

**Senator Grassley
Questions for the Record**

**Haywood S. Gilliam, Jr.
Nominee, U.S. District Judge for the Northern District of California**

- 1. Can you describe your role with the NAACP in the San Francisco case involving race quotas in high schools? What legal positions were at issue and what legal arguments were you presenting?**

Response: My former law firm, McCutchen, Doyle, Brown & Enersen (now known as Bingham McCutchen), began serving as co-counsel for the San Francisco NAACP (“SFNAACP”) in approximately 1979 in connection with a class-action desegregation lawsuit against the San Francisco Unified School District (“SFUSD”) (the “SFNAACP Action”). The SFNAACP Action alleged that the SFUSD “engage[d] in discriminatory practices and maintain[ed] a segregated school system in the City and County of San Francisco” in violation of the federal and California constitutions. *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F.Supp. 34, 36 (N.D. Cal. 1983). In 1983, the district court approved a consent decree to resolve the SFNAACP Action that included racial and ethnic guidelines regarding the assignment of students to the schools of the SFUSD.

In 1994, a group of students of Chinese descent filed a lawsuit, *Ho v. San Francisco Unified School District et al.* (the “*Ho* Action”), challenging the student assignment plan under the Equal Protection Clause and seeking dissolution of the consent decree. *See San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F.Supp.2d 1021, 1024 (N.D. Cal. 1999). The SFNAACP was added as a defendant in the *Ho* Action in January 1995.

I joined McCutchen as an associate in November 1995, and was asked to assist lead counsel in representing the interests of our client SFNAACP. In 1996, the *Ho* plaintiffs moved for summary judgment. The SFNAACP opposed the motion for summary judgment on the basis that disputed issues of fact existed regarding whether a compelling state interest justified the provisions of the consent decree and whether the decree was narrowly tailored to achieve that interest. I assisted in preparing the SFNAACP’s opposition brief, and argued the SFNAACP’s position at the hearing on the motion for summary judgment. The district court denied the motion for summary judgment, finding that disputed issues of fact existed as to each of these factors. *Ho v. San Francisco Unified Sch. Dist.*, 965 F.Supp. 1316, 1323-26 (N.D. Cal. 1997).

The *Ho* plaintiffs appealed, and I assisted in preparing the SFNAACP’s appellate brief, and argued the SFNAACP’s position at oral argument. The Ninth Circuit dismissed the appeal for lack of jurisdiction and remanded the case. *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854 (9th Cir. 1998). Following remand (and after I left McCutchen in November 1998 to take a position at the United States Attorney’s Office), the case ultimately settled.

2. How would you approach a qui tam case if it came before your court, if you are confirmed?

Response: Title 31, Section 3730 of the United States Code describes a number of specific responsibilities that district judges have in matters brought under the *qui tam* provisions of the False Claims Act. If confirmed, I would follow the procedures set out in section 3730, as well as any applicable Supreme Court and Ninth Circuit precedent. In all other regards, I would approach a *qui tam* case in the same manner that I would approach any civil case before me: I would come to the matter without prejudgment, identify the controlling legal authority, and apply it neutrally to the facts of the case.

3. In 1986, I authored an update of the Federal False Claims Act which reinvigorated the qui tam provisions and has helped recover over \$30 billion in taxpayer dollars.

a. Could you please briefly describe your experience with the False Claims Act, in general, and specifically any work you did with qui tam whistleblowers?

Response: I have represented clients in a number of False Claims Act matters, assisting them in responding to requests for documents and witnesses, and discussing substantive and procedural issues with opposing counsel. In most of these cases, the clients have been companies and organizations in various industries who have been involved in investigations by the Civil Division of the Department of Justice. The majority of these investigations have stemmed from underlying *qui tam* lawsuits brought by relators, with the remainder involving investigations initiated independently by the Department of Justice. In two instances, a *qui tam* relator elected to pursue a False Claims Act action against a client after the Department of Justice declined to intervene, and I am part of the teams defending these cases.

b. What is your view regarding the constitutionality of the False Claims Act and its qui tam provisions?

Response: In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778 & n.8 (2000), the Supreme Court found “no room for doubt that a *qui tam* relator under the [False Claims Act] has Article III standing,” but noted that “[i]n so concluding, we express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the ‘take Care’ Clause of § 3.” In *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 760 (9th Cir. 1993), the Ninth Circuit “conclude[d] that the *qui tam* provisions of the False Claims Act do not conflict with Article III of the Constitution, nor violate the principle of separation of powers, the Appointments Clause, or the Due Process Clause.”

