

**Senator Chuck Grassley  
Questions for the Record**

**Cynthia Ann Bashant  
Nominee: U.S. District Court for the Southern District of California**

**1. You have been a strong supporter of a woman’s right to choose whether or not to have an abortion. You were President of the Lawyers Club of San Diego which supports reproductive rights. In one President’s column you wrote that pro-life supporters were a “small minority” and that “opponents of choice pose a very real threat to the very foundations of democracy.” You have also praised Planned Parenthood’s work for their “successful suits against those attempting to curtail the constitutional right to choose.”**

**a. What are the Constitutionally acceptable restrictions on the right to an abortion?**

Response: The United States Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) ruled that “[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” *Id.* at 878. This standard was reiterated in *Gonzales v. Carhart*, 550 U.S. 124 (2007), in which the Supreme Court distinguished between such an “undue burden” and “regulations which do no more than create a structural mechanism by which the state...may express a profound respect for the life of the unborn.” *Id.* at 146 (internal citation omitted).

**b. You did not identify the lawsuits for which you were expressing support in your column. What lawsuits were you referencing?**

Response: Respectfully, the article you are referencing was written nineteen years ago when I was a young lawyer. I don’t remember specifically what lawsuits I was referencing at that point in time.

**2. Planned Parenthood has criticized state laws that prohibit filing “wrongful birth” lawsuits. These are lawsuits where parents of a congenitally diseased child claim that their doctor failed to properly warn them of the risk to their child and therefore were not able to make an informed decision about whether or not to have the child.**

**a. How do you understand the constitutionality of these suits?**

Response: These suits, brought in federal court under diversity jurisdiction or under the Federal Tort Claims Act, require a federal court to interpret the laws of the state in which the injury occurs. *Santana v. Zilog*, 95 F.3d 780, 781 (9<sup>th</sup> Cir. 1996). The California Supreme Court in *Turpin v. Sortini*, 31 Cal.3d 220 (1982) addressed this issue with respect to California law. The Court found “while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child--like his or her parents--may recover special damages for the extraordinary expense necessary to treat the hereditary ailment.” Laws similar to that of California’s have been affirmed by other Circuit Courts. *See Gallagher v. Duke University*, 852 F.2d 773 (4<sup>th</sup> Cir. 1990) (affirming such a cause of action under North Carolina law); *Robak v. United States*, 658 F.2d

471 (7<sup>th</sup> Cir. 1981) (Alabama law); *Duplan v. Harper*, 188 F.3d 1195 (10<sup>th</sup> Cir. 2013) (Oklahoma law). In *Campbell v. United States*, 962 F.2d 1579 (11<sup>th</sup> Cir. 1993), the Eleventh Circuit found that Georgia's failure to recognize a cause of action for wrongful birth did not implicate the Fourteenth Amendment because the action only involved an action between private parties.

**b. Do you have any concerns with the concept of “wrongful birth” lawsuits?**

Response: If such a suit came before me as a federal district judge under a diversity jurisdiction theory or under the Federal Tort Claims Act, I would interpret the state law in which the injury was alleged to have occurred and follow the precedent in effect at the time from both the Supreme Court and the Ninth Circuit.

**3. Among the cases you listed as your ten most significant was one where the defendant was acquitted of distributing marijuana after he argued that it was being used for medical purposes. You wrote the case involved the interpretation of the new medical marijuana law and whether it applied to individuals who sold medical marijuana as part of a cooperative. Can you please describe how you interpreted the statute and what tools you used to reach the result you did?**

Response: I looked at the plain language of the statute and drafted a jury instruction that incorporated this language. The jury then reached a verdict based on this jury instruction.

**4. In March of this year, you gave a talk about factors to consider when deciding what bail should be and what sanctions should be for defendants. You listed many factors to discuss with the group but provided no indication how you consider each factor when making a sentencing or bail decision for defendants. Please elaborate on when each of the factors you listed should be considered in criminal law cases.**

Response: Under California law, such factors as the defendant's criminal history as well as the extent of the injuries to a victim may be taken into consideration in making a sentencing or bail decision. The above-referenced talk was simply a Socratic discussion with a group of young people. I did not offer any opinion or answer to what would be appropriate factors to consider.

**5. In this same talk, you wrote “No one wants to talk about race but it is often the big elephant in the room that everyone is ignoring.” What did you mean by this statement?**

Response: I was simply noting the fact that, nationwide, African Americans are disproportionately represented in both the criminal justice and the dependency systems.

