

**Senator Grassley
Questions for the Record**

**André Birotte, Jr.,
Nominee, U.S. District Judge for the Central District of California**

- 1. Your responses to the Committee’s questionnaire indicate that you were a panelist at an event in 2011 celebrating the *Brown v. Board of Education* decision. The notes you submitted from the event state that “the Constitution is a living document that should relate to current times.” The notes also state that “the times have changed” and that the “interpretation of the Constitution must also reflect those changes.”**

- a. If you are confirmed, would you consider “evolving standards” or, as your notes put it, “changing times” when you’re called upon to interpret the meaning of the Constitution?**

Response: No. In an effort to provide context to this question, the above-referenced event was known as the Second John G. Gabbert Historical Oral Argument and Lecture Series which was held at the Riverside County Court of Appeals. This was an event organized by local lawyers and judges for law students and lawyers in Riverside and San Bernardino Counties. The event was expressly an historical re-enactment of the *Brown v. Board of Education* oral argument. I, along with two other attorneys, were asked to play the role of counsel for the NAACP who argued before the United States Supreme Court and other volunteer lawyers played the role of counsel for the Board of Education and the State. Each volunteer performed a historical reenactment of the arguments that we as a group believed would have been made by those advocates in the 1950s drawn from the historical record – as closely as we could ascertain. Our reenactment was meant only to theatrically express the views of the historical figures, not our own.

- b. How would you describe your judicial philosophy?**

Response: I have not had the opportunity to preside as a trial judge other than in limited jurisdiction small claims matters; as such I do not have a specific judicial philosophy per se. However if I am fortunate enough to be confirmed as a judge, I would follow the relevant law and precedent of the Supreme Court and the Ninth Circuit Court of Appeals. I would seek to be impartial and fair in all cases and to all litigants, I would judge each case on its individual merit and I would work hard and seek to be as prepared as possible for every hearing. Finally, I would seek to provide a forum where litigants feel that their matter was given a full and fair hearing with a reasoned and timely ruling.

- c. Do you believe it is ever appropriate for a federal judge to consider his or her own policy preferences when interpreting the Constitution?**

Response: No.

- d. Do you believe it is ever appropriate for a federal judge to rely on materials such as legislative history or decisions of foreign courts when deciding a legal question?**

Response: If confirmed, my foremost priority would be to faithfully abide by legal precedent. As such, reliance on legislative history would be limited to circumstances where the text of a statute remains ambiguous, there is no Supreme Court or Ninth Circuit precedent and there is no legal authority from other circuits on the issue in question. I also would only consult legislative history to the extent mandated by the Supreme Court or Ninth Circuit Court of Appeals. With respect to decisions of foreign courts, I would rely and faithfully abide by the prevailing precedent of the Supreme Court and the Ninth Circuit Court of Appeals on that and all other issues.

- 2. As US Attorney, you are responsible for the enforcement of federal law in a large part of California, a state that has a medical-marijuana statute. That state law is called the Compassionate Use Act. In 2011, you initiated a number of forfeiture actions against landlords of medical-marijuana dispensaries. You stated that you undertook those actions because the dispensaries had transformed the “Compassionate Use Act into the Commercial Use Act.” By 2013, you had dismissed those cases with prejudice.**

- a. Why did you abandon the cases your office brought against the landlords?**

Response: A number of the cases to which this question refers were actually resolved by way of settlements and consent judgments. There were some dismissals sought without prejudice following the August 29, 2013 “Guidance Regarding Marijuana Enforcement” Memorandum For All United States Attorneys from Deputy Attorney General James M. Cole, which set forth eight priority areas to use as guidance for focusing federal enforcement efforts in this area in order to use our “limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent and rational way.” The dismissals were sought without prejudice after a judgment was made that the matters did not fall within the eight priority areas and that dismissal was warranted.

- b. Did your decision have anything to do with the updated policy guidance you received from the Department of Justice in August 2013?**

Response: Please see my response to Question 2a above.

- c. Were you instructed by anyone at the Department of Justice to dismiss the cases?**

Response: No.

