

Responses of Brian C. Wimes

**Nominee to be U.S. District Court Judge for the Eastern and Western Districts of Missouri
to the Written Questions of Senator Chuck Grassley**

1. As a Circuit Court Judge, you served on the Sixteenth Judicial District Strategic Planning Committee. In 2008, this Committee produced a strategic plan, including factors which the committee believed would affect the successful implementation of the plan. One factor identified was “Challenges to the Judiciary and Oversight by the Supreme Court.” You and the committee expressed concern regarding the “Supreme Court” noting it “will increasingly attempt to influence and become more heavily involved in local state court matters, decreasing the autonomy of Missouri courts.”

a. Was the use of the term “Supreme Court” in reference to the Missouri Supreme Court or to the Supreme Court of the United States?

Response: The Missouri Supreme Court.

b. Would you please explain how either the Missouri Supreme Court or the Supreme Court of the United States is “increasingly attempting to influence” courts in Missouri’s Sixteenth Judicial District?

Response: I participated as a committee member of the Sixteenth Judicial Circuit Strategic Planning Committee. I was one of eighteen members who served on that committee. In preparation of the strategic plan, eleven focus groups were conducted with partners, stakeholders, and court staff. One hundred and ten people participated in those sessions. Additionally, input was solicited from all judges, selected court staff, a 2007 judge’s retreat, court en banc meetings, and a web based survey. The Strategic Planning Committee developed the strategic direction and priorities utilizing the information gathered from all of the groups mentioned previously. The strategic plan published was not a plan developed solely by the planning committee, but it was a comprehensive plan utilizing information from a wide range of court stakeholders.

To the best of my recollection in making the quoted statement, the committee was acknowledging that the Missouri Supreme Court would be increasingly exercising its constitutionally mandated authority and responsibility to supervise lower courts. The Missouri Supreme Court was establishing statewide rules in an attempt to bring uniformity to all of the judicial circuits across the State of Missouri. The committee recognized that the implementation of rules could have an impact on the Sixteenth Judicial Circuit Court’s ability to achieve its local goals set forth in the strategic plan.

The committee did not suggest that the Missouri Supreme Court's increased exercise of its supervisory authority was improper. Instead, the committee was acknowledging the Supreme Court's mandate to oversee the administrative functions of the lower courts. The committee recognized that local courts are limited and subject to the authority of the Missouri Supreme Court.

c. Do you think that the Supreme Court of the United States attempts to influence federal trial courts?

Response: Yes, I believe the Supreme Court influences federal trial courts through its rulings and binding precedent.

2. At your hearing, I asked you the following questions, but wanted you to have an opportunity to provide a more complete answer, having had the opportunity to review the Strategic Plan. In that plan, you and the committee also listed as a concern the "hostility toward, criticism, and the politicization of the judiciary by legislators."

a. How do legislators show hostility toward the judiciary?

Response: During that period of time there was an attempt by some in the legislature to eliminate the Non-Partisan Court Plan in the State of Missouri. The Non-Partisan Court Plan is one method by which judges are selected in the State of Missouri.

b. Is it your view that the United States Congress has politicized the federal judiciary? If so, how?

Response: No, that is not my view.

c. In your view, what is the proper relationship between the federal judiciary and Congress?

Response: The United States government is divided into three branches. Each branch has its own independent powers and areas of responsibility. It is Congress's responsibility to make the law and it is the federal judiciary's responsibility to follow the law.

d. If confirmed, what will you do to ensure that you maintain appropriate respect and deference to the legislature throughout your lifetime appointment?

Response: I have always adhered to our form of government and if confirmed, I would continue to give all branches of government the appropriate respect and

deference. In particular, in interpreting federal statutes, I would faithfully apply laws enacted by Congress.

3. **From press accounts (for example *Kansas City Star*, March 31, 2001, *see* http://blogs.kansascity.com/crime_scene/files/20010331_judge_considers_wheather_murder_charges_can_be_refiled.txt), you appear to have been involved with the prosecution of Richard Buchli. Please provide the following information related to that case:**

- a. **What was your role in the investigation?**

Response: I was the lead prosecutor assigned to the case. The local police department conducted the investigation.

- b. **What was your role in the case preparation?**

Response: I was the lead prosecutor assigned to the case and was responsible for the case preparation from May of 2000 until March of 2001. I had a limited role after March of 2001 and no role in the case after I left the office in June of 2001.

- c. **What was your role in representing the Prosecuting Attorney's office before the court?**

Response: As the lead prosecutor on the case, I had several responsibilities, including appearing in court for any hearings related to the case. I also filed motions on behalf of the State, and I produced witnesses for depositions and also deposed witnesses.

