case. In another free speech case, the State of Wyoming settled with WyWatch Family Action for nominal damages and attorney fees.**

- a. Could you please explain the nature of your advocacy on behalf of the city and the legal theory you presented in the budget hearing case?**

Response: By statute, the Wyoming Attorney General's Office defends peace officers acting within the scope of their duties who are sued in their individual capacities for allegedly violating citizens' civil rights. In late April 2012, at a budget session for the Town of Torrington, Russ Zimmer and local officials got into some sort of a dispute. After consulting with the town's attorney and its mayor about this event, the police chief delivered a letter to Mr. Zimmer barring him from town government buildings and meetings for about two months. Mr. Zimmer sued the Town of Torrington, its mayor, its police chief, and its police department.

Unfortunately, neither the town nor its officials sought any advice from us before barring Mr. Zimmer from public meetings and buildings. We learned of the dispute only after being served with a notice of claim and civil complaint. After researching the law, we determined that barring Mr. Zimmer from public meetings likely amounted to a prior restraint in violation of his right to free speech. Accordingly, on behalf of the police chief in his individual capacity, and about a month after filing our answer to the complaint, we joined with counsel for the other defendants in offering judgment for \$25,000, which Mr. Zimmer accepted.

- b. Can you explain your involvement in the WyWatch Family Action case?**

Response: In early February 2011, during a general session of the state legislature, the president of WyWatch Family Action, Inc. obtained a permit to set up a booth in a hallway regularly used by legislators and citizens. Although it did not set up a booth,

the group did display two large pro-life signs. After receiving complaints, the state employee who had approved the permit removed the signs from the hallway. Although I was not the Attorney General at that time, I understand that no one consulted with the Attorney General's Office before removing the signs. In early March 2011, I was sworn in as Wyoming's Attorney General, an appointed position, and in April 2011, I first became involved in the WyWatch case after receiving a letter from WyWatch's attorneys asserting constitutional violations. Over the next several months, I or attorneys in my office advised the state officials on applicable law.

As Wyoming's Attorney General, I defended the January 2012 federal suit brought by WyWatch in which it sought injunctive relief, declaratory relief, and nominal damages under 42 U.S.C. § 1983. After the district court denied WyWatch's motion for a preliminary injunction, the parties settled the suit, agreeing in a Consent Order that the defendants had "unconstitutionally prevented Plaintiff from engaging in protected expression in the Herschler Gallery in February 2011 by enforcing an unconstitutionally vague policy against the Plaintiff and by enforcing that policy in such a way to discriminate against the viewpoint of Plaintiff's expression." The State agreed to pay \$1 in nominal damages and \$30,000 in legal fees. During the 2013 legislative session, under a policy now in effect, WyWatch and all other groups desiring to display their materials and messages in the hallway did so. My office drafted the policy for the state officials' review.

c. If confirmed, how would you approach First Amendment issues, particularly those regarding speech, assembly, and the right to petition the Government?

Response: I would approach First Amendment issues the same way I would any issue—I would review the applicable case law from the Supreme Court and Tenth Circuit and apply it against the facts to determine whether the government acts would violate or had violated civil rights of its citizens.

2. You joined with other attorneys general to urge Congress to reauthorize the Violence Against Women's Act. While that reauthorization passed with bipartisan support, VAWA and other laws present questions of the proper Constitutional boundary between federal and state powers.

a. In your opinion, what powers are reserved to the States under the Tenth Amendment?

Response: By its terms, the Tenth Amendment reserves to the States all powers not prohibited to them or delegated to the United States by the Constitution or reserved to the people. The Supreme Court has spoken to limits on the federal government in dealing with the States. *See, e.g., New York v. United States*, 505 U.S. 144, 162 (1992) (“While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”); *Printz v. United States*, 521 U.S. 898, 925 (1997) (“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”).

- b. **In U.S. v. Morrison the Supreme Court held that the Commerce power has obvious limits by striking down the federal regulation of intrastate, non-commercial activities.**

To what extent does the Commerce Clause permit the federal government to assert power traditionally exercised by the States—such as domestic and family law?

Response: In *United States v. Morrison*, 529 U.S. 598 (2000), the Court rejected “the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.” *Id.* at 617. In guarding the boundaries of traditional State authority, the Court said that “we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.” *Id.* at 618 (citations omitted). In cautioning against overreliance on the Commerce Clause to justify federal intrusion into the States’ domain, the Supreme Court cited family law as another area of traditional State regulation. *Id.* at 615-16.