More generally, a statute passed by Congress is presumed to be constitutional. A federal court should only reach the question of a statute’s constitutionality if the case cannot be resolved on other grounds. If it is necessary to reach the constitutional question, a court may only declare a statute unconstitutional if the statute clearly conflicts with Supreme Court precedent interpreting the Constitution, or if Congress

clearly exceeded its constitutional authority. If confirmed and called upon to address this question, I would apply the above precedent and principles, as well as all other applicable Supreme Court and Ninth Circuit precedent.

- 4. What factors should a judge consider when determining whether or not to award a portion of the government's recovery to qui tam whistleblowers, or determining the amount to award?**

Response: Section 3730 of Title 31 of the United States Code sets forth the principles governing when a *qui tam* relator is entitled to receive an award, and the method of calculating the percentage range of the award. See *United States ex rel. Sharma v. Univ. of Southern Calif.*, 217 F.3d 1141 (9th Cir. 2000) (reviewing district court's application of 31 U.S.C. § 3730). If confirmed, I would apply the factors in section 3730, as well as any applicable Supreme Court and Ninth Circuit precedent, in deciding these issues.

- 5. If confirmed, will you ensure that qui tam whistleblowers are afforded all the rights and privileges authorized by the False Claims Act?**

Response: Yes.

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

Response: I believe that the most important attribute of a judge is the commitment to faithfully and impartially apply the law in every case, without regard to the type of matter or the identity of the parties. I do possess this attribute.

- 7. 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: In my view, the most important element of judicial temperament is treating every person who comes into the courtroom, whether they are litigants, counsel, witnesses, jurors or court staff, with evenhandedness, respect, and courtesy. The judge also must ensure that all parties in a case receive the opportunity to have their arguments heard and fairly considered, and should then render decisions in a timely manner. To carry out these responsibilities, a judge should maintain a calm yet firm demeanor, be an attentive and careful listener and work diligently to promptly reach a decision. I do meet these standards, and am deeply committed to upholding these principles.

- 8. 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 district judge, I would be fully committed to following the precedents of higher courts faithfully and giving them full force and effect, without regard to whether I personally agreed or disagreed with those precedents.

- 9. 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 a case of first impression, I would look first to the text of the statute or regulatory provision at issue. I anticipate that in most cases, applying the plain language of the provision to the facts of the case would permit me to resolve the matter. If the language of the provision was ambiguous or unclear so as to require additional analysis, I would next look to Supreme Court and Ninth Circuit precedent involving analogous circumstances. If no such precedent existed, I would consider persuasive authorities from other circuits and district courts. Finally, where appropriate and as permitted by binding precedent, I would examine the history of the applicable provision.

- 10. 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 faithfully apply controlling precedent of the Supreme Court and the Ninth Circuit Court of Appeals, whether or not I believed the court's ruling was in error.

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

Response: A statute passed by Congress is presumed to be constitutional. A federal court should only reach the question of a statute's constitutionality if the case cannot be resolved on other grounds. If it is necessary to reach the constitutional question, the court may only declare a statute unconstitutional if the statute clearly conflicts with Supreme Court precedent interpreting the Constitution, or if Congress clearly exceeded its constitutional authority.

- 12. 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.

- 13. 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 believe that there is no greater honor, or greater responsibility, than serving as a district judge. The citizens of our country entrust federal judges to dispense equal justice under the law, and to decide cases by applying controlling precedent to the facts of the

cases before them, without regard to any other considerations. I had the privilege of beginning my career as a district court law clerk to the Honorable Thelton E. Henderson, and I have served as a federal prosecutor, a defense lawyer and counsel for clients in a range of civil matters. I have never viewed my legal practice as ideological, and I can assure the Committee that if confirmed as a district judge, I would base my decisions solely on the facts of each case and the applicable precedent, without regard to any political ideology or motivation.

14. 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: Over the course of my career as a prosecutor and defense counsel, I believe that I have earned a reputation with the bench and bar as an advocate who takes well-reasoned positions, gives thoughtful and respectful consideration to the positions of other parties, and assesses the strengths and weaknesses of a case based on the facts and the law rather than my personal views. I can assure the Committee and future litigants that if confirmed as a district judge, I would be fully committed to treating everyone who appeared before me fairly, and that any personal views would not interfere in any way with my ability to neutrally apply the law.

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

Response: If confirmed, I plan to manage my caseload by scheduling case management conferences shortly after matters are filed, setting a reasonable schedule as early as possible in a matter, directing the parties to meet and confer to resolve and narrow issues to the fullest extent possible without court intervention, and remaining actively engaged over the course of a matter to ensure steady progress toward resolution.

16. 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 have an important role in controlling the pace and conduct of litigation. If confirmed, I would take the steps described above to control my docket. In addition, I would encourage counsel appearing before me to adhere to the highest standards of civility and professionalism while representing their clients, consistent with the Northern District of California's Guidelines for Professional Conduct.

