

**Senator Chuck Grassley  
Questions for the Record**

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

- 1. In 2006 the San Francisco Bar Association sent a letter to Senators Feinstein, Specter, Boxer, and Leahy opposing the nomination of Samuel Alito to the Supreme Court of the United States. You were an officer of the San Francisco Bar Association. Can you explain your personal objections to Justice Alito's nomination?**

Response: The referenced letter was submitted on behalf of the Bar Association of San Francisco in January 2006. I did not prepare the letter or undertake any research for it, and I did not take a personal position for or against the confirmation of Justice Alito.

- 2. The San Francisco Bar Association particularly had an issue with Justice Alito's view of Congressional power under the commerce clause. In your view are there any limitations to Congressional power under the commerce clause?**

Response: Several Supreme Court decisions have found limits on Congress's power to regulate non-economic activity under the Commerce Clause. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). These cases stand for the proposition that non-economic activity with only an attenuated effect on interstate commerce cannot be regulated pursuant to the Commerce Clause. If confirmed, I will follow Supreme Court precedent without regard to any views I might or might not have.

- 3. There was a recent decision by the New Mexico Supreme Court<sup>1</sup> where the Court held that a photographer improperly discriminated against a gay couple when she refused to take photos for their commitment ceremony for religious reasons and, as the Court stated in its opinion, the Respondents are, "now are compelled by law to compromise the very religious beliefs that inspire their lives."<sup>2</sup>**

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<sup>1</sup> *Elane Photography, LLC v. Willock*, 2013 WL 4478229 (N.M. Aug. 22, 2013).

<sup>2</sup> *Id.*, Para. 90.

- a. How would you approach this issue if a party in a similar case claimed this was a Freedom of Speech violation? Particularly with respect to a creative and expressive art form such as photography?**

Response: The Freedom of Speech guarantee is one of the most important guarantees in the Constitution. If confirmed as a District Judge, I would approach this issue by following applicable Supreme Court and Ninth Circuit precedent, and applying it to the admissible evidence in the record. Since this issue might come before me if I am confirmed, I cannot comment further on it.

- b. Do you think the New Mexico state legislature, by requiring companies that advertise publicly to act in this way, compels the company to speak the government's message?**

Response: The Supreme Court has issued decisions on compelled speech. These decisions include *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), *Wooley v. Maynard*, 430 U.S. 705 (1977), and other cases. If confirmed, I would follow this and other applicable precedent, without regard to any personal thoughts or views I might or might not have.

- c. How would you respond if an individual or company in this circumstance raised a Free Exercise claim?**

Response: The Free Exercise guarantee is also a critically important guarantee in the Constitution. If confirmed, I would respond by identifying applicable Supreme Court and Ninth Circuit precedent, and applying it to the admissible evidence in the record. No other factors would affect my determination of the issue. Since this issue might come before me if I am confirmed, I cannot comment further on it.

- 4. How will you use the Sentencing Guidelines to guide you in criminal cases?**

Response: The Sentencing Guidelines are an important tool to achieve uniformity in criminal sentences. If confirmed, I would treat the Sentencing Guidelines with substantial deference in determining appropriate sentences.

- 5. Some have contended that a judge should have empathy for those who appear before them. My concern is that when someone suggests a judge should have empathy, they are really suggesting the judge should place their thumb on the scales of justice to tilt it in the favor of the proverbial little guy. In your personal opinion, is it ever the role of a judge to favor one party over another?**

Response: No.

**6. 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 the commitment to upholding the impartial rule of law in all cases. I possess that attribute.

**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: In my view, appropriate judicial temperament consists of decisiveness, transparency in decision-making, impartiality, civility to litigants and counsel, the ability to listen carefully, a calm demeanor, and an unwavering commitment to the rule of law. I meet these standards.

**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. 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.

**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 matter of first impression involving a statute, I would turn first and foremost to the language of the statute. If the text is clear, my inquiry would be at an end. If for some reason the statutory text did not lead to a clear answer, I would look to the structure and context of the provision, and turn to precedents of the Supreme Court and the Ninth Circuit interpreting similar provisions.

**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: As a District Judge, I would be bound to follow all Supreme Court and Ninth Circuit precedent and would apply it, regardless of whether I thought it was correctly decided or not.