- d. **Is it fair to say you were the lead prosecutor on this case during 2000 and 2001?**

Response: I was the lead prosecutor on the case when it was filed in May 2000 until March of 2001.

4. **A key issue that later surfaced in the *Buchli* case concerned the existence and content of certain evidence. The Missouri Court of Appeals later found the evidence to be *Brady* material, and as a result, the Court vacated the defendant's murder conviction in 2006 and remanded for a new trial. I recognize that additional discovery disputes compromised the second trial. I am interested in your involvement in 2000 and 2001. In particular, your involvement with respect to the video surveillance tape later found to be *Brady* material.**

- a. **During the time you served with the Jackson County Prosecuting Attorney's Office, what was the full extent of your knowledge about this evidence?**

Response: I became aware of a video surveillance tape in May of 2000. Following my usual practice, I requested a copy of the video surveillance tape from local law enforcement, and I provided a copy of what I received to the defense counsel. I believed the tape I received from the local law enforcement was the entire surveillance tape, and it was not until 2006, five years after leaving the Prosecutor's office, that I learned there was an issue regarding the tape.

b. If applicable, when did you learn about this information?

Response: Please see response to question 4a above.

c. If applicable, as an Assistant Prosecutor, did you ever make, or permit another to make, any material misrepresentation about the tape's existence or content? If so, please explain.

Response: I never made or permitted another to make any material misrepresentation or any misrepresentation of the tape's existence or content.

5. In March 2001, on behalf of the Jackson County Prosecuting Attorney's Office, you filed a motion requesting a continuance. The press reports indicate the court denied your motion because, according to the Court, it was "woefully inadequate" and "flimsy." What reasons did you offer the court in support of this request?

Response: In my request for a continuance filed, I listed several reasons in support of the request.

First, the defense never responded to the State's request for discovery filed May 30, 2000. The trial was scheduled to begin on April 16, 2001. On March 7, 2001, the defense represented to the State that they would only call five witnesses to testify at trial. On March 9, 2001, the defense filed "defendants witness list" that listed 188 witnesses who could potentially be called for trial. On March 16, 2001, the defense amended the "witness list" and listed twenty four witnesses who could potentially be called for trial, including an out of state expert witness who the State wanted to depose.

Second, as of the date I filed the motion, the defense indicated that they needed to depose ten more State witnesses.

Third, before the motion was filed, the State sent a blood sample to an expert witness in Chicago, Illinois in order to determine an unknown substance found in the sample. The blood test was not completed as of the date I filed the motion.

Fourth, on March 7, 2001, the victim's spouse informed me that she had additional items that might be of evidentiary value. Those items were collected by members of

the local police department on March 14, 2001, and they were being examined for evidentiary value as of the date I filed the motion.

6. 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 integrity. A judge that possesses integrity is fair minded, unbiased, principled, and willing to make tough decisions. I believe I possess these qualities.

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: I believe a judge's temperament should be one that instills faith, trust, and confidence in the judicial system to those who appear in the courtroom. The judge should be even tempered, impartial, courteous, patient, and display humility. I believe I meet this standard.

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. 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.

9. 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: First, I would look to the plain text of the relevant statute or provision at issue. I would then look to the legislative history enacting the statute. Next, I would look to analogous precedent of the Supreme Court and the Eighth Circuit Court. Finally, I would look to analogous precedent of other Circuit Courts as persuasive authority in deciding the case.

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 own judgment of the merits, or your best judgment of the merits?

Response: If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would be bound to follow precedent established by the higher courts. I would follow the Supreme Court's or the Eighth Circuit Court's decision.

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

Response: It is appropriate for a federal court to declare a statute enacted by Congress unconstitutional when that statute violates the Constitution or if Congress exceeds its authority under the Constitution in enacting the statute. If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would be guided by the Supreme Court's and the Eighth Circuit Court's precedent in determining whether a statute was constitutional.

12. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?

Response: As a state court judge for the last four years, I have had to face the challenge of managing a heavy caseload of criminal, civil, and domestic cases. I employ a case management schedule that ensures the prompt and efficient resolution of cases. Near the beginning of any litigation, I hold a case management conference. At that conference, I issue a scheduling order which sets forth deadlines for certain matters to be completed at significant stages of the litigation process. The dates scheduled are with the parties' agreement, which ensures that deadlines are met. Further, at the conference I discuss with the attorneys the proper procedures to follow to have discovery issues addressed quickly and promptly by the court. If confirmed as a district court judge, I would take the steps described above to manage my caseload.

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: Yes, I do believe that judges play a role in controlling the pace and conduct of litigation. Please see response to question 12 above as to the specific steps I would take to control my docket if confirmed as a district court judge.

