

**Senator Chuck Grassley
Questions for the Record**

**Sheryl H. Lipman
Nominee, U.S. District Judge for the Western District of Tennessee**

- 1. Please elaborate on your time at the Memphis Race Relations and Diversity Institute. What were your responsibilities and what kind of issues did you work on?**

Response: The Memphis Race Relations and Diversity Institute (MRRDI) was a nonprofit organization founded by business leaders in Memphis to focus on the economic benefits that can accrue to businesses when they provide a welcoming environment for diverse employees and customers. As Vice President for Comprehensive Services for MRRDI, I assisted in all aspects of the organization's work, but focused on the delivery of fee-for-service programming that highlighted the economic value of all types of diversity. If a company is welcoming of all types of people as employees, it is more likely to attract and retain the best and the brightest employees. Likewise, the more diversified the customer/client base, the more likely the company is to be successful economically.

- 2. At your hearing I asked where in the constitution you find the right to privacy. You responded that the Supreme Court has noted that there is a right to privacy. Is it your belief that there is a right to privacy or that one has been implied by the Supreme Court?**

Response: The words "right to privacy" do not appear in the Constitution but the United States Supreme Court has held that several provisions of the Constitution, notably the Fourth and Fourteenth Amendments, protect certain privacy rights.

- 3. I asked you to consider your approach to a case involving a law that requires physicians performing abortions to have hospital admitting privileges. You said that you would be bound by Supreme Court and 6th Circuit precedent. What are the factors that the 6th Circuit would require you to look at?**

Response: The undue burden standard is used to assess whether an abortion regulation is to be upheld. *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). As the Court reiterated in *Gonzales*, "[b]efore viability, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy. It also may not impose upon this right an undue burden, which exists if a regulation's purpose or effect is to place a substantial obstacle in the path of a woman seeking an

abortion before the fetus attains viability. On the other hand, regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Gonzales*, 550 U.S. at 146 (internal quotations and citations omitted). If confirmed, I would follow this binding precedent in this area of the law, just as I would in any other area of the law.

- 4. A recent conflict between religious freedom and federal law is the mandate in the Affordable Care Act that employers provide contraception and abortion coverage as part of their employee health insurance plans. For some employers this presents a particularly difficult question of whether to abide by the law or go against their conscience. If a case were to come before you involving this question how would you take into consideration the first amendment rights of these employers and the mandate?**

Response: The Supreme Court has recently accepted certiorari on this specific issue in two consolidated cases, *Hobby Lobby v. Sebelius* and *Conestoga Wood Specialties v. Sebelius*. If confirmed, I will follow the precedent which will be set by the Supreme Court in its consideration of these cases.

- 5. You have spent a significant portion of your career as in-house counsel for the University of Memphis. Please explain how your experiences there have prepared you to be a federal judge.**

Response: As University Counsel for the University of Memphis, I must often assess the best course of action for my client, in light of applicable legal constraints as defined by the numerous statutory and regulatory schemes which apply to higher education institutions. If I was fortunate to be confirmed, I would no longer evaluate legal issues from the perspective of an advocate for a client, but I nevertheless believe that constantly interpreting the statutory and regulatory provisions which apply to my work has given me extremely relevant experience for the work of a judge. In addition, the volume of work in our office is quite large, requiring "case management" to keep all matters on track for proper and timely resolution. I believe this experience also will serve me well, if confirmed.

- 6. Some have contended that a judge should have empathy for those who appear before them. My concern is that when someone suggests a judge should have empathy, they are really suggesting the judge should place their thumb on the scales of justice to tilt it in the favor of the proverbial little guy. In your personal opinion, is it ever the role of a judge to favor one party over another?**

Response: A judge should never use empathy to tilt the scales in favor of one party over another.

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

Response: It is difficult to pick just one attribute as the most important one for a judge. A judge should be open-minded and fair, and respectful to all who appear before the judge. A judge must listen carefully and exercise patience in dealing with all participants in the process. Finally, a judge must be hard-working, always prepared and decisive in handling cases, and driven by integrity. I do possess these qualities.

8. 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 judge should be even-tempered, patient, and must listen attentively and respectfully to all participants in the system. A judge should be firm and confident, to ensure control of the courtroom, yet humble so as not to presume to know all of the answers. I do possess these qualities, and use them in my work at the University as I interact with many different constituents, always striving to treat them all with dignity, respect, and patience, while also ensuring that they adhere to the legal constraints under which we operate.

9. 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 have a deep belief in the rule of law, which dictates that the lower federal courts follow binding precedent. Our judicial system does not properly operate if the lower courts fail to follow precedent, regardless of personal opinion. I am deeply committed to the rule of law, including following precedent.

10. 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: If faced with a case of first impression, I would first look to the language of any applicable text, whether the case involved a statute, regulation or Constitutional provision. If the plain meaning of the text is unambiguous, that plain meaning is then applied to the facts of the case. If the words are ambiguous, I would use the canons of statutory construction to determine their meaning. I would also be guided by Sixth Circuit and Supreme Court precedent interpreting analogous provisions. If necessary, I would look to the non-binding law of other circuits to assist in the interpretation and may also consider the legislative history of the particular provision at issue.

