

**Senator Chuck Grassley**  
**Questions for the Record**  
**Valerie E. Caproni**  
**Nominee, U.S. District Judge for the Southern District of New York**

- 1. In your hearing I asked about any exigent letters issued by the FBI. You informed me that you had written many emails regarding exigent letters during your time at the FBI but you were unsure about why these emails had not been delivered to the Committee. Now that you have had time to review your records, let me ask the question again.**

**In March 2007, I requested copies of unclassified emails related to the exigent letters issued by the FBI. Director Mueller told this Committee that he thought the emails were probably fairly substantial. After seven months, the FBI produced a small batch of heavily redacted emails and said it would provide additional documents as its review continued. Fourteen months later, in June 2008, I asked Director Mueller for the remainder of the documents and an explanation for the delay. At some point, on a visit to my office, while briefing my staff on another issue, you were asked about the delay. At that time you said the documents were on your desk awaiting your review. You left the FBI in 2011, without delivering those documents. In fact, I still haven't received them.**

**Why did you tell my staff the documents were on your desk awaiting your review and why were the promised emails never delivered to me?**

Response: I have no specific recollection of your March 2007 request or the ensuing production and no recollection why the production took so long. I also do not recall reporting to your staff that documents were on my desk awaiting review. My practice at the FBI was to give requests from Members of Congress high priority, so I am confident that the extended time this production took was not a function of documents needing to be reviewed by me.

I understand that on December 2, 2010, the FBI provided a CD of documents to Senator Leahy and you that responded to your request from March 19, 2007, for documents related to exigent letters. While there may have been some documents authored by me that were produced at that time, most of my involvement with the exigent letter situation post-dated your March 2007 request.

- 2. In your hearing, I asked you about inaccuracies reported in the National Security Letters. I asked you about the reported inaccuracies and you asked me if I was referring to the inaccurate numbers. I was. But this raises the question: Were there other inaccuracies regarding the NSL program, besides the numbers?**

Response: Not to my knowledge.

- 3. 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 ability to be impartial and fair, regardless of the issue presented to him or her. I believe I possess that attribute, as demonstrated by a long career in which I have developed a reputation for just such fairness.

- 4. 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 district court judge needs to be patient and respectful of parties and attorneys while still maintaining control of the courtroom and of his or her docket. A judge needs to be decisive and capable of remaining focused on the critical issue presented by the particular case. I believe I possess all of those abilities.

- 5. 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. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?**

Response: Yes.

- 6. What assurances can you give this committee that, should you be confirmed, you will be able to eliminate any potential biases and influences, and that your courtroom decisions will not be affected by any political, economic, or philosophical influences?**

Response: If I am fortunate enough to be confirmed, I can assure the Committee that I will decide issues presented to me based on the facts and the law and not on my personal opinions, potential biases or influences, and without regard to any political, economic or philosophical influence. I am confident I can do so because during the course of my legal career, I have represented a wide variety of clients and positions, not all of which matched my personal policy preferences.

- 7. Do you believe the death penalty is an appropriate form of punishment? If called upon to do so, would you have any personal objection to imposing this sentence? Please explain your response.**

Response: Under controlling United States law, certain crimes carry a potential penalty of death. The Supreme Court has upheld the constitutionality of the death penalty as a sentence, except in certain circumstances. As a district court judge, if I were to preside over a death penalty case, I would apply the law and the facts fairly and in accordance with controlling precedent.

- 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 matters of statutory construction I would begin with the words of the statute. If the meaning is clear, then the inquiry stops at that point. If the language is ambiguous, then I would look to controlling precedent and the applicable rules of statutory construction to resolve the ambiguity. If there were no controlling precedent from the Supreme Court or the Second Circuit Court of Appeals, I would look for persuasive precedent from those and other federal courts.

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

Response: Established precedent requires a court to attempt to decide the case without reaching a constitutional question. If that is not possible, a court should endeavor to uphold the constitutionality of a duly enacted statute, if possible. A statute should only be declared unconstitutional if it clearly violates the Constitution or if Congress clearly acted beyond its constitutional authority.

**10. 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.

**11. 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: If I am fortunate enough to be confirmed I can assure the Committee and future litigants that I will decide issues presented to me based on the facts and the law and not on my personal opinions. During the course of my legal career, I have represented a wide variety of clients and positions, not all of which matched my personal policy preferences.

