

**Senator Grassley
Questions for the Record**

**Stephen R. Bough,
Nominee: U.S. District Judge for the Western District of Missouri**

1. During your hearing I asked you about some complaints you filed with the Federal Election Commission [FEC]. They dismissed all the complaints in your 93-page report. Mind you, for some of the allegations the Commission dismissed, they assumed for the sake of argument your allegations were accurate, and they still declined to pursue the matter. This was because the violations were technical or inadvertent. For instance, the candidate had failed to put a box around the “paid-for” designation at the bottom of billboards.

- a. First, you did not disclose these complaints to the Committee with your Questionnaire. I am not suggesting you necessarily should have, although that argument could be made. But I would like to know if there are any other complaints of this nature that you have made. If so, please list them all.**

Response: I have made no other complaints of this nature.

- b. In your 2012 complaint, you accused the candidate’s campaign of, among other things, “continually failing to report expenditures,” related to billboard advertising. The Commission noted that your complaint—including your attachments—provided “no basis for its allegations,” found that this allegation was “vague and speculative” and concluded that there was “no reason to believe” the campaign failed to report expenditures. Other than the *de minimus* material included in the appendix to the complaint, which the FEC concluded provided no basis for your allegation, upon what evidence did you base this allegation?**

Response: At the time I filed this complaint I believed I had a good faith basis for all the allegations and my report contained all of the evidence for the basis of the claim. I fully accept the FEC resolution of the issue.

- c. You also accused the candidate’s campaign of illegally coordinating communications with the political action committee Missouri Right to Life. The Commission noted that there was “no substantial similarity” between the two ads compared in your complaint and found that there was “no reason to believe” the campaign illegally coordinated communications. Other than the photograph of a Missouri Right to Life Ad and the print-out of the candidate’s campaign website you included with your complaint, which the FEC concluded was not “substantial[ly] similar,” upon what evidence did you base this allegation?**

Response: The report contained all of the evidence for the basis of the claim.

- d. **You also accused the candidate’s campaign of failing to “report a donation as an in-kind contribution” from an unnamed company or donors. The Commission concluded that the allegation was “speculative and unsupported” and found that there was “no reason to believe” the campaign failed to disclose contributions. Other than what was included in the appendix to the complaint, which the FEC concluded provided no support for the allegation, upon what evidence did you base this allegation?**

Response: The report contained all of the evidence for the basis of the claim.

- e. **You also accused the candidate’s campaign of improperly converting campaign funds to personal use by excessively reimbursing the candidate and his wife for campaign travel. The Commission concluded that this allegation was also “speculative and unsupported” and found that there was “no reason to believe” the campaign excessively reimbursed for campaign travel. Other than what was included in the appendix to the complaint, which the FEC found failed to support your allegation, upon what evidence did you base this allegation?**

Response: The report contained all of the evidence for the basis of the claim.

- f. **You also accused the candidate’s campaign of failing to timely disclose a TV expenditure made on August 3, 2010. The Commission concluded that the evidence you supplied with your complaint “does not appear to support the claim” and found that there was “no reason to believe” the campaign failed to timely disclosure TV expenditures. Other than what was included in the appendix to the complaint, which the FEC found did not support the claim, upon what evidence did you base this allegation?**

Response: The report contained all of the evidence for the basis of the claim.

2. **In 2008, you wrote the following,**

“The right wing gets it—if you want to keep unconstitutional laws in force, you have to pack the Supreme Court.” and

“President Bush has rewarded his most loyal supporters - the religious right wing - with appointments of justices that will erode civil liberties. Bush has rewarded his most loyal contributors - Chamber of Commerce folks - with justices who disregard consumers in favor of corporations.”

What “unconstitutional laws” were you referring to when you wrote this post? Please list with specificity all of the laws you had in mind.

Response: I made these comments several years ago in my personal capacity in conjunction with my affiliation with the Committee for County Progress. Comments made in that capacity would have no bearing on my role as a judge if I am confirmed. I had no particular laws in mind.

In the course of completing the Senate Judiciary Questionnaire, I have reviewed some of my past political statements and realized that some of them, particularly on blogs, were overly harsh. I want to take this opportunity to apologize for them. If I am given the honor of serving as a federal judge, my tone and temperament will always represent the dignity of the office. I assure you and the entire Senate that if allowed to serve as a judge I will never be motivated by a political ideology. There is no place for politics or personal views on the bench. I fully recognize the role of a judge is dramatically different than that of an advocate for a client or an official in a political party, and I'm committed to being a fair and neutral judge.

