

**Senator Chuck Grassley
Questions for the Record**

**James Maxwell Moody, Jr.
Nominee, U.S. District Judge for the Eastern District of Arkansas**

- 1. According to your questionnaire, it appears that the majority of your legal experience is limited to civil litigation. As a district judge, you will be asked to preside over both civil and criminal cases.**

- a. What experience do you have with criminal law?**

Response: Although almost all of my experience as a judge has been with civil cases, I have tried criminal jury trials as a judge and presided over plea and arraignment days. Upon taking the state court bench I attended the National Judicial College where a large part of the curriculum was dedicated to criminal law and criminal procedure.

- b. What steps have you taken to familiarize yourself with the area of criminal law?**

Response: I have been studying the federal criminal code, the Federal Rules of Criminal Procedure, and the Federal Sentencing Guidelines.

- c. What steps do you plan to take to get up to speed, should you be confirmed?**

Response: I plan to enroll in educational programs on federal criminal law provided by the Administrative Office of the United States Courts. I will consult judicial colleagues and continue to work hard to master the area of criminal law.

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

Response: While the Sentencing Guidelines are no longer mandatory, if confirmed I will use them as a baseline and only deviate from them when appropriate. Sentencing Guidelines promote uniformity and consistency.

- 3. How would you define the term judicial activism? What would indicate to you that a judge is an activist judge?**

Response: Judicial activism occurs when a judge attempts to make policy from the bench. If confirmed, my job would be to follow and interpret the law, leaving the making of policy and laws to the legislative branch.

- 4. 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.

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

Response: During the past eleven years as a state court trial judge I have discovered that the most important attributes of a judge are dedication to the rule of law, civility and respect toward the litigants and being prepared. I possess each of these attributes.

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's temperament sets the tone and decorum for all business before the court. A civil attitude and a patient demeanor toward every person appearing before the court are essential to the administration of justice. I have strived to maintain this temperament on the state court bench and if confirmed will continue to do so on the federal bench.

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. 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: As a state court judge, when considering a case of first impression, I first look at the relevant statutes to determine the plain unambiguous meaning of the law. If the meaning of the statute is unclear or ambiguous, I then look to analogous precedent from the Arkansas Supreme Court. If confirmed, to be a federal district court judge, I would continue to look at the text of the statute first to determine if its meaning was unambiguous. If it was ambiguous, I would look to analogous Supreme Court and Eighth Circuit precedent, and then other United States Circuit Courts of Appeals for guidance.

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: I would follow any applicable precedent regardless of my opinions of the validity of the controlling decision.

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

Response: I would only declare a statute enacted by Congress unconstitutional in cases where Congress exceeded the authority given to it by the Constitution.

- 11. 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: As a state court trial judge, I have been assigned over 1,000 cases and in each of them my decisions were grounded in precedent and the text of the law without regard to any underlying political ideology or motivation. If confirmed, I will continue do the same.

- 12. 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: As a state court trial judge I have been fair and impartial to all litigants that have come before me regardless of my personal views, if any. If confirmed I will continue to set aside any personal views and follow the law and apply the facts of each case before me.

- 13. 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.

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

Response: If confirmed, I will promptly issue a scheduling order for each particular case when it is filed and follow the litigation with status hearings and pretrial conferences to insure that the case is moving along at an appropriate pace.

- 15. As a judge, you have experience deciding cases and writing opinions. Please describe how you reach a decision in cases that come before you and to what sources of information you look for guidance.**

Response: When deciding a case, I first establish the applicable standard of review. I then review the briefs submitted in the case as well as the trial record and consider oral argument by counsel. I conduct my own research of the relevant case law and render a decision by applying the law to the particular facts 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: Yes. If confirmed, I will continue to use scheduling orders, pretrial hearings and status conferences to ensure that cases move forward efficiently.

- 17. 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.

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

Response: On October 2, 2013, I received a series of questions and personally drafted my responses on the same day. The week of October 21st, I reviewed the draft of my responses with an official in the Department of Justice before submitting these to the Committee.

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

Response: Yes.

**Questions for Judicial Nominees
Senator Ted Cruz**

**James Maxwell Moody, Jr.
Nominee, U.S. District Judge for the Eastern District of Arkansas**

Judicial Philosophy

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: My judicial philosophy as a state court judge for the past eleven years could best be characterized by fair and impartial treatment to all litigants that have come before me regardless of my personal views, if any. If confirmed, I will continue to follow the law and apply the law to the facts of each case before me. I do not think any single Justice's philosophy is analogous to mine but credit my judicial philosophy to my father, Judge James Moody.

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: The Supreme Court has used "original intent" and "original public meaning" when interpreting the Constitution in certain cases. I would faithfully follow that 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: I would always follow controlling precedent.

Congressional Power

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: To the extent that *Garcia* is still controlling precedent, if confirmed, I would follow and apply controlling precedent on any issue before me.

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

Response: The United States Supreme Court has ruled that “Congress may regulate the use of the channels of interstate commerce . . . Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities . . . Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.” *U.S. v. Lopez*, 514 U.S. 549, 559 (1995). If confirmed as a district court judge and faced with a question regarding the scope of the Commerce Clause, I would follow this precedent.

Presidential Power

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

Response: The Executive Branch of government is limited in power by the authority and powers vested to it by an act of Congress or the Constitution. If those powers and authority are exceeded, the judiciary must enforce those limitations. “The President’s power, if any, to issue the order must stem from an act of Congress or from the Constitution itself.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Individual Rights

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

Response: “[T]he Court has regularly observed that the Clause specially protects those fundamental rights and liberties which 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, 721 (1997). In addition, the Court has “required in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest.” *Id.* at 721 (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

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

Response: A classification is subject to heightened scrutiny when it involves race, gender or other suspect classification or when the classification burdens fundamental rights such as the right to vote.

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 applied *Grutter v. Bollinger* to allow continued use of affirmative action in public higher education admissions but further reinforced that such a practice was subject to strict scrutiny. The Court reiterated that such an inquiry required “a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications,” and clarified that “[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.” *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2420 (2013). The Court also held “a university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity that ‘encompasses a ... broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.’” *Id.* at 2421 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978)).

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