

**Responses of Morgan Christen
Nominee to be United States Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Chuck Grassley**

- 1. At your hearing, Senator Hatch asked you about one of your opinions on the Alaska Supreme Court, *Allstate Ins. Co. v. Dooley*. In this case, you created an implied private right of action. Senator Hatch explained that many federal statutes create duties but do not explicitly call for private causes of action. He asked what approach a federal judge should take when asked to create what Congress did not – an implied private cause of action based on a federal duty. You said, “A federal judge like a state court judge should always interpret the law faithfully according to the law we are given by the legislative branch. When a statute is unambiguous, Senator, my job is to apply it.” Your response, however, does not fully answer Senator Hatch’s question. Please take whatever time you need to reflect upon this question and provide a complete answer to the question.**

Response: In the federal system, I believe the Supreme Court has instructed that it is the intent of Congress that determines whether a private cause of action exists to enforce federal law. To determine the intent of the legislative branch as to any particular statute, I believe the appropriate approach is to begin by examining the text of the statute itself, and to consider how it fits into the larger statutory scheme. If Congress has not expressed an intent to create a private cause of action, I would find that no private cause of action exists.

- 2. Based on your legal and judicial experience in Alaska, please explain how privacy rights under the Alaska Constitution compare to privacy rights under the U.S. Constitution.**

Response: Privacy rights under the Alaska Constitution are generally afforded greater protection than privacy rights under the U.S. Constitution because the Alaska Constitution has an express right to privacy. *Anchorage Police Dep’t Emps. Ass’n v. Municipality of Anchorage*, 24 P.3d 547, 550 (Alaska 2001).

- 3. Do you think your experience and knowledge of privacy rights and the Alaska Constitution will influence your interpretation of the federal Constitution? Please explain.**

Response: My experience and knowledge of privacy rights and the Alaska Constitution will not influence my interpretation of the federal Constitution. My personal experiences and knowledge of the law of other jurisdictions, including Alaska, would have no bearing on what I determine the rule of law to be, nor on how I apply the rule of law to any particular case.

- 4. According to your questionnaire, only a small percentage of your legal experience concerned criminal law. What is your experience with criminal law and procedure, and how will you prepare yourself for hearing criminal law cases?**

Response: In the Alaska Supreme Court, I have participated in over 225 petitions for discretionary review of criminal appeals. For these petitions, each justice receives and considers the decision or order being appealed, the petition, the opposition, the excerpt of record and/or record, and a recommendation drafted by a member of the court.

As a superior court judge, I had a civil docket but my regular duties also included hearing search warrant applications, conducting grand jury selection, and taking grand jury returns. I was also assigned criminal matters for judges who were disqualified in single-judge court locations and for judges who were on leave or unable to attend to criminal calendars due to illness.

In the Anchorage Municipal Prosecutor's Office, I represented the Municipality in hundreds of misdemeanor criminal cases. These daily court appearances included arraignments, bail hearings, changes of plea, suppression motions, and misdemeanor jury trials.

In the first 10 – 12 years of my private practice, I primarily had a civil case load but I also assisted with the defense of some criminal cases in state and federal court, including drafting and arguing suppression motions. In the last two years of my private practice, approximately half of my time was devoted to defending a federal Medicaid fraud investigation in federal court. This involved coordinating with private criminal defense counsel from approximately ten law firms pursuant to a joint defense agreement.

If confirmed to the Ninth Circuit, I anticipate that I would have a heavier criminal case load than I do on the Alaska Supreme Court. I would prepare for those cases as I have in the past: by working diligently to fully familiarize myself with the applicable law. My preparation would start with thoroughly reviewing the parties' briefs to understand the arguments presented on appeal and the statutory and case law authorities cited in support of the arguments. As appropriate, I would also consult the federal rules of criminal procedure, the federal rules of appellate procedure, library resources, and resources from the Administrative Office, to be fully prepared to address the issue(s) presented on appeal.

5. In the past few years, the court to which you have been nominated, the Ninth Circuit, has been reversed by the Supreme Court at a higher rate than any other circuit.

a. What is your view of the proper role of an intermediate appellate judge in interpreting and applying Supreme Court precedent?

Response: The proper role of an intermediate appellate judge is to faithfully interpret and apply the rule of law as articulated by Supreme Court precedent, without regard to the judge's own views or experiences.

- b. What should an appellate court judge do in a case where he or she believes the applicable Supreme Court precedent is wrong?**

Response: An appellate court judge should apply Supreme Court precedent, regardless of the judge's own views regarding the correctness of the precedent.

- 6. Based on your experience, how do you think the approach of a state court judge differs, or should differ, from that of a federal court judge, other than the applicable rules of decision?**

Response: In many ways, my role as a state supreme court justice is very similar to the role of a judge on an intermediate circuit court: my caseload is entirely appellate, and I am a member of a multi-judge court that reviews the work of trial courts, the Alaska Court of Appeals, and administrative agencies.

One way in which my current role differs is in the appropriate approach to statutory interpretation. In the federal system, precedent directs that judges apply statutes according to their plain meaning unless there is an ambiguity in the statute itself. In Alaska state courts, controlling precedent directs that judges may consider legislative history in the absence of ambiguity on the face of a statute. *Bullock v. State, Dep't of Cmty. and Reg'l Affairs*, 19 P.3d 1209, 1224 (Alaska 2001).