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

Response: It is important for a judge to be fair, intelligent and decisive. I believe I have all of those attributes.

**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: A judge should be patient and treat everyone in front of him or her with civility and respect. I believe I possess those qualities.

- 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. 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: I am fully committed to following Supreme Court and Circuit Court precedent without regard to my personal opinions.

- 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: I would look to the plain language of the statute, and, if the meaning was clear, my inquiry would be over. If the plain language was not clear, I would use canons of statutory construction, including considering the statute as a whole to attempt to discern its meaning, and would consider relevant legislative history, if necessary. If there was no Supreme Court or Ninth Circuit precedent dispositive on the issue, I would turn to other Circuit Court cases for their analysis of the issue. I would also look to precedent from the Supreme Court and Ninth Circuit on analogous issues.

- 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: I would follow the Supreme Court or Court of Appeals precedent without regard to my belief.

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

Response: Statutes passed by Congress are presumed constitutional, so it should be rare that a federal court declares such a statute unconstitutional. Only if the statute exceeded Congressional authority or violated a Constitutional provision should a federal court find it to be unconstitutional.

- 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, it is never proper for a judge to rely on foreign law or the views of the “world community” in interpreting the Constitution.

- 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: In my thirteen years as a California Superior Court Judge, I have grounded my decisions in precedent and the law rather than any personal ideology or motivation, and, if confirmed as a district court judge, I would continue to do so.

**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: My work as a Superior Court Judge in San Diego reflects that I am able to put aside any personal views and be fair to all who appear in front of me. I would continue to do so if confirmed as a district court judge.

**15. 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 and manage your caseload?**

Response: I do believe that judges have a role in controlling litigation in their courtroom. If confirmed as a district court judge, I would continue to impose firm and fair deadlines on attorneys and litigants appearing before me. I would also enlist the assistance of Magistrate Judges in an attempt to narrow issues.

**16. 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: I carefully review the issues presented to ensure that I am limiting my decision to the questions presented. I listen carefully to all evidence presented. I research and review relevant statutory and case law, and then I apply that law to the facts to reach a decision.

**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 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: I am not aware of any such endorsements.

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

Response: After receiving the questions, I personally prepared all responses. I discussed the prepared responses with a representative of the Department of Justice and then authorized the Department to submit my responses.

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

Response: The above answers do reflect my true and personal views.

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

**Cynthia Ann Bashant**  
**Nominee: U.S. District Court for the Southern 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: My judicial philosophy is to approach every case with an open mind, make sure all parties are adequately heard, research the relevant law, limit my ruling to the specific issue at hand, determine the facts based on the evidence presented and then apply the relevant law to the facts. I have not studied any particular Supreme Court Justice well enough to know whether he or she completely embodies my judicial philosophy.

**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 employed originalism to interpret the Constitution. *See e.g. District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed as a district court judge, I would follow this 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 not overrule precedent as a district court judge.

**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, I would be bound by the Supreme Court's decision in *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985), and I would follow this precedent.

**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 recognized limits on the power of Congress to regulate non-economic activity pursuant to the Commerce Clause. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). 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 as a district judge, I would follow all binding Supreme Court and Ninth Circuit precedent regarding the issue of Congressional regulatory powers.

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

Response: The standard for judicial review of executive orders and executive actions by the President is set forth in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). The President can issue executive orders or take executive action if the Constitution or an act of Congress provides the President with the authority to do so.

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

Response: The Supreme Court has held that a right is fundamental for purposes of the substantive due process doctrine only if it is deeply rooted in our nation’s history and tradition and “implicit in the concept of ordered liberty.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (internal citation omitted). If confirmed, I will follow this and all binding precedent from the Supreme Court and the Ninth Circuit concerning the substantive due process doctrine.

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

Response: The Supreme Court has held that heightened scrutiny under the Equal Protection Clause, either strict or intermediate scrutiny, is appropriate when a classification burdens a fundamental right or when it differentiates categories such as race, national origin or gender. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). If confirmed, I would follow binding precedent from the Supreme Court and the Ninth Circuit on this issue.

**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 have not formed any expectation as to when the use of racial preferences in public higher education will no longer be necessary. However, if confirmed as a district judge, I would follow binding Supreme Court precedent concerning the legality of such racial preferences, including the precedent established by *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).