- d. Irrespective of the policy guidance from the Department of Justice, do you believe there is a federal interest in prosecuting marijuana distributors who are violating federal drug laws but may be operating legally under state law?**

Response: In my role as United States Attorney, I believe that there is always a federal interest in enforcing federal laws. I also believe that the August 29, 2013 memorandum

reflects the Department's commitment to using its "limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent and rational way." However, if confirmed as a federal judge, I recognize that it would not be appropriate for me to weigh in on policy decisions regarding the federal interests of criminal prosecutions involving the United States. In every case, I would follow the law and binding precedent.

- e. **What about actions against landlords who rent to operations that distribute what are controlled substances for purposes of federal law? Do you believe there is a federal interest in prosecuting those individuals?**

Response: In my role as United States Attorney, I believe that there is always a federal interest in enforcing federal laws. I also believe that the August 29, 2013 memorandum reflects the Department's commitment to using its "limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent and rational way." However, if confirmed as a federal judge, I recognize that it would not be appropriate for me to weigh in on policy decisions regarding the federal interests of criminal prosecutions involving the United States. In every case, I would follow the law and binding precedent.

3. **Your office represents the Department of Veterans Affairs ("DVA") and related entities in *Valentini v. Shinseki*. On August 28, 2013, Judge Otero ruled that various land-use agreements between the DVA and private entities, which included a hotel corporation, a movie studio, and a soccer club, were unlawful and void because the private entities were "wholly unrelated to the provision of medical care." The government filed a notice of appeal on October 28, 2013.**

- a. **Did you make the decision to appeal this judgment or instruct your Assistant United States Attorneys file an appeal? If you or your office did not exercise authority concerning the decision whether to appeal the judgment, please state who did.**

Response: The case referred to in Question 3 has been handled by attorneys with the United States Department of Justice in Washington, D.C. Lawyers in my office have been local counsel on the matter to assist with logistical support only, such as electronic filings of legal pleadings, but they have not assisted with substantive issues involving the litigation of the matter.

- b. **Please explain the legal basis for the government's argument that the DVA has unreviewable discretion to enter into enhanced sharing agreements ("ESA") with entities that do not provide health-care resources to veterans. Does your office plan to reassert this argument on appeal?**

Response: Please see my response to Question 3a above.

- c. **Your office argued that the DVA had unreviewable discretion to enter into ESAs with entities like 20 Century Fox and Marriot Laundry Services because the DVA**

is entitled to “determine the optimal uses for its space, land, and property.” Is it the position of your office that the “optimal” use of DVA resources with respect to the disputed ESAs is the status quo – i.e., maintaining ESAs with entities wholly unrelated to the provision of medical services to veterans? Does your office plan to reassert this argument on appeal?

Response: Please see my response to Question 3a above.

- d. Is it the position of your office that maintaining ESAs with entities that provide health-care services to veterans is a sub-optimal use of DVA resources?**

Response: Please see my response to Question 3a above.

- e. How long had the challenged ESAs been effective prior to the district court’s finding that they are unlawful?**

Response: Please see my response to Question 3a above.

- f. Prior to the creation of the now-voided ESAs, what was the DVA land being used for?**

Response: Please see my response to Question 3a above.

- g. Please describe whether, during your tenure as US Attorney, your office has initiated or participated in any investigations of mismanagement of DVA facilities or of DVA provision of services in the Central District of California.**

Response: To the best of my knowledge, my office has not initiated or participated in any investigations of mismanagement of DVA facilities or of DVA provision of services in the Central District of California.

- 4. 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.**

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

Response: Yes. It is my understanding that the quoted language is binding legal precedent.

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

Response: It is my understanding that Justice Kennedy’s reference to “lawful marriages” refers to marriages deemed lawful by the individual states.

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: Yes, that is my understanding.

iv. Are you committed to upholding this precedent?

Response: Yes. If confirmed, I will follow the United States Supreme Court’s decision in *Windsor* and all other relevant precedent from the United States Supreme Court and the Ninth Circuit Court of Appeals.

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: Yes. I understand that this portion and all portions of the *Windsor* opinion are binding precedent that should be given full force and effect by the lower courts.

