

**Senator Chuck Grassley
Questions for the Record**

**Elizabeth K. Dillon
Nominee, U.S. District Judge for the Western District of Virginia**

- 1. It does not appear that you have criminal litigation experience. As a federal district court judge, you will preside over both civil and criminal matters. What steps have you taken or will you take to familiarize yourself with criminal law?**

Response: While I do not have criminal litigation experience, I have already begun studying federal criminal law and procedure so that, if I am fortunate enough to be confirmed, I will be prepared to preside over criminal proceedings. I have read cases regarding sentencing, reviewed sentencing factors and the sentencing guidelines, attended a continuing legal education seminar on federal criminal procedure, and observed criminal proceedings in the United States District Court for the Western District of Virginia. I plan to continue these educational efforts by observing more federal criminal proceedings, studying additional federal criminal law materials, and learning from the judges in the Western District of Virginia.

Additionally, I will draw upon my experience representing clients in civil cases that frequently involved constitutional issues that can arise in criminal cases. For example, I have experience representing clients in Section 1983 cases involving alleged Fourth Amendment violations. I have also represented clients in civil cases alleging malicious prosecution in underlying criminal proceedings, as well as cases involving *Brady* issues and criminal trial procedures. Moreover, I am well versed in the Federal Rules of Evidence, which apply to both civil and criminal cases.

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

Response: The most important attribute of a judge is to have the utmost respect for the tremendous responsibility of the position. A judge who recognizes and respects the responsibility of the position will respect the rule of law, the litigants, and the lawyers, and will serve with integrity, fairness, and impartiality. I have the utmost respect for the tremendous responsibility of the position and would be honored to serve should I be confirmed.

- 3. 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 professional and show respect for the rule of law, the litigants and the lawyers who appear before him or her, and other judges and court personnel. A judge must be patient, listen carefully, and apply the law impartially and fairly. If confirmed, I can and will be such a judge.

4. **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, I will follow faithfully, and adhere to, the precedents of the Supreme Court of the United States and the Fourth Circuit Court of Appeals regardless of my personal beliefs.

5. **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 first look to the plain language of the constitutional provision or statute at issue. If the language were clear and unambiguous, I would apply it. If further analysis were required because of unclear language, I would look to canons of statutory interpretation, binding precedent regarding definitions of the same words, and binding precedent regarding interpretations of similar language in cases involving other constitutional provisions or statutes. If necessary, I would also look to similar cases outside the Fourth Circuit Court of Appeals and consider them for their persuasive authority.

6. **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 apply the precedents of the Supreme Court of the United States and the Fourth Circuit Court of Appeals regardless of my personal beliefs.

7. **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, and courts are to avoid declaring a statute unconstitutional if the statute can be construed in such a way to avoid reaching that conclusion. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *Jones v. United States*, 529 U.S. 848, 857 (2000). Only in circumstances where Congress exceeded its authority under the Constitution would a statute be determined to be unconstitutional. *United States v. Morrison*, 529 U.S. 598, 607 (2000).

8. **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. If confirmed as a district court judge, I would not look to foreign law or the views of the “world community” to determine the meaning of the Constitution.

- 9. 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 understand that district court judges are to make decisions based upon precedent and the text of the law without regard to political ideology or motivation. The rule of law requires a dedication to this principle, and I am so dedicated. Without dedication to this principle, our system of justice would not exist.

- 10. 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 recognize that, if I am confirmed as a district judge, I would no longer be an advocate for any litigant or any position. I am firmly and deeply committed to the principle that judges must administer justice fairly and impartially to all persons and would work hard every day to insure that I did exactly that.

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

Response: If confirmed, I intend to manage my caseload by reviewing the caseload regularly, delegating appropriate matters to magistrate judges, making use of scheduling orders, holding conferences with the parties, and rendering decisions promptly.

- 12. 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 that judges do have a role in controlling the pace and conduct of litigation. If confirmed, I would control my docket through use of scheduling orders and conferences with the parties. I would consult with the parties regarding the scheduling orders because some cases do not lend themselves to generic scheduling orders. I would also make myself available to the parties to assist in resolving disputes promptly so the case could move forward. I would also render decisions promptly.