3. **You served as a Democratic Senator in the Wyoming Legislature and have done campaign worker for Democratic candidates.**

- a. **In what ways, if any, did this political experience affect your service as an Assistant United States Attorney or your present service as Wyoming Attorney General?**

Response: I have always performed my duties as an Assistant United States Attorney and as Wyoming’s Attorney General without regard to political considerations. In a non-political way, my legislative experience has assisted me by informing me on legislative processes, by educating me on a wide variety of Wyoming substantive law

that I had not encountered in private practice, and by the friendships and acquaintances I made with people still serving in the legislature and the Legislative Service Office.

- b. 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 and that you will be fair to all parties who come before you, regardless of political affiliation?**

Response: I can assure the Committee that throughout my legal career—working in three branches of government, in state and federal courts, and in trial and appellate courts—I have always applied the law to persons without any consideration of the characteristics mentioned.

- 4. 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. Whatever a judge’s gender, ethnicity, or other demographic factor, the text of any disputed Constitutional provision, statute, or regulation remains the same.

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

Response: I believe the most important attribute of a judge is a strong work ethic fueled by intellectual curiosity. I believe I possess this.

- 6. 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: I believe that a judge exhibits appropriate temperament by always treating everyone including counsel respectfully and by patiently and attentively listening to and fully considering all arguments impartially. I believe I have this temperament.

- 7. In general, Supreme Court precedents are binding on all lower federal courts, and Federal Circuit precedents are binding on the Court of International Trade. 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.

8. **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 look to the plain language of the law at issue and give it a fair reading. In doing so, I would also examine other related statutory or constitutional language. If the meaning of the disputed legal text were ambiguous, I would rely upon accepted canons of construction to help give meaning to the ambiguous language. I would also look to Supreme Court and Tenth Circuit cases for their reasoning in related contexts. If there were no Supreme Court or Tenth Circuit precedents involving related issues, I would research case law to learn whether any other circuit or district court had provided persuasive reasoning in addressing the same issue.

9. **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 be bound as a circuit court judge to apply Supreme Court precedent whether I agreed with it or not. I would also be bound to apply circuit precedents except in those rare instances in which the Tenth Circuit had granted *en banc* review.

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

Response: Although Congress' statutes are presumed constitutional, I believe a federal court with jurisdiction must declare a Congressional enactment unconstitutional if a party challenging the constitutionality of the statute has met its burden to show that in enacting the statute Congress had exceeded its enumerated powers under the Constitution or otherwise violated the Constitution.

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

Response: Although I am not fully informed on the Tenth Circuit's case load, I understand informally that the Court is busy but does a good job staying current on its work. If confirmed, I would rely on court staff and other judges to guide me on best practices in managing my case load.

- 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, except that English common law may assist a court in determining the meaning of language in our Constitution. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008).

- 13. 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 would rely upon my record over the past 26 years—from law clerk, to private attorney, to state legislator, to Assistant United States Attorney, and to Wyoming Attorney General—in which I believe I have demonstrated that I have always put aside personal views and treat fairly all parties appearing before me.

- 14. 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: The rule in the Tenth Circuit is that a panel cannot overrule circuit precedent. But under Rule 35 of the Federal Rules of Appellate Procedure a majority of the active service judges in a circuit may order *en banc* consideration of an appeal or other proceeding in two narrow circumstances: (1) to secure or maintain uniformity of the court’s decisions; or (2) to address a question of exceptional importance. The petition must state that the panel decision conflicts with Supreme Court or Tenth Circuit precedent or involves a question of exceptional importance, e.g., it conflicts with authoritative decisions of other circuit courts. Tenth Circuit Rule 35.1 tracks this standard, finding *en banc* consideration disfavored and an extraordinary procedure. Accordingly, if confirmed, I would consider these factors before voting to overturn circuit precedent.

- 15. You have spent your 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: If confirmed, I would study the briefs of counsel until I understood the arguments and supporting law, I would review the record on appeal for facts relevant to issues on appeal, I would independently research the applicable law, and then I would apply the law to the facts. If confirmed, I think the most difficult part of the transition

would be setting up my office and learning the administrative side of the circuit court system.