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

Response: I reviewed the questions and prepared my responses after receiving these questions on November 23, 2011. I discussed my responses with a Department of Justice official. I finalized my responses and authorized their submission to the Judiciary Committee.

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

Response: Yes.

Responses of Brian C. Wimes
Nominee to be U.S. District Judge for the Eastern and Western Districts of Missouri
to the Written Questions of Senator Amy Klobuchar

- 1. If you had to describe it, how would you characterize your judicial philosophy? How do you see the role of the judge in our constitutional system?**

Response: A judge should be fair, impartial, open-minded, and even tempered with parties that appear before the court and apply the facts of the case to the applicable law. A judge's role is to resolve disputes between parties in a just, timely, efficient, and professional manner in accordance with the law and rules of procedure.

- 2. What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their political beliefs or whether they are rich or poor, defendant or plaintiff?**

Response: I believe that a judge's demeanor should instill trust, confidence, and faith in our legal system. Having had the privilege of sitting on the bench for ten years, I believe I have always treated all parties appearing before me equally, respectfully, and in a fair and impartial manner. If confirmed, I will continue to perform my duties in a manner that instills trust, confidence, and faith in our legal system.

- 3. In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? How does the commitment to stare decisis vary depending on the court?**

Response: I believe judges should commit themselves to the legal principle of stare decisis. I believe it promotes stability and predictability in our legal system. I believe this commitment should not vary depending on the court.

Responses of Brian C. Wimes
Nominee to be U.S. District Judge for the Eastern and Western Districts of Missouri
to the Written Questions of Senator Tom Coburn, M.D.

- 1. Some people refer to the Constitution as a “living” document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

Response: I do not agree with the perspective that the Constitution is a “living” document constantly evolving as society interprets it. The Constitution is a document that can only be changed by the amendment process set forth in the document itself.

- 2. Justice William Brennan once said: “Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized.” Do you agree with him that constitutional interpretation today must take into account this supposed transformative purpose of the Constitution?**

Response: No.

- 3. Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

Response: No.

- 4. Do you believe empathy is an essential ingredient for arriving at just decisions and outcomes and should play a role in a judge’s consideration of a case?**

Response: No, I believe an unbiased and impartial view is essential for arriving at just decisions. Therefore, empathy would not be an essential ingredient or play a role in the judicial decision-making process.

- 5. Is any transaction involving the exchange of money subject to Congress’s Commerce Clause power?**

Response: The Supreme Court has held that Congress has broad but limited power under the Commerce Clause. If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would follow precedent established by the Supreme Court and the Eighth Circuit Court in determining the breadth of congressional power under the Commerce Clause.

- 6. The U.S. Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment of the United States Constitution “protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.” As Justice Scalia’s opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms**

as one of the fundamental rights of Englishmen. Leaving aside the *McDonald v. Chicago* decision, do you personally believe the right to bear arms is a fundamental right?

Response: The Supreme Court held in *Heller* that the Second Amendment protects an individual's right to bear arms and *McDonald* held that right to be fundamental and therefore applicable to the States. I have not reviewed the relevant legal issue sufficiently enough to have formed a personal view or belief. If confirmed as a district judge for the Eastern and Western Districts of Missouri, my personal view or belief on this issue would not play a role in my analysis and decision-making process. I would be bound by and follow precedent established by the Supreme Court in the *Heller* and *McDonald* decisions and any other applicable precedent bearing on this issue by the Supreme Court or the Eighth Circuit Court.

- a. Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.**

Response: I have not reviewed the relevant legal issues sufficiently enough to have formed a personal view or belief on this question. My personal view or belief would not play a role in my analysis and decision-making process as a judge. If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would be bound by and follow any applicable precedent in this area established by the Supreme Court and the Eighth Circuit Court.

- b. Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.**

Response: Yes, I do recognize that the Supreme Court has held that certain fundamental rights embodied in the Bill of Rights are in fact applicable to the States. If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would be bound by and follow any applicable precedent with regard to these fundamental rights and any other applicable precedent established by the Supreme Court and the Eighth Circuit Court.

- c. The *Heller* Court further stated that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." Do you believe that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right? Please explain why or why not.**

Response: I have not reviewed the relevant legal issues sufficiently enough to have formed a personal view or belief on this question. My personal view or belief would not play a role in my analysis and decision-making process as a judge. Further, consistent with the Supreme Court's holding in *Heller*, I would

follow the Supreme Court and the Eighth Circuit Court precedent and any other applicable precedent bearing on the issue.

