

**Senator Chuck Grassley
Questions for the Record**

**James D. Peterson
Nominee, U.S. District Judge for the Western District of Wisconsin**

- 1. You wrote in the February 2010 newsletter for the Western District of Wisconsin Bar Association that, “For nearly every plaintiff that is drawn to the Western District of Wisconsin, there is a defendant who would prefer to litigate somewhere else.” Please explain what you meant by this statement.**

Response: I wrote that statement in an article to provide guidance to litigants on motions to transfer venue filed in the Western District of Wisconsin. The statement reflects that the plaintiff’s choice of venue is often perceived as providing a tactical advantage. Thus, many defendants, when possible, try to challenge the plaintiff’s choice by filing a motion to transfer the case to a venue of the defendant’s choosing. I was not suggesting that the Western District of Wisconsin had any pro-plaintiff bias, and I have observed no such bias in my experience with the court.

- 2. During your hearing I asked you about your work with the Freedom From Religion Foundation. You said your law firm has worked on both sides of religious liberty issues. Have you personally worked on any cases that defended the religious side of religious liberty? If so, please describe your involvement in them.**

Response: At the hearing, I testified that my firm has a long history of advocating the First Amendment interests of clients across the political spectrum. To cite one recent and notable example of my firm’s defense of the free exercise of religious liberty, my colleagues represent Archbishop Jerome E. ListECKI, as Trustee of the Archdiocese of Milwaukee Catholic Cemetery Perpetual Care Trust, in an appeal of a bankruptcy court decision. Our firm successfully argued that the bankruptcy decision infringed the Trust’s rights under the Religious Freedom Restoration Act and the Free Exercise Clause of the First Amendment. Although I have not been counsel of record in Free Exercise Clause cases, I have advised my colleagues on litigation strategy in such cases.

Religious liberty is a fundamental right of every citizen. If confirmed, I will treat the religious convictions of anyone who appears before me with respect, and faithfully follow Supreme Court and Seventh Circuit precedent in deciding First Amendment cases.

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

Response: A good judge must have many qualities. But the single most important attribute of a judge is to be fair, setting aside any personal interest or bias, to decide cases strictly on the admissible evidence and the governing law. I have this attribute.

- 4. 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 even-tempered, patient, thoughtful, and decisive. The temperament of the judge should be one that leaves even the losing party with the conviction that he or she has been fully and fairly heard. I have demonstrated this temperament both in my personal life and in my career.

5. **In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Please describe your commitment to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?**

Response: If confirmed, I will be absolutely committed to following binding precedent regardless of any personal opinion.

6. **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: If faced with a matter of first impression, I would apply established principles of legal analysis. If the matter involved statutory interpretation, I would begin with the text of the law, which in most cases is decisive as the best expression of legislative intent. I would turn next to judicial constructions of related laws, then to other recognized sources of authority, aiming at all times to effectuate the legislative purpose.

7. **What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?**

Response: I would always follow Supreme Court and Court of Appeals precedent regardless of any personal opinion.

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

Response: All validly enacted statutes carry a presumption of constitutionality. A federal court should declare a statute unconstitutional only when that decision is necessary to decide the case and it is clear that the statute exceeds Congress' constitutional authority or that it violates a constitutional right.

9. **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. In matters of constitutional interpretation, a district judge should consider only those sources authorized by Supreme Court or Circuit Court precedent.

- 10. 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: In my practice, I have represented clients with diverse interests and political perspectives and I have never declined to undertake a representation because of the client's political ideology or motivation. If confirmed, I will decide cases based on precedent and the law, and never to serve some political ideology or motivation.

- 11. 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: If confirmed, I pledge to put aside my personal views, treat every party as equal under the law, and decide cases impartially on the law and the evidence, as reflected in the oath of office, which I will take without reservation.

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

Response: If confirmed, I expect to follow many of the case-management practices of my predecessor, the late Honorable John C. Shabaz. I will set early and firm trial dates, see that discovery disputes are decided expeditiously, and I will give full consideration to dispositive motions and decide them promptly.