- 7. In the Supreme Court's recent decision striking down a ban on violent video games, *Brown v. Entertainment Merchants Association*, Justice Breyer supplemented his opinion with appendices comprising scientific articles on the sociological and psychological harm of playing violent video games.**

- a. When, if ever, do you think it is appropriate for judges to conduct research outside the record of the case?**

Response: I have not studied *Brown v. Entertainment Merchants Association* and I am not familiar with its appendices, but I do not believe it is appropriate for judges to conduct research outside of the record of a case.

- b. When, if ever, do you think it is appropriate for judges to base their opinions on psychological and sociological scientific studies?**

Response: It can be appropriate for judges to base their opinions on scientific studies if the studies satisfy the requirements for the admission of scientific evidence, and if the evidence is relevant to issues in a case, e.g. evidence that tends to make a fact at issue more or less likely to be true.

- 8. At a speech in 2005, Justice Scalia said, "I think it is up to the judge to say what the Constitution provided, even if what it provided is not the best answer, even if you think it should be amended. If that's what it says, that's what it says." Do you agree with Justice Scalia? Please explain your answer.**

Response: I am not familiar with the speech Justice Scalia gave in 2005, so I do not know the context for his remarks. I do believe that a judge must begin every constitutional analysis with the language of the Constitution itself. I also believe that a judge's personal views about possible constitutional amendments or the correctness of Supreme Court precedent are never a proper part of constitutional analysis or application.

9. Do you believe it ever appropriate for a judge to consult foreign law, when determining the meaning of the United States Constitution?

Response: No. To interpret and apply the United States Constitution, a judge should first consider the language of the pertinent provision of the Constitution itself, and then consider controlling precedent interpreting and applying the provision. Foreign law is not part of this analysis.

10. A recent Time magazine article said that "If the Constitution was intended to limit the federal government, it sure doesn't say so." Do you agree with this statement? Please explain your answer.

Response: I do not agree with this statement. The United States Supreme Court has said that the Tenth Amendment to the United States Constitution affirms that the federal government is one of limited and enumerated powers. *See New York v. U.S.*, 505 U.S. 144, 155-57 (1992).

11. Do you believe that the Second Amendment is an individual right or a collective right?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010) the Supreme Court addressed the Second Amendment and held that it provides protection of an individual right. I would faithfully follow this precedent.

12. What factors have you considered or will you consider when deciding whether or not to dissent from the decision of the court?

Response: I have dissented in cases where, in my best judgment, the facts or controlling authorities do not support the majority decision of the court. If confirmed, I believe it will be my continuing duty to decide cases in accordance with my best judgment and understanding regarding the controlling rule of law.

13. What does the concept of separation of powers mean for the federal courts? If confirmed, will this be a governing principle which you will follow?

Response: The separation of powers is a bedrock principle of our constitutional framework, limiting each branch of government to its appropriate role. I have abided by

this principle for the 9 ½ years I have served as a superior court judge and state supreme court justice. If confirmed, I will continue to abide by it as a federal judicial officer.

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

Response: I believe the most important attribute of a judge is the discipline and commitment to adhere to, and fairly apply, the rule of law, regardless of one's personal views. I believe my record as a judicial officer shows that I possess this attribute.

15. 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 a judge's temperament should demonstrate integrity, dignity, open-mindedness, respect for others, patience, courtesy, and diligence. I believe these qualities should be reflected on and off the bench. I believe I meet this standard.

16. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded 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: If the question of first impression arose from a statute, I would look first to the language of the provision itself with the goal of giving the statutory interpretation intended by the legislative branch. Consideration of the statutory language includes consideration of how the provision fits into the larger statutory scheme. If the language of a statute is unambiguous, the statute should be applied as written. If an ambiguity exists after considering the language itself, the legislative history of the provision should be considered, putting the greatest weight on the history that provides the most reliable indication of the intent of the legislative body as a whole. I would then consider the most closely analogous controlling precedent and the reasoning of other circuit courts for guidance.

If the question of first impression involved a constitutional issue, I would start with the language of the constitutional provision, then consider the most closely analogous controlling precedent and reasoning for guidance.

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

Response: Federal statutes are entitled to a presumption of constitutionality, but it is the role of federal courts to declare a federal statute unconstitutional if the statute violates a constitutional provision or if Congress exceeded its authority when it enacted the statute. Federal courts are bound by the Constitution and by Supreme Court precedent and controlling circuit court precedent when making this determination.

18. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?

Response: Fed. R. App. P. 35 provides that intermediate federal appellate courts may overturn circuit precedent through the en banc review process. Absent en banc review, panels are bound by stare decisis. En banc review may be appropriate if the question is one of exceptional importance or if a division between panels in the circuit, or between a panel and a decision of the Supreme Court, requires review in order to insure uniformity within the circuit.

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

Response: I received the questions in the late afternoon of July 20, 2011. I prepared my answers the evening of July 21, 2011. I discussed the questions with a staff person from the Department of Justice on July 22, 2011 and requested that my responses be forwarded to the Committee.

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

Response: Yes.