- 7. Some have criticized the Supreme Court’s decision in *Heller* saying it “discovered a constitutional right to own guns that the Court had not previously noticed in 220 years.” Do you believe that *Heller* “discovered” a new right, or merely applied a fair reading of the plain text of the Second Amendment?**

Response: The decision of the Supreme Court in the *Heller* case was based in part upon the Court’s reading of the plain text of the Second Amendment. I have not reviewed the relevant legal issues sufficiently enough to have formed a personal view or belief on this question. My personal view or belief would not play a role in my analysis and decision-making process as a judge. If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would be bound by and follow *Heller* and any other applicable precedent in this area established by the Supreme Court and the Eighth Circuit Court.

- a. Similarly, during his State of the Union address, the President said the Supreme Court’s decision in *Citizens United v. FEC*, 558 U.S. ___ (2010), “reversed a century of law” and others have stated that it abandoned “100 years of precedent.” Do you agree that the Court reversed a century of law or 100 years of precedent in the *Citizens United* decision? Please explain why or why not.**

Response: I have not reviewed the relevant legal issues sufficiently enough to have formed a personal view or belief on this question. My personal view or belief would not play a role in my analysis and decision-making process as a judge. If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would be bound by and follow the Supreme Court’s holding in *Citizens United*.

- 8. What limitations remain on the individual Second Amendment right now that it has been incorporated against the States?**

Response: The Supreme Court in *Heller* and *McDonald* held that the Second Amendment protects an individual’s right to bear arms. The rulings in the two cases do not preclude all limitations on the right to bear arms. For example, in *Heller* the Court stated that there are limitations to this right as it relates to convicted felons, the mentally ill, carrying weapons in sensitive places, and imposing conditions and qualifications on the commercial sale of arms. However, the Supreme Court’s ruling did not undertake a full analysis of the Second Amendment and the extent of these limitations. If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would be bound by and follow any applicable precedent in this area established by the Supreme Court and the Eighth Circuit Court.

- a. **Is the Second Amendment limited only to possession of a handgun for self-defense in the home, since both *Heller* and *McDonald* involved cases of handgun possession for self-defense in the home?**

Response: In *Heller* and *McDonald* the Supreme Court did not define the limits of an individual's right to bear arms nor address the issue in this question. If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would be bound by and follow the precedent established in *Heller* and *McDonald* and any other applicable precedent of the Supreme Court and the Eighth Circuit Court.

9. **In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the “evolving standards of decency” to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy’s analysis?**

Response: If confirmed as a district judge for the Eastern and Western Districts of Missouri, my personal views or belief would not play a role in my analysis and decision-making process. I would be bound by and follow the precedent established by the Supreme Court in *Roper*.

- a. **Do you agree that the Constitution’s prohibition on cruel and unusual punishment “embodies a principle whose application is appropriately informed by our society’s understanding of cruelty and by what punishments have become unusual?”**

Response: If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would follow Supreme Court and Eighth Circuit Court precedent when determining what constitutes cruel and unusual punishment.

- b. **How would you determine what the evolving standards of decency are?**

Response: If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would follow the analytic framework established by the relevant Supreme Court and Eighth Circuit Court precedent.

- c. **Do you think that a judge could ever find that the “evolving standards of decency” dictated that the death penalty is unconstitutional in all cases?**

Response: If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would follow Supreme Court and Eighth Circuit Court precedent. The Supreme Court has held that the death penalty is constitutional except in limited circumstances, and I would follow that precedent.

d. What factors do you believe would be relevant to the judge’s analysis?

Response: Given that the Supreme Court has held that the death penalty is constitutional except in limited circumstances, that analysis would be inappropriate.

e. When determining what the “evolving standards of decency” are, justices have looked to different standards. Some justices have justified their decision by looking to the laws of various American states,¹ in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries.² Do you believe either standard has merit when interpreting the text of the Constitution?

Response: If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would be bound to follow precedent, including precedent established by Supreme Court decisions in *Roper* and *Graham*. To that end, my analysis of any Supreme Court and Eighth Circuit Court holding in this area would be consistent with precedent.

i. If so, do you believe one standard more meritorious than the other? Please explain why or why not.

Response: Please see response to question 9e above.

10. In your view, is it ever proper for judges to rely on foreign or international laws or decisions in determining the meaning of the Constitution?

Response: No, unless directed to do so by Supreme Court precedent.

a. Is it appropriate for judges to look for foreign countries for “wise solutions” and “good ideas” to legal and constitutional problems?

Response: No, I do not believe it is appropriate unless directed to do so by Supreme Court precedent.

b. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: I would not consider foreign law when interpreting the Constitution unless directed to do so by Supreme Court precedent.

c. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

¹ *Roper v. Simmons*, 543 U.S. 551, 564-65.

² *Graham v. Florida*, 130 S.Ct. 2011, 2033-34.

Response: I believe it is inappropriate to adopt ideas and solutions to legal problems from foreign nations unless directed to do so by Supreme Court precedent.

d. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: No, unless required to do so by Supreme Court precedent.