

**Senator Chuck Grassley
Questions for the Record**

**Theodore David Chuang
Nominee, U.S. District Judge for the District of Maryland**

- 1. As a former congressional staffer who has worked in the Executive Branch for some time, and who is now nominated to serve in the Judicial Branch you have a unique perspective. How has your experience shaped your understanding of the balance between Congress's constitutional obligation to conduct oversight and the Executive Branch's interests?**

Response: As a former counsel for congressional oversight committees, I firmly believe and appreciate that appropriate congressional oversight of the Executive Branch is a critical part of our constitutional system of checks and balances and can lead to important reforms and improvements in the operations of government. Having also worked on such issues from the Executive Branch, I also recognize that congressional oversight should be sensitive to the Executive Branch's legitimate need to have candid internal deliberations in order to carry out its various missions effectively. Ultimately, I believe that congressional oversight is most effective when both branches approach this important function with a spirit of cooperation and accommodation of each branch's legitimate interests.

- 2. I understand that for the last few months, you have been working with the State Department and its response to the ongoing congressional investigation into the attack on the U.S. mission in Benghazi. On August 1, 2013, House Oversight and Government Reform Committee Chairman Darrell Issa issued a subpoena to the State Department that compelled the Secretary of State to produce, among other things, all the notes and summaries of witness interviews conducted by the State Department's Accountability Review Board. I understand that the State Department has refused to comply with that aspect of the subpoena. Please answer each question separately.**

- a. On what legal basis is the State Department withholding those documents?**

Response: The State Department articulated the institutional concerns surrounding production of these documents, and its willingness to engage in a process of accommodation, in its letter of September 20, 2013 to the House Committee on Oversight and Government Reform.

- b. Has the Executive asserted Executive Privilege?**

Response: At this time, the Executive has not asserted Executive Privilege over these documents.

- c. Has the Executive asserted any privilege?**

Response: At this time, the Executive has not asserted an applicable privilege. The State Department articulated the institutional concerns surrounding production of these documents, and its willingness to engage in a process of accommodation, in its letter of September 20, 2013 to the House Committee on Oversight and Government Reform.

- d. Do you believe there are valid reasons—other than an assertion of executive privilege or another privilege—to withhold documents from Congress that have been subpoenaed?**

Response: A valid legal privilege could form an appropriate basis for withholding documents subpoenaed by Congress. In practice, if an Executive Branch agency identifies other reasons that providing certain subpoenaed documents to Congress may have adverse consequences for the government, it may seek, through the traditional process of accommodation, to reach an understanding with the relevant congressional committee that production of such documents need not occur.

- e. Did you advise the Secretary to withhold those documents from the House Oversight Committee?**

Response: My role during my temporary detail to the State Department, as in all of my professional positions, has been as legal counsel. In that capacity, I have provided legal advice to the Department on the parameters of the law. As an attorney subject to rules of professional responsibility, I do not believe it is appropriate to discuss specific legal advice provided to a client.

- 3. In your hearing, I asked you about the statement you wrote of Judge Nelson that said, “some of Judge Nelson’s most noteworthy opinions embody the principle that the courts must be vigilant in protecting the rights of weaker minority interests when they have been unjustifiably violated by more powerful majority interests.” When I asked you whether you would take this approach to the administration of justice in your courtroom, if confirmed, you said you would approach your cases by looking at the facts and following precedent. While I appreciate that you will follow the law, I would like a more responsive answer.**

- a. In what ways will you protect the rights of “weaker minority interests”?**

Response: The role of a judge is to make decisions based on the law and the facts, without regard for outside considerations, such as whether one party has more or fewer resources or is advocating for a more or less popular position. If confirmed to serve as a federal judge, I would rule for whichever party the law and facts dictate should prevail, regardless of the party’s level of resources or the popularity of its position.

b. Are there circumstances under which these interests can be justifiably violated?

Response: If the law and facts do not support the position of a party which has fewer resources or has a less popular or minority position, the court should rule against that party.

4. In that same 1999 profile of Judge Nelson you wrote about her dissenting opinion in a Ninth Circuit case upholding the state of Hawaii's designation of Good Friday as a state holiday. Judge Nelson found this to be a violation of the establishment clause. Do you agree with her dissent in this case? Please explain.

