

**Senator Grassley
Questions for the Record**

**Richard Franklin Boulware II,
Nominee, U.S. District Judge for the District of Nevada**

- 1. In your capacity as an officer of the Las Vegas NAACP, you have testified on their behalf to the Nevada Legislature on a variety of topics. Many of the issues dealt with criminal law and the effect on minorities. Your positions have, at times, been at odds with the law enforcement community in Las Vegas, specifically the District Attorney's office.**

Anyone who comes before a federal judge should feel that they will get a fair shake. You have been an advocate on a number of issues and you have also served as a federal public defender. I want to ensure you will impartially hear both sides. With that in mind, if you are confirmed, what will your approach to criminal law be?

Response: If confirmed as a district court judge, my approach to criminal law cases and all types of cases would be to fairly and impartially render decisions based upon applicable Supreme Court and Ninth Circuit precedent without regard to any personal beliefs I might have or policy arguments I may have previously asserted on behalf of an organization.

- 2. Have you ever witnessed any federal judges approach a set of legal facts in a case differently because of their ethnicity or background?**

Response: No

- 3. You have expressed disappointment with the Supreme Court's ruling in the Shelby County Case.**

- a. Do you still believe the Court decided *Shelby* incorrectly?**

Response: If confirmed as a district court judge, I would follow the Supreme Court precedent established in *Shelby*, without regard to any personal opinions I might have or policy arguments I may have previously asserted on behalf of an organization.

- b. Regardless of whether this remains your view, please explain why you believed, at the time of the interview, the Court decided *Shelby* incorrectly.**

Response: I was interviewed about the *Shelby* case in conjunction with my role with the local branch of the NAACP. As a policy matter, the NAACP is committed to seeking to expand opportunities for all citizens to be able to vote. My interview comments regarding the *Shelby* decision were part of a larger policy conversation about voting rights and not meant to be an in-depth or definitive

legal analysis. If confirmed as a district court judge, I would faithfully follow Supreme Court and Ninth Circuit precedent in voting rights cases.

c. What assurances can you give us that you will follow all applicable precedent, if confirmed, despite your own personal preferences?

Response: I give the committee my personal assurance that, if confirmed, I would faithfully and strictly follow all applicable precedent. I first developed my appreciation for the crucial role of precedent and *stare decisis* while clerking in the district court in the Southern District of New York. Over the years of my federal practice, I have gained an even greater appreciation for the centrality of precedent in maintaining the integrity and fairness of our legal system.

4. According to your questionnaire, you have spent the majority of your career handling criminal matters. Since being nominated, what steps have you taken to prepare yourself to handle the complex civil cases that would come before you if you were confirmed?

Response: Since being nominated I have observed various civil proceedings in the federal court in Las Vegas. I have also spoken with district court judges and civil practitioners in general terms about complex and less complex federal civil matters. I have also been reviewing the Federal Rules of Civil Procedure and the local civil rules of the district court in Nevada. During this nomination process, I will continue this multi-faceted approach in preparation for handling civil cases. I also anticipate receiving, if confirmed, additional training from the Federal Judicial Center regarding the administration of civil cases.

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

Response: The most important attribute of a judge is a deep commitment to ensuring a fair and impartial process in the resolution of cases. I possess this attribute.

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: A judge should have an equanimous demeanor with an emphasis on promoting respect for the process and civility in the courtroom. I meet this standard.

7. 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 as a district court judge, I would faithfully and diligently follow Supreme Court and Ninth Circuit precedent without regard to any personal opinions I might have.

8. Every nominee who comes before this Committee assures me that he or she will follow all applicable precedent and give them full force and effect, regardless of whether he or she personally agrees or disagrees with that precedent. With this in mind, I have several questions regarding your commitment to the precedent established in *United States v. Windsor*. Please take any time you need to familiarize yourself with the case before providing your answers. Please provide separate answers to each subpart.

a. In the penultimate sentence of the Court’s opinion, Justice Kennedy wrote, “This opinion and its holding are confined to those lawful marriages.”¹

i. Do you understand this statement to be part of the holding in *Windsor*? If not, please explain.

