Senator Grassley
Questions for the Record

Winfield Ong,
Nominee, U.S. District Judge for the Southern District of Indiana

1. **As amended on December 1, 2015, Federal Rule of Civil Procedure 26(b)(1) defines the "scope of discovery" in litigation matters as "any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.*"**

   Chief Justice Roberts explained in his 2015 Year-End report that these amendments "make a significant change, for both lawyers and judges."

   a. **What is the effect of this amendment to Rule 26(b)(1)?**

      Response: The effect of the recent change to Fed. R. Civ. P. 26(b)(1) is to directly encourage counsel and the courts to focus discovery on what is reasonably necessary to resolve the case, and correspondingly minimize, or weed out altogether, discovery that is not reasonably focused on a fair resolution of the case. It makes explicit what was previously only implicit, that not all discovery is created equal. The parties and the courts should weigh the costs and benefits of particular discovery requests through an application of the criteria set out in the new rule in order to obtain a more fair and expeditious resolution of civil disputes.

   b. **If confirmed, how would you assess whether a discovery request is "proportional to the needs of the case"?**

      Response: I would assess the proportionality of any particular discovery by engaging counsel early and often in the litigation, listening to their arguments about the costs and benefits of particular discovery, and erring on the side of focused and targeted discovery early in the case to see if progress can be made without more detailed and burdensome discovery. I would also make it clear very early in the case that I value highly the prompt administration of justice and that I am prepared to preside over a trial at the earliest reasonable opportunity. I believe that would have a salutary effect on the parties in moving their case along, and settling it at the earliest appropriate opportunity if that is the right outcome.

   c. **How, if at all, would your assessment of whether a discovery request is "proportional to the needs of the case" differ from your view of the scope of discovery under the prior version of the rule?**

Response: I do not believe that the rule change makes a substantive change to what is appropriately discoverable. The courts have always had the authority to balance the costs and benefits of discovery. The change is more a matter of emphasis than substance, but it is a significant emphasis nonetheless. In a sense, it is putting in writing the "well-timed scowl" described by Chief Justice Roberts in remarks explaining the rule change in order to remind parties that justice must be administered with no more time and expense than is reasonably necessary to obtain a just result.

2. **The Chief Justice's 2015 Year-End report also noted reports from litigants that "[a] judge who is available for prompt resolution of pretrial disputes saves parties time and money."**

   As amended on December 1, 2015, Rule 16 requires a district judge to issue a scheduling order within "the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared." This amendment shortened both applicable deadlines by 30 days.

   a. **Please explain the approach you will take to case management and the tools you will use to manage cases in a just and efficient manner if you are confirmed.**

      Response: As a lawyer who has tried many civil and criminal cases, I have a significant amount of experience with how justice can be administered expeditiously yet fairly, and also how it can be unnecessarily delayed. I have been impressed over the years by judges who engaged the parties early and often in litigation to set a tone that the case should be resolved in the most expeditious manner reasonable. I would set a scheduling conference at the earliest opportunity to discuss discovery deadlines, make clear my interest in seeing the case moved with dispatch, and then follow up with regular status conferences. I have been particularly impressed over the years by judges who use periodic conference calls, sometimes on short notice, to check on the progress of the litigation. It can be done more frequently than in-court conferences, minimizes the time and expense to the parties, and achieves a similar result. Finally, I would engage the parties in setting a prompt but reasonable trial date, then do everything I reasonably can to hold them to it. Nothing prompts the expedient handling of litigation like a firm trial date.

   b. **Please explain and describe any effect the 2015 amendments to the Federal Rules of Civil Procedure will have on your approach to case management if confirmed.**

      Response: If confirmed, my philosophy about case management in general is described above. I would use all the tools explicitly provided for in the rule changes to administer fair and prompt justice.