- 3. I often ask nominees who have been involved in politics what kind of assurances they can give me that they will be fair and impartial to all the litigants who come before them, even those who represent issues or causes the nominee personally disagrees with. However, in your case, you have not only been active in Democratic politics, but you have written about Republicans at length, often utilizing rhetoric that is highly disparaging and unprofessional. In one of your least offensive blog posts you wrote, “to the religious right folks, come on over to the party that cares about the poor.” If you were confirmed as a judge, what will you do to ensure that any Republican who comes before you will feel that they’ll get a fair shake?**

Response: I give you and the entire Senate my personal assurance to treat all individuals with respect, fairness and impartiality. Additionally, I want to reassure you that the comments – the tone of which I regret – do not actually reflect my ability to work with individuals regardless of their party affiliation. For example, in my professional work capacity I have represented clients without regard for their political views. I have worked with other lawyers as co-counsel on many cases without regard to their political views. I have hired my law firm colleagues without regard to their political views. If I am fortunate enough to be confirmed, I will ensure that politics never play a role in any judicial decision making and that every person, regardless of political affiliation, gets a fair shake.

- 4. I am also concerned about how you will treat those who have different views of religion than you do. For example you wrote, again criticizing the “religious right wing,” “Seems like when the religious scholars were quizzing Jesus about the most important commandments, Jesus told them to 1) love your God; and 2) love your neighbor. How about a little love, food, clothing and healthcare for your neighbor?” You have written about how you believe religious people should act and what values they should promote. If confirmed as a judge, how will you set aside these personal beliefs and treat all litigants fairly?**

Response: I made these comments several years ago in my personal capacity in conjunction with my affiliation with the Committee for County Progress. Comments made in that capacity would have no bearing on my role as a judge if I am confirmed.

Additionally my personal religious views have never affected my legal representation of clients and those views will not affect my role as a judge, if I have the privilege of serving. I give you and the entire Senate my personal assurance to treat all individuals with respect, fairness and impartiality. In my professional work capacity I have represented individuals from a variety of different faiths, in addition to those with no religious faith. If I have the opportunity to serve as a trial judge, I will work on a daily basis to ensure that my own religious views never play a role in any judicial decision making.

5. **You wrote the following, “Let's elect a Democratic president so John Paul Stevens and Ruth Bader Ginsburg can retire so we can put on a couple of 50 year olds.” You have frequently discussed how, in your view, Republicans put partisan judges on the Court who will pre-commit to certain outcomes on various topics of constitutional importance. When you wrote this statement, who did the “we” refer to?**

Response: I made these comments several years ago in my personal capacity in conjunction with my affiliation with the Committee for County Progress. Comments made in that capacity would have no bearing on my role as a judge if I am confirmed and the statements were directed to members of that political organization.

6. **In 2007, you wrote this regarding Missouri’s 2004 vote enacting a state constitutional amendment prohibited same-sex marriages from being recognized in the state: “Missourians voted down gay marriage by over 70%. That vote broke my heart. I saved my ‘No on 2’ sign and look at it in my garage sadly.” Given your prior statement on this issue, would you commit to recusing yourself from any cases involving same-sex marriage?**

Response: If I am fortunate enough to be confirmed, I would closely follow the Code of Conduct for United States Judges, as well as 28 U.S.C. § 455, which requires a judge to disqualify him or herself “in any proceeding in which his impartiality might reasonably be questioned.”

7. **You have written that, “Women’s issues will be defined by the Supreme Court as much as the next president.” Please list what you see as “women’s issues” that you expect the Supreme Court to “define.”**

Response: I made these comments several years ago in my personal capacity in conjunction with my affiliation with the Committee for County Progress. Comments made in that capacity would have no bearing on my role as a judge if I am confirmed. The “women’s issues” referenced in that statement would include sex discrimination and fair pay.

8. **You received the Jackson County Democratic Committee Harry S. Truman Democratic Achievement Award in 2013. Can you describe the work that you did in order to earn this award?**

Response: The award that I received states that it was given “in recognition of your dedication, commitment and outstanding contribution to the Democratic Party” and was given the year after I concluded my service as the Chairman of the Jackson County Democratic Committee.

9. How would you describe your judicial philosophy, generally?

Response: I do not have any particular judicial philosophy. In addition to believing that our justice system requires that judges always follow precedent, I believe that every case should be handled in a just and speedy manner with sensitivity to the cost that litigation can impose on both sides of a dispute. I also believe that judges should be neutral umpires in the litigation process. Having served as a law clerk for a United States District Judge, I was able to witness the qualities of a great trial judge. Those qualities include hard work, following the rules, being available to the attorneys to resolve disputes, listening calmly to arguments and acting fairly and impartially.