- 13. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?**

Response: Yes. In consultation with counsel for the litigants, I would set the quickest reasonable litigation schedule and a firm trial date. This approach requires diligence from both counsel and the court, but I believe that it is the best way to secure the just, speedy, and inexpensive determination of matters.

- 14. You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?**

Response: I began my law career as a judicial clerk to a judge that I admire, an experience that prepared me well for a career as a litigator. If confirmed, I will draw on that experience again as I make the transition to the bench. In deciding cases, I will begin with a careful review of the submissions of counsel, and a careful evaluation of the evidence submitted. I will test the arguments of counsel by verifying the authorities they cite, and I will conduct my own review of the primary law and legal research. The role of judge will present many new challenges, but I expect that developing expertise in criminal law and procedure to be the most challenging aspect of the transition. I am confident that I can handle this challenge through hard work, careful study, and with the mentoring and assistance of my future colleagues at the court.

15. 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 subject matter 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.

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

Response: I received a copy of the questions from an attorney in the Office of Legal Policy of the Department of Justice. I drafted responses, submitted them to the same attorney for review, and submitted them in final form.

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

Response: Yes.

Questions for the Record
Senator Ted Cruz

James D. Peterson
Nominee, U.S. District Judge for the Western District of Wisconsin

Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice’s judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.

Response: I am not sufficiently familiar with the philosophies of the individual justices to identify any one of them as similar to my own. Moreover, I do not have any philosophy that would predict my approach to deciding a particular case, except that I would decide each case impartially on the basis of the admissible evidence and the law. As a district court judge, my judicial philosophy would focus on efficient case management. If confirmed, I would set reasonably fast case schedules with firm dates, give full consideration to dispositive motions, and decide all motions promptly.

Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?

Response: Pursuant to *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008), the contemporaneous public understanding of a legal text is a critical tool of constitutional interpretation. If confirmed, I will follow this and all other Supreme Court precedent concerning constitutional interpretation.

If a decision is precedent today while you're going through the confirmation process, under what circumstance would you overrule that precedent as a judge?

Response: None. As a district judge, it would not be within my authority to overrule precedent, and I would not attempt to do so.

Explain whether you agree that “State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.” *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).

Response: The statement from *Garcia* reflects the Supreme Court’s determination that state interests are protected in Congress through the political process, whereas its own interpretation of the Commerce Clause in *National League of Cities v. Usery*, 426 U.S. 833 (1976), had proved unworkable and produced inconsistent results. If confirmed, I would follow *Garcia* and subsequent decisions in which the Supreme Court identified constitutional limitations on congressional power. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

Do you believe that Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?

Response: Congress may regulate non-economic activity that has a substantial relation to interstate commerce, or when a "regulation is a necessary part of a more general regulation of interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring). If confirmed, I would faithfully follow Supreme Court and Seventh Circuit precedent in deciding issues concerning the Commerce Clause.

What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?

Response: When executive action is challenged in a judicial proceeding, the reviewing court must determine first whether jurisdictional and standing requirements are satisfied. If so, and if necessary to resolve the question presented, the court may be called upon determine whether the President's order or action is authorized by the Constitution or an act of Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). If confirmed, I would faithfully follow Supreme Court and Seventh Circuit precedent in deciding any challenge to executive action.

When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?

Response: A right is fundamental when it is expressly stated in the Constitution or when it is "objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *See Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). If confirmed, I would faithfully follow Supreme Court and Seventh Circuit precedent in deciding issues concerning fundamental rights.

When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: The Supreme Court requires strict scrutiny of governmental classifications that burden a fundamental right, or those based on race, religion, or national origin. Intermediate scrutiny is required of governmental classifications based on gender or illegitimacy. *See, e.g., Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-41 (1985). If confirmed, I would faithfully follow Supreme Court and Seventh Circuit precedent in deciding Equal Protection Clause issues.

Do you "expect that [15] years from now, the use of racial preferences will no longer be necessary" in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: I do not have personal expectations about the status of educational diversity in 15 years, and my personal expectations would play no role in judicial decisions. The statement from *Grutter* reflects Supreme Court precedent that racial preferences should be truly rare and used only in cases of compelling need. If confirmed, I would faithfully follow Supreme Court and Seventh Circuit precedent in deciding any case involving racial preferences.