11. 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: If confirmed, it would be my obligation to apply binding Supreme Court and Sixth Circuit precedent, regardless of my personal feelings about the decisions.

12. 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 are presumed to be constitutional. A statute should only be found unconstitutional where Congress clearly exceeded its constitutional authority in enacting the statute, or where the statute directly contradicts the Constitution.

13. 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: It is never proper to use such sources.

14. 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 have a deep belief in the rule of law, which dictates that the lower federal courts follow binding precedent and the text of the law, as approved by Congress. Our judicial system does not properly operate if the lower courts fail to follow precedent and law, regardless of personal opinion. I am deeply committed to the rule of law, including following precedent.

15. 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 confirmed, my work would be guided by my belief that, in our system of justice, it is the role of the judge to be the fair and neutral arbiter, basing all decisions on the evidence presented in the courtroom and the application of the law, as found in precedent, to those facts. A judge's personal views do not play a role in the evaluation of the case.

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

Response: I believe the keys to successfully managing a caseload include setting reasonable but firm deadlines, based on a thorough knowledge of the case, and enforcing those deadlines. If confirmed, I will immediately familiarize myself with the cases assigned to me and insure that each case has an efficient and effective schedule in place. In addition, I would be committed to prompt resolution of pretrial matters pending before the court, strategically using my own time, the time of my law clerks, and the magistrate judges. Regular monitoring of the cases for adherence to the schedule is also vital.

17. 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 a judge plays a role in controlling the pace and conduct of litigation, and, if confirmed, I will use the case management system described in my response to question 16 to control the docket.

18. 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: If confirmed, I will reach decisions based on a careful analysis of the facts of a case, and the application of the law as found in precedent and statutes to those facts. As for the transition, I believe that my natural tendency to see both sides of issues will serve me well. As University Counsel, I am responsible for protecting the legal interests of the University. In fulfilling that objective, I spend much of my time working to ensure that the University complies with the law and, at times, recommending that the University pursue a different course of action, given the law. In that manner, my advocacy for my client has been ensuring that my client is following the law. Given this experience, I do not think it will be difficult to transition into the role of examining the facts as presented within the litigation, and applying the law as found in precedent and statute, to arrive at a

decision. The most difficult part will probably be leaving the University, an institution whose mission I deeply believe in. The transition will be made easier by the fact that, if confirmed, I will be working within another institution - the judiciary - I also deeply believe in.

19. 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.

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

Response: I read through the questions, conducted legal research where appropriate, and drafted my answers. I then submitted my draft answers to Department of Justice officials for review, and revised my answers where I believed it was appropriate. I then submitted the answers to the Department of Justice for submission to the Senate.

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

Response: Yes.

Questions for the Record
Senator Ted Cruz

Sheryl H. Lipman

Nominee, United States District Court for the Western District of Tennessee

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 a judicial philosophy per se, but rather I have a philosophy on the best ways to efficiently and effectively approach the job of a district court judge. If confirmed, the greatest influence in how I would approach the work is the Honorable Julia S. Gibbons of the United States Court of Appeals for the Sixth Circuit. I clerked for Judge Gibbons when she presided in the Western District of Tennessee, and witnessed her respect for the litigants and their cases, dedication to hard work and fairness, tendency toward clear and plain spoken rulings, and the approachable yet professional manner in which she ran the courtroom. If confirmed, I would strive to emulate her approach.

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: The United States Supreme Court used originalism to interpret the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008). As the Court explained, public meaning of the text at the time of its enactment guides the interpretation today. *Id.* at 605. If confirmed, I would follow this binding precedent, as I would all other binding precedent.

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: There are no circumstances under which I would overrule 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: *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985), is binding Supreme Court precedent that I would follow if confirmed, regardless of whether I agree with the statement.

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

Response: Congress may rely upon its Commerce Clause power to regulate three categories of activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate

commerce; and (3) activities having a substantial relation to interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). If confirmed, I will follow these binding Supreme Court cases, as well as any applicable Sixth Circuit cases.

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

Response: The United States Supreme Court has held that “[t]he President’s authority to act, as with the exercise of any governmental power, ‘must stem either from an act of Congress or from the Constitution itself.’” *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). If confirmed, I will apply this precedent to evaluate executive orders or actions.

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

Response: Fundamental rights, for purposes of the substantive due process doctrine, are those rights that are “objectively ‘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 omitted). If confirmed, any analysis of a fundamental right would be founded upon this precedent as well as other Sixth Circuit and Supreme Court precedent in this area.

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

Response: When statutory classifications are based on race, alienage, national origin or gender, the statute is subject to heightened scrutiny under the Equal Protection Clause. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Generally, strict scrutiny is applied to race, alienage and national origin classifications while an intermediate level of scrutiny is applied to gender classifications.

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: If confirmed, my personal expectations in this area, or in any other area, would not be relevant. *Grutter v. Bollinger*, 539 U.S. 306 (2003), as well as *Fisher v. University of Texas*, 570 U.S. ___ (2013), are binding Supreme Court precedent that I will follow, if confirmed to be a United States District Judge.