3. **As you know, parties frequently propose protective orders for the approval of the district judge during the course of discovery. The 2015 amendments to the Federal Rules of Civil Procedure included a change to Rule 26(c)(1)(B) adding "allocation of expenses" to the list of items that may be included in a protective order.**

a. **How would you evaluate cost-allocation mechanisms included in proposed protective orders, if confirmed?**

   Response: I would rely on the parties to propose how costs could best be allocated in protective orders. I would see little reason to dispute what the parties agreed to in this regard.

b. **Under what circumstances, if any, would you consider ordering allocation of expenses pursuant to Rule 26(c)(1)(B) absent suggestion of the parties?**

   Response: I believe I would be very reluctant to impose cost-allocation if the parties did not suggest it.

c. **Do you understand the 2015 amendment to Rule 26(c)(1)(B) to confer upon the district court a new authority or obligation to manage discovery costs through cost allocation?**

   Response: I do not believe the cost-allocation mechanisms provide a new authority to courts. Courts have long had broad authority to manage discovery, including imposing costs of discovery on the party seeking the discovery.

d. **How, if at all, do you understand the cost-allocation provisions of Rule 26(c)(1)(B) to relate to those found in Rule 37?**

   Response: I do not believe the cost-allocation provision in Rule 26 relate directly to those found in Rule 37. Cost-allocation in Rule 26 is a prophylactic rule, designed to prevent undue harm to a party from whom discovery is sought, while allowing that discovery nonetheless. Rule 37 costs are punitive, designed to sanction a party for abusing discovery.

4. **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 incisiveness. In my experience what sets the best judges apart is their ability to get to the root of an issue or dispute and apply the rule of law. I do believe I possess this quality. In 30 years as a litigator, and most recently as criminal chief in a U.S. Attorney's Office, I have earned a reputation for sound and balanced judgment over a wide variety of matters that come through the office.

5. **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 understand "temperament" to refer to essential personality traits. Foremost, a judge should be civil, humble, and balanced. In my experience as a trial lawyer, civility and humility are defined by restraint. The best judges maintain a basic level of decorum and

respect for all the parties in the courtroom. Moreover, they maintain this decorum despite the occasional agitation of counsel or a party.

I believe I do meet this standard. I believe I have earned a reputation, through a litigation career involving a significant number of highly contentious and stressful matters, as someone who maintains an even keel regardless of the circumstances. I have always put the highest value on treating everyone with civility. A judge should never forget that there are people in the courtroom, not merely "parties" or "counsel."

6. **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 completely committed to following all precedents of higher courts. A district judge must apply the law regardless of their personal feelings. I welcome the opportunity to look for the most appropriate precedent and the strongest analysis for all issues.

7. **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: First, I have found in my 30 year career that when I believed I had an issue with no precedent it was almost invariably because I was not looking hard enough. Thorough research usually reveals precedential principles and analysis that end up making the solution clear. Second, if the issue involved a matter of statutory construction I would look to the plain meaning of the statute. If no ambiguity exists that would be the end of the analysis. If an ambiguity remained, I would review argument of the parties, and decisions from other courts involving analogous issues, to find an answer that provided the most clarity to the issue. Finally, if the issue was truly a matter of first impression, I would try to err on the side of the most modest effect of the consequences of the ruling.

8. **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 follow all binding precedent.

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

   Response: It would be the extremely rare situation for a trial court to declare a Congressional statute unconstitutional. All statutes are presumptively constitutional. However, it is the role of the federal courts to see that all laws comport with constitutional principles. There is

extensive Supreme Court case law on how a court should evaluate whether a statute violates constitutional principles, and I would follow that case law.

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. I would never rely on foreign law or other similar references to interpret the Constitution. Our Founding Fathers provided our country a constitution unique to us.

11. **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: As a fourth generation lawyer, and a practitioner myself 30 years, I have the highest respect for the process of the law. I believe a review of my career as a lawyer would show that I have always adhered to the rule of law and have tried to maintain a basic modesty in everything I do. I would never allow a political ideology or ulterior motive to interfere with the careful application of precedent and legal analysis.

12. **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: I believe a review of my career, including colleagues, opponents, people I supervise, and judges, would show that I have scrupulously adhered to the law, and basic fairness, even when it was not necessarily what was easiest or most advantageous to me, or comported with my personal views.