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

Response: Yes. I commit to giving this and all portions of the *Windsor* opinion full force and effect.

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

² *Id.* 2689-2690.

³ *Id.* 2691.

- 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: Yes. I understand that this portion and all portions of the *Windsor* opinion are binding precedent that should be given full force and effect by the lower courts.

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

Response: Yes. I commit to giving this and all portions of the *Windsor* opinion full force and effect.

- 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: Yes. I understand that this portion and all other portions of the *Windsor* opinion are entitled to full force and effect by the lower courts as binding United States Supreme Court precedent.

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

Response: Yes. I commit to giving this and all portions of the *Windsor* opinion full force and effect.

- 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: Yes. I understand that the quoted portion and all portions of the *Windsor* opinion are entitled to full force and effect by the lower courts as binding United States Supreme Court precedent.

⁴ *Id.* (internal citations omitted).

⁵ *Id.* (internal citations omitted).

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

Response: Yes. I commit to giving this portion and all portions of the *Windsor* opinion full force and effect.

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

Response: I believe that the most important attribute a judge can possess is the ability to always faithfully and impartially adhere to the rule of law and controlling precedent. I believe that I have demonstrated throughout my career that I do possess the ability to faithfully and impartially follow the law and that I would demonstrate this quality if confirmed as a United States District Court Judge.

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: I believe that a judge should always be calm and even-tempered. A judge should also be a good listener who is respectful of all the litigants and lawyers who appear in court and the public who serve as jurors. I believe that I do possess these qualities.

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 United States District Court Judge, I would be fully committed to following all of the precedents of the United States Supreme Court and the Ninth Circuit Court of Appeals, and I would be committed to doing so regardless of whether I personally agree or disagree with those 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 such a case, I would start by looking at the plain language of the written text of the provision, statute, rule or regulation at issue to determine if the language is clear and unambiguous. If the language is clear and unambiguous, then I would make a decision by applying the law to the facts of the case. If, however, the language was not clear and unambiguous, then I would look for guidance in case law from the United States Supreme Court and Ninth Circuit Court of Appeals that was as closely analogous to the matter as I could locate. And if I could not locate analogous case law, then I would seek guidance from other United States Supreme Court and federal appellate court cases for the most applicable persuasive authority I could find for the facts of 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: I would apply the applicable precedent without reservation and my personal views would not play any role.

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

Response: Congressional statutes are presumed to be constitutional. An Act of Congress should only be declared unconstitutional when it is clear that Congress has exceeded its constitutional authority.

- 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. If confirmed, 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?**

Response: I can assure this Committee that if confirmed all of my decisions would be well grounded in legal precedent and the text of the law rather than any personal or political motivation. I believe that my track record as a lawyer, including my roles as federal prosecutor, deputy public defender, Inspector General for the Los Angeles Police Commission, and the United States Attorney has demonstrated my commitment to the rule of law.

- 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: I have served as prosecutor, deputy public defender and also as a private criminal and civil practitioner during my career. I believe that the reputation I have earned during that time in the legal community of the Los Angeles region is that of a person who is fair and objective. Despite the natural differences of opinion that one finds in adversarial proceedings, I believe that those whom I have worked with feel that they were treated fairly and with respect. If confirmed, I will continue to strive to maintain and nurture that reputation as a United States District Court Judge.

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

Response: If confirmed, I will be active in managing every aspect of the docket. I will rely upon the Federal Civil and Criminal Rules of Procedure to conduct meet and confer

conferences early in the case and rule on dispositive motions as efficiently as possible to allow the parties to evaluate the case for settlement or trial. I will make myself available to the parties to settle discovery disputes and work with them to narrow the issues, and I will stay engaged to ensure that cases are not unnecessarily delayed.

- 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?**

Response: I do believe that judges play a vital role in controlling the pace and conduct of litigation, especially in districts like the Central District of California where the civil and criminal caseload is very high. If confirmed, I will use the methods described in the previous answer, and I will strive to resolve matters promptly, efficiently and fairly.