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

Response: A district court should avoid reaching constitutional questions whenever possible. If that cannot be avoided, a district court must presume that a statute passed by

Congress is constitutional and should be declared unconstitutional only if it clearly conflicts with the Constitution as interpreted by the Supreme Court and relevant circuit courts, or if Congress clearly acted beyond its constitutional authority.

- 12. What assurances or evidence can you give this Committee that, if confirmed, your decisions will be grounded in precedent and the text of the law rather than any underlying political ideology or motivation?**

Response: If confirmed, my duty as a District Judge would be to decide every case solely on the basis of the plain text of the law, applicable precedent and the admissible evidence in the record. I will fulfill that duty without regard to any ideology or motivations that I might or might not have.

- 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: The rule of law and equal justice under law are the bedrock principles of our legal system. I have been committed to upholding those principles throughout my legal career, starting with my service as judicial law clerk to the Hon. Procter R. Hug, Jr., United States Circuit Judge. I can assure the Committee and future litigants that I will decide every case and issue presented to me on the basis of the facts and applicable law, and without regard to any personal views that I may or may not have.

- 14. 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.

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

Response: I have been advised that the Northern District of California has a substantial case load and that the seat I would take, if I am fortunate enough to be confirmed, has been deemed a judicial emergency vacancy. If confirmed, I will manage my caseload by maintaining reasonable and efficient schedules in all matters, deciding motions and other issues promptly, making appropriate use of Magistrate Judges, and encouraging dispute resolution through mediation and other services.

- 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 play a critical role in ensuring fair and prompt resolution of disputes. If confirmed, I would implement the measures discussed in Question 15 above to manage my docket, and use the procedures provided for in the Federal Rules of Civil Procedure

and Criminal Procedure to manage cases.

- 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, I will resolve legal issues based on applicable Constitutional and statutory provisions, along with precedent from the Supreme Court and the Ninth Circuit. I will resolve factual disputes on the basis of admissible evidence in the record. With respect to challenges in the transition, I have been fortunate in my 23 years of civil practice to have worked on a broad array of federal claims and issues, including class actions and multi-district cases, in every phase of litigation from the complaint to judgment, verdict or settlement. While I will need to familiarize myself with areas of the law where I have had less experience, such as criminal law, I will prepare through diligent and dedicated work, and will have substantial resources to assist me in achieving a smooth transition.

- 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 nature 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: I received these questions from the Department of Justice and prepared my responses. I discussed my responses with a representative of the Department of Justice, and I authorized the Department of Justice to submit my responses to the Committee.

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

Response: Yes.

## Senator Lee

### Questions for the Record Nominations Hearing (10:30 AM, Sept. 11, 2013)

James Donato

**1. It is my understanding that while you were serving as a board member of the Bar Association of San Francisco, the Association sent a letter to Senators Feinstein, Boxer, Specter, and Leahy in opposition to the confirmation of Justice Alito to the Supreme Court of the United States.**

**a. Did you oppose confirmation of Justice Alito to the U.S. Supreme Court and, if so, on what basis?**

Response: The referenced letter was submitted on behalf of the Bar Association of San Francisco in January 2006. I did not prepare the letter and did not take a personal position for or against the confirmation of Justice Alito.

**b. Did you participate in the drafting of the letter?**

Response: No.

**c. Did you agree with the contents of that letter?**

Response: I did not prepare the letter or undertake any research or analysis of the issues discussed in it, and consequently have no views on the contents of the letter.

**d. Did you express any opposition or support within the association with respect to the contents of that letter?**

Response: The letter reports that 23 directors voted to approve it, two voted against it, one abstained and two did not vote. I do not recall specifically how I voted, but it is likely I voted to send the letter out of deference to the committee that researched and prepared it.

**2. The Bar Association letter asserts that Justice Alito does not properly understand “the Court’s role to protect the personal rights of individuals and a respect for and sensitivity to the respective powers and reciprocal responsibilities of the Congress,**

**the Court, and the Executive, federal-state relations, and limits on governmental power.”**

- a. What is your understanding of Justice Alito’s understanding of “the Court’s role to protect the personal rights of individuals and a respect for and sensitivity to the respective powers and reciprocal responsibilities of the Congress, the Court, and the Executive, federal-state relations, and limits on governmental power”?**

Response: I did not prepare the letter or undertake any research or analysis of Justice Alito’s opinions on those issues, nor have I studied Justice Alito’s record on the Supreme Court. Although I do not have a substantive understanding of Justice Alito’s views on these issues, if confirmed, I will follow any binding Supreme Court precedent reflecting Justice Alito’s views on these or any other issues.