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

    Response: In managing my caseload I would set a status conference at the earliest opportunity to discuss the anticipated course of the litigation with the parties, establishing scheduling orders, status conferences and deadlines, and generally emphasizing my interest in seeing the case move along promptly. I would rely on magistrate judges to manage the discovery schedule, consulting with the magistrate judges regularly. Finally, I anticipate setting a tone for professionalism and promptness in how the work of my court is handled by providing guidance and direction at regular staff meetings.

14. **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 a judge is central to controlling the pace and conduct of litigation. I have appeared in courts where an otherwise fine judge's disengagement from the administration of the docket was unfortunately apparent. The judge needs to set a persistent tone that cases need to be handled proactively, with regular engagement of counsel, and issues resolved as promptly as reasonably possible.

15. 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: In general I believe that the more input in solving a challenging problem the better. First, there must be thorough preparation through careful reading of briefs and independent research. Second, I anticipate engaging counsel through inviting written and oral argument. This could be done even more informally through conference calls. I would also encourage my staff to challenge me and each other in all matters before the court. Mindful that the responsibility for all matters in my court rests with me, in particularly difficult matters I would consider discussing the issue with other judges to get as many perspectives as possible, always ending with the most incisive application of the law to the facts.

Never having been a judge, I am mindful of the new challenge I would have as a judge to carefully resolve disputes dispassionately and according to a scrupulous application of the law to the facts. As an experienced litigator, I would need to maintain deference for particular litigation strategies and tactics chosen by counsel. I believe that, being aware of this challenge, I can help move litigation along a more successful path with the rare but well considered suggestion or direction.

16. 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: No. The answer to the vast majority of difficult issues lies in the careful application of precedent and careful analysis. I believe my answers to many of the questions above describe the methodology I would employ in resolving issues, and it does not involve relying on empathy or what is in my heart.

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

Response: I did some research for the questions regarding rules of civil procedure, fundamental rights, the free exercise of religion, voter identification, and the level of scrutiny regarding Second Amendment challenges. The rest of the questions I answered by personal reflection. After reviewing my responses with the Office of Legal Police, I finalized my responses and authorized the submission of my responses to the Committee.

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

Response: Yes.

Written Questions of Senator Jeff Flake
U.S. Senate Committee on the Judiciary
Judicial Nominations
May 18, 2016

Answers of Winfield D. Ong,
Nominee, U.S. District Judge for the Southern District of Indiana

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1. **What is your approach to statutory interpretation? Under what circumstances, if any, should a judge look to legislative history in construing a statute?**

   Response: First, I would look for controlling precedent from the Supreme Court and the Seventh Circuit Court of Appeals. Next, a judge should always look to the plain and ordinary meaning of the specific provisions of the statute applicable to the issue. If the plain meaning of the text is not clear, I would look to the statute in its entirety. I would also apply the canons and precedents regarding statutory interpretation. Only as a last resort, and consistent with binding Supreme Court and Seventh Circuit Court of Appeals precedent, would I look to legislative history to construe a statute.

2. **What is the proper scope of the 10th Amendment to the Constitution? In what circumstances should a judge apply it?**

   Response: The Tenth Amendment to the Constitution reserves all powers not expressly delegated to the federal government in the Constitution to the states. Should I be confirmed I would follow all Supreme Court precedent in determining how the Tenth Amendment should be applied. *See, e.g., New York v. United States*, 505 U.S. 144 (1992).

3. **Does current standing doctrine foster or impede the ability of litigants to obtain relief in our legal system?**

   Response: As a general matter, the standing doctrine is a threshold requirement a putative plaintiff must satisfy in order to maintain their suit in court. In that respect, it is an impediment—albeit an impediment critical to the fair and expeditious administration of justice—to obtaining relief.

Questions for the Record
Senate Judiciary Committee
Senator Thom Tillis

Questions for Mr. Winfield Denton Ong

1. **Some individuals have argued that the United States Constitution is a "living document," subject to different interpretations as society changes. Do you subscribe to this point of view?**

   Response: No. Our Founding Fathers provided us a Constitution that establishes a form of government and provides a specific set of rules, principles and values for the country to be governed by at all times. It is a judge's job to understand whether the issues before him comport with the Constitution, not how to bend the Constitution to the issues of the day.