Response: If confirmed as a federal judge, any personal views I may have about any issue would not play a role in my evaluation of any case. The Fourth Circuit has addressed the question of whether Good Friday can be designated as a public school holiday under the Establishment Clause and held that such a designation is permissible. *Koenick v. Felton*, 190 F.2d 259, 268-69 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118 (2000). This opinion is consistent with the rulings of the Seventh Circuit in *Bridenbaugh v. O'Bannon*, 185 F.3d 796 (7th Cir. 1999), and the Ninth Circuit in the case in which Judge Nelson dissented, *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991). If confirmed to serve as a United States District Judge for the District of Maryland, I would be bound by and would faithfully apply all Supreme Court and Fourth Circuit precedent relating to the Establishment Clause, including *Koenick*.

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

Response: The most important attribute of a judge is the ability to be entirely fair and impartial toward parties and their arguments, such that cases are decided based on the applicable facts and law and not on any outside considerations. I believe that over the course of my legal career, I have demonstrated that I possess this ability.

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: As a guardian of the rule of law and the American system of justice, a judge must be able to consider every case fairly and objectively, based on the applicable law and facts, without consideration of outside factors. A judge must also act in a manner that instills confidence in the parties and the public that the judge's rulings are rendered in this manner. Accordingly, a judge should be fair, open-minded, and evenhanded in all matters. A judge should also be respectful, courteous, and patient with all who appear in the courtroom. I believe that I have demonstrated these qualities over the course of my legal career.

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: A district judge is bound by precedent of the Supreme Court and the relevant Circuit Court. If confirmed, I would faithfully apply controlling precedents of the Supreme Court and the Fourth Circuit and give them full force and effect, regardless of whether I personally agree or disagree with such precedents.

- 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: In a matter of first impression, I would consider the plain language of an applicable statute and, if necessary, would apply the canons of statutory construction to assist in interpreting the language for purposes of the case. I would also review and consider persuasive case law, including Supreme Court and Fourth Circuit case law addressing analogous issues and case law from other circuits addressing the same issue. I would follow the principle of judicial restraint and would endeavor to decide only those issues that need to be decided to resolve the case.

- 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: As a district court judge, I would apply controlling Supreme Court or Fourth Circuit precedent even if I believed that the higher court's ruling was incorrect.

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

Response: Having served as legal counsel to congressional committees, I have a strong appreciation for the prerogative of the elected representatives in the Legislative Branch to enact the laws of the United States. Accordingly, and consistent with the doctrine of constitutional avoidance, I believe that a federal court should address the constitutionality of a federal statute only when it is necessary to decide the case at hand and should declare a statute unconstitutional only in rare circumstances, when the Constitution and applicable legal precedent make clear that such a ruling is required.

- 11. 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 the absence of Supreme Court or Fourth Circuit precedent requiring me to do so, I would not rely on foreign law or the views of the "world community" in determining the meaning of the Constitution.

- 12. 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? In your answer, please address how your work with several different Democratic organizations and campaigns will not influence you as a judge.**

Response: All of my professional positions have been as legal counsel, and although I have had some limited involvement with political activities on a voluntary basis, I have always understood that politics has no place in legal analysis. Throughout my legal career, I have represented individuals and institutions of diverse political, economic, and social backgrounds, including representing both the Legislative and Executive Branches, serving in a U.S. Attorney's Office under both Democratic and Republican administrations, and representing large corporations in the securities, financial, energy, and telecommunications sectors as well as individuals with diverse viewpoints while in private practice. Throughout these legal representations, I have always advocated for the best interests of my clients regardless of their political or philosophical viewpoints, and I have not allowed any personal views or my limited participation in certain political activities to affect my legal advice and representation. While I recognize that the role of a judge is very different from that of an advocate, if confirmed I would draw on this experience in setting aside any personal views and prior political participation and commit that I would decide cases solely based on the facts and the relevant legal text and precedent.

- 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: Throughout my legal career I have represented diverse interests as discussed in my response above to question 12, including as a criminal prosecutor, criminal defense attorney, and as a civil attorney for both plaintiffs and defendants. Throughout these legal representations, I have always advocated for the best interests of my clients regardless of their positions or viewpoints, and I have always set aside any personal views in representing my client as an attorney. While I recognize that the role of a judge is very different from that of an advocate, if confirmed I would draw on this experience and would set aside any personal views, treat all parties fairly regardless of their background or circumstances, and decide cases solely based on the relevant law and facts.

- 14. 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: In order to advance the administration of justice and the efficiency of the justice system, judges may play a role relating to the pace and conduct of litigation, provided that they act in accordance with existing precedent on the due process rights of litigants. I would expect to employ scheduling and discovery orders, case management and status conferences, pretrial conferences, and other similar tools to advance the efficiency of the litigation process. I would also endeavor to issue timely rulings so as to keep cases proceeding toward resolution.