**12. What is your understanding of the workload in the Southern District of New York? If confirmed, how do you intend to manage your caseload?**

Response: My understanding is that the workload in the Southern District of New York is among the country’s heaviest. I would manage my workload to ensure that all cases are resolved in a timely fashion. Management techniques would include making judicious use of Magistrate Judges to manage discovery in civil matters and setting and maintaining reasonable schedules in all matters.

**13. 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 believe judges have an important role in controlling the pace and conduct of litigation. I would make effective use of initial conferences in civil cases and initial appearances in criminal cases to set the schedule for the case, consistent with its complexity.

**14. You have spent your entire legal career as an advocate or counselor 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?**

In a number of my jobs as an attorney, I have been required to ascertain facts and then apply the law to those facts in order to decide, for example, whether to indict a person or to seek authority to bring an enforcement action. While the role of the judge is obviously different, the basic process of fairly determining the facts and applying the law to those facts is a similar undertaking. I suspect the most difficult part of the transition will be moving from being a colleague of the attorneys in the courtroom to being a neutral judge who must decide who prevails in the case presented.

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

I received these questions on May 30, 2013, and I obtained the date of the production of documents to you from the Office of Congressional Affairs of the FBI on May 31, 2013. I drafted the answers to these questions on May 30 and May 31, and I reviewed them with personnel from the Department of Justice before they were submitted to Congress.

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

Yes.

Questions for the Record

For Valerie E. Caproni, to be United States District Judge for the Southern District of New York  
Senator Ted Cruz  
5-23-13 Nominations Hearing

**Describe how you would characterize your judicial philosophy, and identify which US Supreme Court Justice's judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.**

Response: My judicial philosophy would be to apply the law fairly and impartially to the facts and to treat all who appear before me, whether as a party or an attorney, with respect and patience. The role of a judge in our constitutional system is to interpret the law and apply it to the cases that come before the judge. I am not sufficiently knowledgeable of the judicial philosophies of the Justices who served on the Warren, Burger and Rehnquist Courts to know to whose philosophy mine would be most analogous, but I would note that as a district court judge, my job would be to apply precedent from the Supreme Court.

**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: I do not believe that the Constitution is an evolving document whose meaning constantly changes. I believe the original intent of the drafters is important in interpreting the Constitution. *See, e.g., District of Columbia v. Heller, 554 U.S. 570, 576-603 (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 confirmed as a district court judge, I would be bound by controlling precedent. I would have no authority to overrule decisions of the Supreme Court or the United States Court of Appeals for the Second Circuit.

**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: This decision by the Supreme Court is binding on lower courts. Regardless of my personal opinions, if any, I would abide by controlling precedent.

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

Response: The Supreme Court has long held that Congress has the power under the Commerce Clause to regulate the following: the channels of interstate commerce; the instrumentalities of interstate commerce; and activities that "substantially affect" interstate commerce. *See, e.g., 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 (1995). Justice Scalia noted in a concurring opinion in *Gonzalez v. Raich* that “Congress may regulate even non-economic activity if that regulation is a necessary part of more general regulation of interstate commerce,” *Gonzales v. Raich*, 545 U.S. at 37 (Scalia, J., concurring). If I were faced with a case that presented a challenge to the constitutionality of a statute that extended to non-economic activity, I would need to research carefully the issue to ensure that my decision was consistent with controlling precedent.

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

Response: In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court invalidated President Truman’s action in seizing steel mills during the Korean War, writing: “The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.” *Id.* at 585. Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co.*, set forth the analytic framework that continues to be used by the Court to measure the judicially-enforceable limits of the President’s power. *Id.* at 634-55 (Jackson, J., concurring). If confirmed, I would apply that framework and follow controlling precedent to determine the limits of presidential power.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the Supreme Court explained the two primary features of its substantive due process analysis. First, the Due Process Clause protects fundamental rights and liberties that are “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.” *Id.* at 720-21 (citations and internal quotations marks omitted). Second, the Court requires “a careful description of the asserted fundamental liberty interest.” *Id.* (citations and internal quotation marks omitted). As a district court judge, I would apply that framework and follow controlling precedent in deciding substantive due process cases.

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

Response: The Supreme Court has held that classifications based on race, gender or other suspect classification are subject to heightened scrutiny, as are classifications that burden a fundamental right, such as the right to vote or travel.

**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 no expectation one way or the other. I understand that *Fisher v. University of Texas*, currently pending before the Supreme Court, presents the issue of the constitutionality of certain steps University of Texas has taken to enroll a diverse student body. If I am confirmed as

a district court judge, I will follow controlling precedent on this issue, regardless of my personal opinion, if any.