Response: In the district in which I have been nominated, a district court judge recently upheld Nevada’s state ban on same-sex marriages. *See Sevcik et al. v. Sandoval*, 2:12-cv-00578-RCJ-PAL. That ruling has been appealed to the United States Court of Appeals for the Ninth Circuit. In preparing to answer this question, I reviewed the *Windsor* decision and various briefing in the *Sevcik* case. During this preparation, it became apparent that the arguments in the briefs in the *Sevcik* case offer differing legal analysis regarding some of the very issues raised in this question, including an analysis of the holding and reach of *Windsor*. These issues are directly relevant to the resolution of the legal disputes in *Sevcik*. As the case may be remanded for consideration, I would not want to offer any legal analysis or comments regarding live disputes in a pending case in my district. As a general matter, I would follow all relevant Supreme Court and Ninth Circuit precedent on this issue as with all other issues.

ii. What is your understanding of the set of marriages to which Justice Kennedy refers when he writes “lawful marriages”?

Response: Please see my response to Question 8(a)(i).

iii. Is it your understanding that this holding and precedent is limited only to those circumstances in which states have legalized or permitted same-sex marriage?

Response: Please see my response to Question 8(a)(i).

iv. Are you committed to upholding this precedent?

¹ *United States v. Windsor*, 133 S.Ct. 2675 at 2696.

Response: I am committed to following the precedent in *Windsor* as I am committed to following all Supreme Court and Ninth Circuit precedent.

- b. Throughout the Majority opinion, Justice Kennedy went to great lengths to recite the history and precedent establishing the authority of the separate States to regulate marriage. For instance, near the beginning, he wrote, “By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States.”²**

- i. Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.**

Response: Please see my response to Question 8(a)(i).

- ii. Will you commit to give this portion of the Court’s opinion full force and effect?**

Response: Please see my response to Question 8(a)(i).

- c. Justice Kennedy also wrote, “The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens.”³**

- i. Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.**

Response: Please see my response to Question 8(a)(i).

- ii. Will you commit to give this portion of the Court’s opinion full force and effect?**

Response: Please see my response to Question 8(a)(i).

- d. Justice Kennedy wrote, “The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the ‘[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.’”⁴**

- i. Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.**

Response: Please see my response to Question 8(a)(i).

² *Id.* 2689-2690.

³ *Id.* 2691.

⁴ *Id.* (internal citations omitted).

- ii. Will you commit to give this portion of the Court’s opinion full force and effect?**

Response: Please see my response to Question 8(a)(i).

- e. Justice Kennedy wrote, “The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for ‘when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.’”⁵**

- i. Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.**

Response: Please see my response to Question 8(a)(i).

- ii. Will you commit to give this portion of the Court’s opinion full force and effect?**

Response: Please see my response to Question 8(a)(i).

- 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: If confirmed as a district judge, in deciding cases of first impression, I would first look to the text of the statute to determine if the plain language of the statute could resolve the issue. I would also consider canons of statutory construction established by the Supreme Court or Ninth Circuit for the interpretation of federal legislation. I would next look to relevant or analogous Supreme Court or Ninth Circuit precedent which addressed similar legal issues. I would seek to follow or apply, if possible, such analogous precedent to cases of first impression.

- 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 district court judge, I would follow and apply Supreme Court and Ninth Circuit precedent without regard to my own opinion as to whether such precedent was or was not rightly decided.

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

⁵ *Id.* (internal citations omitted).

Response: The Supreme Court has explained that federal statutes enjoy a presumptive validity. *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963). Under the doctrine of constitutional avoidance, the Supreme Court directs federal courts to seek to interpret federal statutes in a manner that avoids violating the Constitution. *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 571 (1973). A statute may be invalidated if it clearly violates the Constitution or if Congress lacked the authority for its enactment.

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.

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: While the role of an advocate is different from the role of a judge, I have been representing clients for many years exclusively in federal court, and I believe that the legal arguments that I have advanced on behalf of these clients reflect and demonstrate my commitment to legal arguments based upon precedent and federal law without regard to political ideology or motivation.

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 give the committee my personal assurance that, if confirmed as a district court judge, I would maintain a deep commitment to ensuring a fair and impartial process in cases that come before me, regardless of any personal views I might have. My many federal court appearances in my federal court practice demonstrate my ability to be respectful and fair to other litigants in the courtroom.