- 13. 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: I recognize that, if I am confirmed as a district judge, I would no longer be an advocate for any litigant or any position. I understand that our judicial system is founded upon, and depends upon, the judge serving as a fair and impartial decision maker, and I would be a fair and impartial judge. In reaching a decision in cases that come before me, I

would first look to the authority of the court to hear the matter. I would read and hear the arguments of counsel or pro se litigants, listen carefully to the evidence, undertake research on the issues, apply the precedent to the specific facts before me, and render a well-reasoned, clear and prompt decision. If confirmed, I believe the most difficult part of this transition for me would be mastering criminal law given my lack of experience in that area. I am committed to learning about criminal statutes and sentencing guidelines and have begun that process, and I will be prepared to preside over criminal cases if I am fortunate enough to be confirmed.

- 14. 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 familiar with President Obama’s statement or the context of his statement. If confirmed as a district judge, I would fairly and impartially apply the law to the specific facts before me, keeping in mind that my decisions are bound by precedent of the Supreme Court of the United States and the Fourth Circuit Court of Appeals. I would do so without regard to any personal beliefs I held.

- 15. 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 that the set of marriages to which Justice Kennedy refers are those marriages recognized by individual states.

- 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?**

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

Response: Yes.

iv. Are you committed to upholding this precedent?

Response: Yes.

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.

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.

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

² *Id.* 2689-2690.

³ *Id.* 2691.

⁴ *Id.* (internal citations omitted).

- 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.

- 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.

- 16. 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**

⁵ *Id.* (internal citations omitted).

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.

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

Response: I received the questions on November 21, 2014. I carefully reviewed and considered the questions, familiarized myself with the cases cited, and answered the questions truthfully. I reviewed my responses with a representative of the Department of Justice, Office of Legal Policy, and submitted my final responses on November 24, 2014.

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

Response: Yes.

**Senator Ted Cruz
Questions for the Record**

**Elizabeth K. Dillon
Nominee, U.S. District Judge for the Western District of Virginia**

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 have not studied the judicial philosophies of the Justices of the Warren, Burger, or Rehnquist Courts; however, if I am confirmed as a district court judge, my judicial philosophy would be to adhere to the precedent of the Supreme Court of the United States and the Fourth Circuit Court of Appeals and to apply the applicable law to the specific facts presented to me and to then reach well-reasoned, clear, and prompt decisions.

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 of the United States stated that, in interpreting the Constitution, “we are guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.’” *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). If confirmed, I would follow this precedent and use the original public meaning to interpret 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 a decision is precedent today, I would not overrule the decision as a judge; rather, I would be bound by the decision and would follow it.

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: Regardless of any personal beliefs, if I am confirmed as a district court judge, I will follow the precedent set forth by the Supreme Court of the United States in *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985), as I would all Supreme Court precedents.

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

Response: The Supreme Court has found certain statutes to be unconstitutional in some circumstances where the regulated activity was determined to be non-economic. *United States v. Morrison*, 529 U.S. 598 (2000); and *United States v. Lopez*, 514 U.S. 549 (1995). In deciding a case involving non-economic activity and Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, I would be bound by and adhere to the precedent of the Supreme Court of the United States and the Fourth Circuit Court of Appeals including *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Morrison*, 529 U.S. 598 (2000); and *United States v. Lopez*, 514 U.S. 549 (1995).

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

Response: According to decisions of the Supreme Court of the United States, the President's ability to issue executive orders or executive actions "must stem either from an act of Congress or from the Constitution itself." *Medellin v. Texas*, 552 U.S. 491, 525 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). Should I be confirmed, I would adhere to these precedents and any Fourth Circuit Court of Appeals' precedent.

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

Response: I would follow the precedent of the Supreme Court of the United States and the Fourth Circuit Court of Appeals in determining whether a right is fundamental for purposes of the substantive due process doctrine. According to Supreme Court precedent, a right is fundamental when it is a right that is "fundamental to our scheme of ordered liberty and system of justice," *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 (2010), and is "deeply rooted in the Nation's history and tradition" and is "implicit in the concept of ordered liberty," *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)).

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

Response: I would follow the precedent of the Supreme Court of the United States and the Fourth Circuit Court of Appeals in determining when a classification is subject to heightened scrutiny under the Equal Protection Clause. According to the Supreme Court of the United States, a classification is subjected to strict scrutiny under the Equal Protection Clause when a fundamental right is burdened or when the classification is based upon race, national origin, or alienage, and a classification based upon gender or illegitimacy is subject to intermediate scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985); *United States v. Virginia*, 518 U.S. 515, 531-33 (1995).

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: Regardless of my personal expectations, if any, if I am confirmed as a district court judge, I will follow the precedent of the Supreme Court of the United States, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013), and the Fourth Circuit Court of Appeals with regard to racial preferences in public higher education.