- b. What are your views on “the Court’s role to protect the personal rights of individuals and a respect for and sensitivity to the respective powers and reciprocal responsibilities of the Congress, the Court, and the Executive, federal-state relations, and limits on governmental power”?**

Response: The United States Supreme Court has addressed these issues. For example, the Supreme Court has established that Congress’s authority under the Commerce Clause is broad but not unlimited. *See United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). The Supreme Court has also recognized that the President’s powers to issue executive orders or take executive actions are circumscribed by the Constitution and acts of Congress. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). With respect to federal-state relations, the Supreme Court has held that “the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.” *New York v. United States*, 505 U.S. 144, 157 (1992). The Supreme Court has applied this important constitutional limitation to hold that the authority to determine qualifications for state-court judges and other state government officials is, among other powers, “a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States ‘guarantee[s] to every State in this Union a Republican Form of Government.’” *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991). If I am confirmed as a District Judge, I will faithfully follow Supreme Court and Ninth Circuit precedent on these issues.



**c. How do your views on these issues differ from those of Justice Alito?**

Response: I have not undertaken any research or analysis of Justice Alito's views on these issues. If I am fortunate enough to be confirmed as a District Judge, I will follow Supreme Court precedent on these and all other issues, without regard to any personal views I may or may not have.

**Questions for the Record**  
**Senator Ted Cruz**

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

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

Response: I believe a judge should be decisive, transparent in decision-making, impartial, civil and respectful to litigants and counsel, a good listener, should maintain a calm demeanor, and have an unwavering commitment to the rule of law and to following Supreme Court precedent. I have not undertaken a substantive study of the Justices of the Warren, Burger or Rehnquist Courts, but I believe all of the Justices in those Courts were committed to similar principles and I therefore cannot identify a particular Justice most analogous with my views.

**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: If confirmed as a District Judge, I will follow Supreme Court precedent where the Court used originalism to interpret the Constitution. For example, the Supreme Court recently held that the public understanding of a legal text in the time after enactment is a "critical tool of constitutional interpretation." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008). I will follow this and all other Supreme Court precedent.

**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 Judge, I would follow precedent and be powerless to overrule it.

**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 Judge, I would be bound to follow *Garcia* and all other precedent from the Supreme Court.

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

Response: Recent Supreme Court decisions have found limits on Congress's power to regulate non-economic activity under the Commerce Clause. *See, e.g., United States v. Morrison*, 529

U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). These cases stand for the proposition that the Commerce Clause does not empower Congress to regulate non-economic activity with only an attenuated effect on interstate commerce. However, in *Gonzales v. Raich*, 545 U.S. 1 (2005), Justice Scalia noted that “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.” *Id.* at 37 (Scalia, J., concurring). If confirmed, I will follow precedent on the Commerce Clause decided by the Supreme Court.

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

Response: The Supreme Court held in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), that the President’s powers to issue executive orders or take executive actions are circumscribed by the Constitution and acts of Congress. *See also Medellin v. Texas*, 552 U.S. 491, 524 (2008) (President’s authority to act “‘must stem either from an act of Congress or from the Constitution itself.’”) (citation omitted). If confirmed, I will follow Supreme Court precedent on this issue.

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

Response: The Supreme Court has found certain rights to be “fundamental” for purposes of the substantive due process doctrine when they are “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.’” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted). If confirmed, I will follow Supreme Court precedent on these issues, without regard to any personal beliefs I might or might not have.

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

Response: The Supreme Court has applied heightened scrutiny under the Equal Protection Clause when evaluating “suspect” classifications such as race and national origins. It has also stated that heightened scrutiny should be applied when a classification burdens a right that the Court has deemed fundamental.

**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: The Supreme Court has recently addressed racial preferences in public higher education in *Grutter* and *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013). If confirmed, I would follow the Supreme Court’s precedent on this issue without regard to any personal views or expectations.