10. President Obama said that in deciding the “truly difficult” cases, judges need to apply “one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy . . . [and] the critical ingredient is supplied by what is in the judge’s heart.” Do you agree with this statement?

Response: I have not researched the full context of that quote and I am unable to agree or comment on the quote. If I am fortunate enough to be confirmed I believe that a trial judge should apply case precedent to decide all cases.

11. What are some qualities or characteristics that you have seen in judges (state or federal) that you would hope to avoid, if confirmed?

Response: The best qualities that I have seen, and that I would seek to emulate, are to work hard, study the relevant case law, come to hearings prepared, calmly listen to arguments and promptly decide only those issues before the judge. To the extent that any judge does not perform those duties or treats parties to the case disrespectfully, I would want to avoid that behavior.

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

Response: Fairness and impartiality are two of the most important attributes. I believe I possess both.

13. 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 trial judge should always be patient, dignified, respectful and courteous to all individuals who appear in front of the Court. I believe I have exhibited each of

those qualities in my service as an attorney and will continue to do so if I have the honor of being confirmed as a trial judge.

- 14. 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 committed to following binding precedent, regardless of any personal beliefs. A stable and orderly society is premised upon the rule of law, which requires a firm application of precedent.

- 15. 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.**

Response: I do believe that the statement is part of the Court’s holding.

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

Response: In *Windsor*, Justice Kennedy’s use of the term “lawful marriages” refers to “marriages made lawful by the State.” 133 S. Ct. 2675, 2695 (2013).

- 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. *See Windsor*, 133 S. Ct. at 2695 (“The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. . . . The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to

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

protect in personhood and dignity. . . . This opinion and its holding are confined to those lawful marriages.”).

iv. Are you committed to upholding this precedent?

Response: Yes. If I have the opportunity to serve as a trial judge, I will follow *Windsor* and any other relevant precedent from the Supreme Court and the Eighth Circuit.

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.

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

Response: Yes, along with all other portions of the *Windsor* majority opinion.

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

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.

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

Response: Yes, along with all other portions of the *Windsor* majority opinion.

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

² *Id.* 2689-2690.

³ *Id.* 2691.

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.

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

Response: Yes, along with all other portions of the *Windsor* majority opinion.

- 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.

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

Response: Yes, along with all other portions of the *Windsor* majority opinion.

16. **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 the absence of controlling precedent from the United States Supreme Court or the Eighth Circuit Court of Appeals, I would follow accepted principles of statutory construction as defined by the Supreme Court. This would include examining the plain meaning of the constitutional provision, statute or regulation. If that language is clear and unambiguous, I would apply the plain meaning of the language to the facts. If the language is unclear or ambiguous, I would apply other canons of statutory construction to ascertain its meaning, then consider any precedent interpreting analogous provisions and then consult the decisions from the other circuit courts as persuasive authority.

⁴ *Id.* (internal citations omitted).

⁵ *Id.* (internal citations omitted).

- 17. 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: It is a trial judge's duty to always follow the precedent of the United States Supreme Court and the Court of Appeals, regardless of personal views. If I am fortunate enough to be confirmed, I would always apply binding precedent.

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

Response: Statutes enacted by Congress have the presumption of constitutionality. When reviewing a statute enacted by Congress, courts should avoid constitutional issues, if possible, and endeavor to interpret the statute in a manner that upholds its constitutionality. If the court must address the constitutional issue, it should strike down a statute only if it is clearly shown that Congress has exceeded its authority under the Constitution or acted contrary to a provision of the Constitution.

- 19. 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. The Constitution is an American document and trial judges should follow the Constitution and the precedent of the United States Supreme Court and the relevant Court of Appeals.

- 20. 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: Throughout my career I have represented individuals of all political stripes. When representing clients I simply seek a judge who will follow precedent and carefully consider my client's arguments, not a judge who might base his or her decision on any political ideology. I give you and the entire Senate my personal assurance that I would strictly adhere to the precedent of the United States Supreme Court and the Eighth Circuit Court of Appeals if I have the honor of serving as a trial judge.

- 21. 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: In my professional capacity as a lawyer I have represented clients and worked with many lawyers without regard to their personal views. On a daily basis I advise clients on the status of the law, the need for precedent to maintain order in our society and how to abide by the law. Personal views are irrelevant to the bench. All parties deserve a fair and impartial judge.