- 16. 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: I agree that the role of a judge is different than that of an advocate. Should I be confirmed, I understand that I would be required to handle every matter that comes before me with neutrality and impartiality and with respect for controlling legal precedent. In reaching a decision, I would carefully evaluate all of the legally permissible factual evidence and look to the governing law of the Supreme Court and the Ninth Circuit Court of Appeals for guidance. I also recognize that there would be a learning curve for me in this new role with respect to, among other things, familiarizing myself with a broad spectrum of federal laws and regulations associated with matters before the court, some of which I have never handled before. I would approach this position like every other job I have had throughout my legal career - with hard work and diligent study of the relevant law and procedure. In addition, I would also consult with my colleagues on the federal bench for guidance.

- 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: No.

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

Response: I received these questions from the Office of Legal Policy at the Department of Justice on May 27, 2014 and I immediately reviewed the questions and began preparing my responses. Upon completion of my answers, I submitted the responses to the Office of Legal Policy. After that, I finalized all of my responses for submission to this Committee.

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

Response: Yes.

Questions for the Record
Senator Ted Cruz

André Birotte, Jr.

Nominee: United States District Judge for the Central District of California

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: I have not had the opportunity to preside as a trial judge other than in limited jurisdiction small claims matters; as such I do not have a specific judicial philosophy per se. However if I am fortunate enough to be confirmed as a judge, I would strive to know and follow the relevant law and precedent of the Supreme Court and the Ninth Circuit Court of Appeals. I would seek to be impartial and fair in all cases and to all litigants, I would judge each case on its individual merit and I would work hard and seek to be as prepared as possible for every hearing. Finally, I would seek to provide a forum where litigants feel that their matter was given a full and fair hearing with a reasoned and timely ruling. With respect to analogous philosophies, I simply do not have enough personal knowledge of the opinions of the Justices of the Warren, Burger and Rehnquist Courts to be able to determine which of the Justices’ philosophies would be most analogous to mine.

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: Yes. The Supreme Court has used originalism to interpret the Constitution in certain instances. For example, the Supreme Court looked to the original public meaning of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I will faithfully apply the *Heller* decision and all other binding precedent of the United States Supreme Court and the Ninth Circuit Court of Appeals.

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, there are no circumstances under which I would overrule binding 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, I would apply *Garcia* and all other binding precedents of the United States Supreme Court, regardless of whether I agreed or disagreed with them.

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

Response: In *United States v. Lopez*, 514 U.S. 549, 558 (1995), the United States Supreme Court “identified three broad categories of activity that Congress may regulate under its commerce power.” According to *Lopez*, the federal government first “may regulate the use of the channels of interstate commerce,” second, “may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce,” and third, may “regulate those activities having a substantial relation to interstate commerce.” *Id.* at 558-59. If confirmed, I would follow the binding precedent of the United States Supreme Court and the Ninth Circuit Court of Appeals when addressing questions concerning Congress' Commerce Clause power.

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

Response: The President's authority to issue executive orders and take executive actions is limited by the Constitution and federal statutes. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) the United States Supreme Court held that the President's authority to issue an executive order or take executive action “must stem from either an act of Congress or from the Constitution itself.” If confirmed, I would follow United States Supreme Court and Ninth Circuit Court of Appeals precedent with regard to the scope of executive orders and actions.

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

Response: The United States Supreme Court has held that a right is fundamental for the purposes of the substantive due process doctrine where it is “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, 720-21 (1997) (internal citations and quotations omitted). If confirmed, I would follow United States Supreme Court and Ninth Circuit Court of Appeals precedent regarding whether a right is fundamental for purposes of the substantive due process doctrine.

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

Response: According to United States Supreme Court precedent, a classification should be subjected to heightened scrutiny when it differentiates based on factors such as race, alienage, national origin, gender, or illegitimacy. *See, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). If confirmed, I would follow United States Supreme Court and Ninth Circuit Court of Appeals precedent in deciding issues under the Equal Protection Clause.

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 a personal expectation regarding the future use of racial preferences in public higher education. If confirmed, I would apply *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Fisher v. University of Texas* 113 S. Ct. 2411 (2013) and any other United States Supreme Court and Ninth Circuit precedent regarding the consideration of racial preferences in public higher education.