17. 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 would decide cases by applying applicable Supreme Court and Ninth Circuit precedent to the facts before me. I understand that the judge's role differs from the advocate's role, and I would not have any difficulty neutrally and impartially deciding cases. In making this transition, I understand that I will need to learn areas of

substantive law beyond those that I have handled in my practice, and I am committed to working hard to familiarize myself with these areas of the law.

- 18. President Obama said that deciding the “truly difficult” cases requires applying “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 . . . the critical ingredient is supplied by what is in the judge’s heart.” Do you agree with this statement?**

Response: I am not aware of the context of this quote, but I believe that all cases can be decided by applying controlling precedent to the facts of the case. I also believe that it is incumbent on a judge to treat all parties fairly and respectfully, and to be committed to hearing and understanding each party’s position before arriving at a ruling.

- 19. 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: Yes.

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

Response: I understand this phrase to refer to same-sex marriages made lawful by a State.

- 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.

- iv. Are you committed to upholding this precedent?**

Response: Yes. If confirmed I would be committed to following this and all other Supreme Court precedent.

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

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. If confirmed I would be committed to following this and all other Supreme Court precedent.

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. If confirmed I would be committed to following this and all other Supreme Court precedent.

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.

² *Id.* 2689-2690.

³ *Id.* 2691.

⁴ *Id.* (internal citations omitted).

Response: Yes.

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

Response: Yes. If confirmed I would be committed to following this and all other Supreme Court precedent.

- 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. If confirmed I would be committed to following this and all other Supreme Court precedent.

- 20. 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,**

⁵ *Id.* (internal citations omitted).

please detail what individuals or groups made the endorsements, when the endorsements were made, and to whom the endorsements were made.

Response: No.

- 21. 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 September 24, 2014. I reviewed the questions and personally prepared answers to them. I submitted my answers to the Office of Legal Policy and received comments, after which I finalized my responses. I then authorized the Office of Legal Policy to submit these responses on my behalf.

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

Response: Yes.

Questions for the Record
Senator Ted Cruz

Haywood S. Gilliam, Jr.

Nominee: United States District Court for the Northern 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: As a district judge, I would approach every case before me without prejudice, identify controlling precedent and neutrally apply it, and resolve issues before me on the narrowest basis possible. I also believe that it is critical for a judge to treat all participants in the judicial system, including litigants, counsel, jurors, witnesses and court staff, with respect and courtesy, and to ensure that all parties in a case have the opportunity to have their arguments heard and considered fully and fairly. Because I have not studied the judicial philosophies of the members of the Warren, Burger and Rehnquist Courts, I cannot say which of the Justices’ philosophies is most analogous to the approach I would take if confirmed, as described above.

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 Supreme Court has used originalism to interpret the Constitution in certain instances. For example, in *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008), the Supreme Court considered the meaning “known to ordinary citizens in the founding generation” in interpreting the Second Amendment. If confirmed, I would follow this and all applicable Supreme Court and Ninth Circuit precedent in interpreting the Constitution.

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 judge, I would not have the power to overrule precedent under any circumstances.

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 be bound to follow *Garcia* and all other precedent of the Supreme Court.

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 Supreme Court described “three broad categories of activity that Congress may regulate under its commerce power.” Under *Lopez*, Congress (1) “may regulate the use of the channels of interstate commerce”; (2) may “regulate and protect the instrumentalities of interstate commerce, or persons and things in interstate commerce”; and (3) may “regulate those activities having a substantial relation to interstate commerce.” *Id.* at 558-59. The Court has held that “when a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.” *Gonzales v. Raich*, 545 U.S. 1, 17 (internal quotations and citations omitted). Justice Scalia’s concurrence in *Raich* posited that “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.” *Id.* at 37 (Scalia, J., concurring). If confirmed, I would follow this and all other applicable Supreme Court and Ninth Circuit precedent in cases involving the Commerce Clause.

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, 585 (1952), the 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 this and all other applicable Supreme Court and Ninth Circuit precedent in cases involving this issue.

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

Response: The Supreme Court has found rights to be “fundamental” for purposes of the substantive due process doctrine when they 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 and quotations omitted). If confirmed, I would follow this and all other applicable Supreme Court and Ninth Circuit precedent in cases involving this issue.

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

Response: The Supreme Court has applied heightened scrutiny under the Equal Protection Clause to classifications based on factors such as race, alienage, national origin, gender or illegitimacy. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985). If confirmed, I would follow this and all other applicable Supreme Court and Ninth Circuit precedent in deciding cases involving this issue.

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: The Supreme Court has addressed the use of racial preferences in public higher education in cases such as *Grutter* and *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013).

If confirmed, I would follow this and all other applicable Supreme Court and Ninth Circuit precedent in cases involving this issue, without regard to any personal views or expectations I might have.