22. If confirmed, how do you intend to manage your caseload?

Response: I plan to be an active participant in the management of the caseload. I believe that in-person case management conferences at the beginning of a case are essential to ensuring a speedy determination of any case. Through the setting of deadlines and establishing a firm trial date, the parties are then able to proceed in an orderly manner throughout the case. If I have the honor of being confirmed, I would make myself available to hear oral arguments and would promptly decide all motions, including dispositive motions.

23. 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. I plan to be an active participant in the management of the caseload. I believe that in-person case management conferences at the beginning of a case are essential to ensuring a speedy determination of any case. Through the setting of deadlines and establishing a firm trial date, the parties are then able to proceed in an orderly manner throughout the case. If I have the honor of being confirmed, I would make myself available to hear oral arguments and would promptly decide all motions, including dispositive motions. I would also make use of the case management software located within the Electronic Case Filing (ECF) software, will work to make efficient use of the magistrate judges and work collaboratively with the Mediation Assessment Program.

24. 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: If I have the opportunity to serve as a trial judge, I would apply many of the same principles I witnessed as a law clerk to a federal district court judge. That process included closely reading the briefs, reading the cases cited by the parties, conducting independent research for binding precedent, consulting on occasion with fellow district court judges and listening carefully to oral argument by the attorneys.

25. 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”. You indicated that you have been a member of AAJ.

- 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.

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

Response: I received these questions on July 31, 2014. I prepared my responses over the next week and submitted them to the Department of Justice Office of Legal Policy for review. I then finalized my responses and authorized the transmittal to the Judiciary Committee.

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

Response: Yes.

**Questions for the Record
Senator Ted Cruz**

Stephen R. Bough

Nominee: U.S. District Judge for the Western District of Missouri

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 do not have any particular judicial philosophy. In addition to believing that our justice system requires that judges always follow precedent, I believe that every case should be handled in a just and speedy manner with sensitivity to the cost that litigation can impose on both sides of a dispute. I also believe that judges should be neutral umpires in the litigation process. Having served as a law clerk for a United States District Judge, I was able to witness the qualities of a great trial judge. Those qualities include hard work, following the rules, being available to the attorneys to resolve disputes, listening calmly to arguments and acting fairly and impartially. I have not carefully studied the justices of the Warren, Burger and Rehnquist Courts to be comfortable saying that their views are analogous to my own 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 I have the opportunity to serve as a trial judge, it would be my duty to follow binding precedent. The United States Supreme Court has looked at the public understanding at the time of the enactment of the Constitution and I would follow that and any other binding precedent. *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

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 I have the opportunity to serve as a trial judge, I would not overrule established precedent set by higher courts.

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 I have the opportunity to serve as a trial judge, it would be my duty to follow precedent, including *Garcia*. A judge's personal feelings about precedent should never interfere with following 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 United States Supreme Court has ruled on numerous cases involving the application of the Commerce Clause to non-economic activity. According to precedent, Congress may regulate (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce or people or things in interstate commerce; and (3) activity that has a substantial effect on interstate commerce. *See, e.g. United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). If I have the opportunity to serve as a trial judge, it would be my duty to follow the precedent of the United States Supreme Court.

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

Response: The power of the President to issue executive orders or take executive actions must come from either the acts of Congress or the United States Constitution. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Medellin v. Texas*, 552 U.S. 491 (2008). If I have the opportunity to serve as a trial judge, it would be my duty to follow that and other precedent of the United States Supreme Court.

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

Response: According to the United States Supreme Court, a right is fundamental for substantive due process purposes when that right is “deeply rooted in this Nation’s history and traditions.” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal citations in quotation omitted). If I have the opportunity to serve as a trial judge, it would be my duty to follow that and other precedent of the United States Supreme Court.

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

Response: According to the United States Supreme Court, strict scrutiny is only appropriate in limited circumstances such as when a law infringes on a fundamental right or involves a suspect classification such as race. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Intermediate scrutiny is appropriate in limited types of cases, including classifications based on gender. *United States v. Virginia*, 518 U.S. 515 (1996). The United States Supreme Court has also discussed when a classification should be subjected to heightened scrutiny in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). If I have the opportunity to serve as a trial judge, it would be my duty to follow that and other precedent of the United States Supreme Court.

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 on the use of racial preferences in public higher education fifteen years from now. If I have the opportunity to serve as a trial judge, it would be my duty to follow the precedent of the United States Supreme Court, including *Grutter v.*

Bollinger, 539 U.S. 306 (2003), and *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).