- 15. 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: In deciding a case that came before me should I be confirmed, I would seek to learn and understand the facts of the case as presented through witness testimony, exhibits, and submissions by the parties. I would then apply the relevant law to those facts. In determining what law to apply, I would consider the oral and written arguments of the parties but would also conduct independent legal research as necessary. The sources I would rely upon would include the language of any applicable statutes and regulations, controlling Supreme Court or Fourth Circuit precedent, and other relevant case law.

Having served as a judicial law clerk, as well as a government attorney whose role included weighing opposing interests to make an assessment of a fair outcome for both parties, I believe that I am well equipped to make this transition. One difficult but surmountable part of the transition may be the need expeditiously to learn new areas of federal law in order to decide specific cases.

- 16. 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: I have had no such contact.

- 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.

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

Response: I received these questions on December 20, 2013. I drafted responses to the questions and provided them to the U.S. Department of Justice. After discussing my responses with a representative of the Department of Justice, I finalized my responses and authorized the Department to transmit them to the Committee.

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

Response: Yes.

Senator Ted Cruz
Questions for the Record

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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 to with yours?

Response: I believe that a federal judge is a guardian of the rule of law and the American system of justice. Accordingly, my judicial philosophy is that a judge must always decide cases based on the Constitution, the applicable laws, and the facts of the case, and not on any outside considerations. A judge’s role is to learn the facts of a case, study the applicable statutes and precedents, and apply the law to the case in a fair and impartial manner, treating all parties with respect and dignity. I have profound respect for the institution of the Supreme Court and for its justices, past and present, but I do not have a sufficient basis of knowledge to identify a single justice who has expressed a judicial philosophy that I would adopt as my own.

Do you believe that 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 to serve as a United States District Judge, my role in cases involving constitutional interpretation would be to study and apply to the case at hand the applicable precedent of the Supreme Court and the Fourth Circuit, including precedent considering the original intent of the drafters or the original public meaning of the text. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: If confirmed to serve as a United States District Judge, I would be bound by the precedent of the Supreme Court and the Fourth Circuit. I would not overrule that precedent.

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 to serve as a United States District Judge, I would be bound by Supreme Court and Fourth Circuit precedent addressing limitations on federal action toward state governments, including cases such as *Garcia*, which addressed the specific issue of regulatory immunity for state governments under the Commerce Clause. I would apply such precedent without regard to any personal views.

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 identified three categories of activity that may be regulated under the Commerce Clause: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) those activities that substantially affect interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); *United States v. Morrison*, 529 U.S. 598, 608-09 (2000); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). In *Morrison*, the Court declined to “adopt a categorical rule against aggregating the effects of any noneconomic activity” in order to uphold congressional action under the Commerce Clause, but noted that the Court historically has “upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” 529 U.S. at 613. If confirmed to serve as a United States District Judge, I would follow all applicable Supreme Court and Fourth Circuit precedent on the extent of congressional authority under the Commerce Clause.

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

Response: According to the Supreme Court, “[t]he President’s authority to act, as with the exercise of any governmental power, must stem either from an act of Congress or from the Constitution itself.” *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (internal citations omitted). In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court invalidated an executive order requiring federal seizure of the nation’s steel mills based on the determination that it was not authorized by statute or the Constitution. The prevailing framework for a court to analyze whether executive action exceeds presidential authority is set forth in Justice Jackson’s concurrence in *Youngstown*. 343 U.S. at 635-38 (Jackson, J., concurring).

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

Response: The Supreme Court has stated that fundamental rights include “the specific freedoms protected by the Bill of Rights,” and “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition” and which are “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Washington v. Gluckberg*, 521 U.S. 702, 720-21 (1997) (internal citations and quotations omitted). If confirmed, I would consider a right to be fundamental under the Due Process Clause if the Supreme Court or the Fourth Circuit has previously held it to be fundamental under this standard.

When should a classification be subject 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. These classifications include race, alienage, and national origin, which are subject to strict scrutiny; and gender and illegitimacy, which are subject to intermediate scrutiny. *See, e.g., City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985). If confirmed, I would follow Supreme Court and Fourth Circuit precedent on what classifications are subject to heightened scrutiny and how to apply such scrutiny.

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 sufficient background or expertise to have any personal expectations on this matter. If confirmed, I would apply *Grutter* and any other subsequent Supreme Court or Fourth Circuit precedent on the use of race in admissions to public institutions of higher education, such as *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013), in any applicable cases.