- 16. Do you think that collegiality is an important element of the work of a Circuit Court? If so, how would you approach your work on the court, if confirmed?**

Response: Yes. I would always strive to maintain cordial relations with fellow judges and staff. Throughout my career, I have seen for myself that the quality of work increases when decision-makers work together in a friendly, cooperative atmosphere.

- 17. What is your judicial philosophy or approach in applying the Constitution to modern statutes and regulations?**

Response: I would first look to the plain language of the law at issue and give it a fair reading. I would find and apply all controlling decisions from the Supreme Court and Tenth Circuit. Absent any controlling decisions, I would review case law from other circuits and from district courts, looking for persuasive reasoning.

- 18. What role do you think a judge's opinions of the evolving norms and traditions of our society have in interpreting the written Constitution?**

Response: I see no role for that.

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

Response: I have not researched this area in any depth and have not dealt with it in my 26 years practicing law. In the research I did to try to answer this question, I see two recent cases that may apply to the question. In *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012), the Supreme Court found that the Establishment Clause and the Free Exercise Clause both barred suits brought by ministers against their churches under employment discrimination laws. This case illustrates the two clauses working in tandem. In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Supreme Court rejected a facial challenge to the Religious Land Use and Institutionalized Persons Act of 2000, which disallows governments from imposing “a substantial burden on the religious exercise of a person residing in an institution” unless the burden furthers “a compelling government interest” and does so by the “least restrictive means.” The Court reaffirmed that “‘there is room for play in the joints between’ the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free

exercise requirements, without offense to the Establishment Clause.” 544 U.S. at 712-14 (citations omitted).

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

Response: The Supreme Court has found that the death penalty is an acceptable form of punishment, and I would apply its precedents.

21. 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 believe that the Constitution evolves by amendment under Article V of the Constitution.

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

Response: The Supreme Court has found a right of privacy in a line of cases “relating to marriage, procreation, contraception, family relationships, and child rearing and education.” *Paul v. Davis*, 424 U.S. 693, 713 (1976). If confirmed, I would apply these and all other Supreme Court precedents whether I agreed with them or not.

a. Where is it located?

Response: The Supreme Court has found a right of privacy in the liberty component of the Fourteenth Amendment’s Due Process Clause. For example, in Justice Kennedy’s opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), the majority stated that “[w]e conclude the case should be resolved by determining whether the Petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.” *Id.* at 564.

b. From what does it derive?

Response: Please see previous answer.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court listed a “long line of cases” in which “the ‘liberty’ specially protected by the Due

Process Clause” included “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.” *Id.* at 720 (internal citations omitted). The Supreme Court also noted that it had “also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.” *Id.* (citation omitted).

- 23. 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, I would apply Supreme Court precedent whether I agreed with it or not. However, as noted above, I also understand that more recent Supreme Court cases have based the right to privacy in the liberty component of the Due Process Clause of the Fourteenth Amendment.

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

Response: If confirmed, I would see no place for me to undertake such searches. My job as a circuit court judge would be to search for controlling precedent from the Supreme Court and the Tenth Circuit.

- 24. 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: If confirmed, I would see no place for me as a circuit court judge to conduct research outside the record of the cases before me.

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

Response: If the record on appeal included psychological and sociological scientific studies, appellate judges might properly consider them in narrow circumstances—for example, an appellate court might be called upon to decide whether such studies, considered by the district court, supported its decision to admit or exclude an expert opinion based on related scientific issues, all under Rule 702 of the Federal Rules of Evidence.

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

Response: While *District of Columbia v. Heller*, 554 U.S. 570 (2008), did not state which standard of heightened scrutiny applies, it did rule out the deferential rational-basis standard. *Id.* at 628 n.27. The Tenth Circuit has applied intermediate scrutiny to a Second Amendment challenge to 18 U.S.C. § 922(g)(8). *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010). If confirmed, I would follow relevant Supreme Court and Tenth Circuit precedent on this matter as on all other matters.

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

Response: I would define an “activist judge” as one who substitutes his or her personal policy views for Congress’s policy views as expressed in its statutes.

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

Response: I reviewed the questions as they came to me, prepared answers, reviewed my answers with a representative from the Department of Justice, and requested that my answers be submitted to the Senate Judiciary Committee.

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

Response: Yes.