2. **What role, if any, should societal pressure or popular opinion play in interpreting statutes or the United States Constitution?**

   Response: None. On the contrary, a central point of a Constitution is to establish a set of fundamental principles and values that govern society at all times irrespective of the public mood at any particular time. That is unequivocally the role of the Constitution in our system of government.

3. **Please define judicial activism. Is judicial activism ever appropriate?**

   Response: In my view, judicial activism is when a judge allows their personal views to affect their ruling. A judge should never let their personal views affect their rulings. I judge should scrupulously endeavor to apply precedent and the most restrained, reasoned and balanced analysis to the issues before them.

4. **When, if ever, is it appropriate for a federal court to rule that a statute is unconstitutional?**

   Response: It would be the extremely rare situation for a trial court to declare a Congressional statute unconstitutional. All statutes are presumptively constitutional. However, it is the role of the federal courts to see that all laws comport with constitutional principles. There is extensive Supreme Court case law on how a court should evaluate whether a statute violates constitutional principles, and I would follow that case law.

5. **What is a fundamental right? From where are these rights derived?**

   Response: Fundamental rights in our country are derived from the Constitution. The Supreme Court has provided a set of tests to identify when a fundamental right is implicated. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

6. **Do you believe the First Amendment or any other provision of the United States Constitution protects private citizens and businesses from being required to perform services that violate their sincerely held religious beliefs?**

   Response: The constitutional right to free exercise of religion is one of the most fundamental rights in the Constitution. On rare occasions that right can conflict with other fundamental rights. In that instance, the Supreme Court has provided guidance regarding how the First Amendment guarantee of free exercise of religion is to be protected. If confirmed I would follow those precedents faithfully. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

7. **What level of scrutiny is constitutionally required when a statute or regulation related to firearms is challenged under the Second Amendment of the United States Constitution?**

   Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2008), the Supreme Court established the right to bear arms as a fundamental right that applies to the states as well as to federal enclaves. However, the Court did not explicitly establish a single level of scrutiny to be applied by courts in all cases when evaluating laws that restrict the right to bear arms. Also refraining from establishing a single level of scrutiny to be applied in all cases, the Seventh Circuit Court of Appeals has addressed this issue in some detail in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), and *Friedman v. City of Highland Park,* 784 F.3d 406 (7th Cir. 2015). If confirmed I would scrupulously follow the precedents of the Supreme Court, and the Seventh Circuit Court of Appeals.

8. **Do you believe it is constitutional for states to require voters to show photo identification before being eligible to cast their vote?**

   Response: The Supreme Court has provided tests for determining when a statute or regulation that affects the right to vote is unconstitutional. If confirmed I would faithfully follow those precedents. *See, e.g., Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

9. **One challenge you will face as a federal judge is managing a demanding caseload. If confirmed, how will you balance competing priorities of judicial efficiency and due process to all litigants involved in the cases on your docket? Will you give certain cases priority over others? If so, please describe the process you will use to make these decisions.**

   Response: In managing my caseload I would set a status conference at the earliest opportunity to discuss the anticipated course of the litigation with the parties, establishing scheduling orders, status conferences and deadlines, and generally emphasizing my interest in seeing the case move along promptly. I would rely on magistrate judges to manage the discovery schedule, consulting with the magistrate judges regularly. Cases involving the Speedy Trial Act must almost always take priority over others. I anticipate setting a tone for professionalism and promptness in how the work of my court is handled by providing guidance and direction at regular staff meetings.

10. **Do you believe the death penalty is constitutional? Would you have a problem imposing the death penalty?**

   Response: The Supreme Court has affirmed the constitutionality of the death penalty. *See, e.g., Glossip v. Gross*, 135 S. Ct. 2726 (2015). I would faithfully follow the law in all respects and would have no problem doing so.