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

Response: If confirmed as a district court judge, I intend to work with my colleagues in the District of Nevada and follow the established practices of the district to efficiently and fairly resolve cases. This would include maintaining and reviewing daily and weekly case reports indicating which cases require further judicial action. I would also seek to address dispositive motions as quickly as possible as well as refer appropriate cases for settlement early in the life of the case.

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: Judges do have a role in controlling the pace and conduct of litigation. If confirmed as a district court judge, I would be diligent in working with the parties to set a fair and expeditious calendar for each case. I would then seek to maintain this case calendar within reason given developments in the case.

17. 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: If confirmed as a district court judge, I would reach decisions based upon Supreme Court and Ninth Circuit precedent applicable to the facts of the respective cases. I would conduct legal research to independently identify the applicable Supreme Court and Ninth Circuit precedent. I expect that developing an expertise in civil litigation will present the greatest challenge for me. However, I am confident that I can meet this challenge with hard work and with the assistance of my colleagues.

18. 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.

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

Response: On March 19, 2014, I received these Questions for the Record. On March 19 and March 20, I prepared my answers to the questions. On March 20 I forwarded my

answers to an attorney in the Office of Legal Policy of the Department of Justice for review. On March 24, 2014, I finalized my responses and authorized transmittal of the answers to the Committee.

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

Response: Yes.

**Questions for the Record
Senator Ted Cruz**

**Richard Franklin Boulware II,
Nominee, U.S. District Judge for the District of Nevada**

- 1. 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: If confirmed as a district court judge, my judicial philosophy would be a commitment to a fair and impartial process with a strict adherence to precedent and the rule of law. I have not sufficiently studied the opinions of the justices from the Warren, Burger, or Rehnquist Courts to be able to determine which justice's philosophy is most analogous to mine.

- 2. 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: In cases such as *District of Columbia v. Heller*, 554 U.S. 570, 603 (2008), the Supreme Court indicated that the contemporaneous public understanding of the Constitution is an important factor for courts in interpreting the Constitution. If confirmed, I would follow the Supreme Court's precedent in *Heller* as well as any other controlling Supreme Court or Ninth Circuit precedent regarding the interpretation of the Constitution.

- 3. 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: If confirmed as a district court judge, I would not and could not overrule precedent. I would follow the precedent set forth by the Supreme Court and the Ninth Circuit.

- 4. 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: If confirmed as a district court judge, I would follow the Supreme Court's decision in *Garcia* as well as any other related Supreme Court or Ninth Circuit precedent regarding state sovereign interests.

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

Response: The Supreme Court has outlined in various decisions, such as *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the tests or inquiries to determine the extent and limitations on Congress' Commerce Clause. Regarding the regulation of noneconomic activity, Justice Scalia has suggested that Congress may regulate noneconomic activity that has a substantial relation to interstate commerce. See *Gonzales v. Raich*, 545 U.S. 1, 37 (2005)(Scalia, J., concurring). If confirmed as a district court judge, I would follow Supreme Court and Ninth Circuit precedent in deciding cases related to the Commerce Clause.

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

Response: The Supreme Court indicated in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952), that the "President's power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself." The Court further provided a basic analytic framework for reviewing executive action in the *Youngstown* decision. In various subsequent cases, such as *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Supreme Court has explained and elaborated upon the analytic framework for reviewing executive action. If confirmed as a district court judge, I would follow the Supreme Court's precedent in this and all other areas of the law.

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

Response: The Supreme Court has explained that a right may be fundamental if it is expressly stated in the Bill of Rights or if it is "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). If confirmed as a district court judge, I would follow Supreme Court and Ninth Circuit precedent in deciding cases regarding fundamental rights.

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

Response: The Supreme Court has identified the classifications which are subject to heightened scrutiny under the Equal Protection Clause. They include race, alienage, and national origin, which require strict scrutiny; and gender and illegitimacy, which require intermediate scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-41 (1985). If confirmed as a district court judge, I would follow Supreme Court and Ninth Circuit precedent in determining when to apply heightened scrutiny under the Equal Protection Clause to a particular case.

9. 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 any expectations regarding the continued use or lack of use of racial preferences in public higher education. If confirmed as a district court judge, I would follow the Supreme Court's decision in *Grutter* and *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), and any other Supreme Court or Ninth Circuit precedent on the use of race in admissions to public institutions of higher education without regard to any expectations I might have.