

Senator Grassley
Questions for the Record

Pamela Pepper,
Nominee, U.S. District Judge for the Eastern District of Wisconsin

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

Response: While a good judge possesses many attributes—patience, humility, organization—the most important attribute is the ability to set aside personal views and beliefs and base decisions on applying the relevant law to the facts of each case. I believe that I have demonstrated those attributes as a judge on the bankruptcy court, and would continue to do so if confirmed to serve on the district court.

2. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament to you consider the most important, and do you meet that standard?

Response: The appropriate temperament for a judge is the ability to listen patiently and respectfully to the arguments of all parties, then to decide their disputes with integrity and efficiency, and to clearly explain the bases for those decisions. Patience, the ability to listen without prejudging, and integrity are the most important elements of that temperament. I believe that I have demonstrated those elements during my tenure on the bench.

3. 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 serve on the bankruptcy court, and am bound by Supreme Court precedent, Seventh Circuit precedent, and the decisions of district courts reviewing appeals of my decisions. Those precedents are binding, and I follow them. I would continue to follow binding precedent from the Supreme Court and the Seventh Circuit if confirmed to serve on the district court.

4. 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 my service on the bench, I have begun by looking at the language of the relevant statute, regulation or rule. If that language is not clear, or is ambiguous, I look to rules of statutory construction, analogous statutory or regulatory schemes, and, if there are any, decisions from higher courts that have considered similar issues, as persuasive authority.

- 5. 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 decision of the higher court.

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

Response: Because of the presumption that federal statutes are constitutional, it is appropriate for a federal court to declare a statute unconstitutional only in those instances where it is clear that the statute violates a specific provision of the Constitution, and only if the court must address constitutionality in order to resolve the case.

- 7. 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: I do not believe it is ever proper for judges to rely on the law of foreign countries, or the views of such countries or communities, in interpreting the United States Constitution.

- 8. 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 offer the Committee evidence in the form of my nine years of service on the bankruptcy court. Over those years, I have made hundreds of decisions based on precedent and the law, and not any political ideology or motivation.

- 9. 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 offer the Committee the evidence of my record of service on the bankruptcy court. I have not based decisions on my personal views, and have been fair and impartial to every litigant who appeared before me. I would continue to do so if confirmed to serve on the district court.

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

Response: I would use similar case management procedures to the ones I have used on the bankruptcy court. I use several electronic systems to track the status of cases—an

“under advisement” report, a report regarding the status of pending business case deadlines, and various motion and objection reports. Such systems are critical in bankruptcy court, given the high case load, and I believe they would work equally well to manage a district court case load.

11. 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: Judges play a critical role in controlling the pace and conduct of litigation. If confirmed, I would employ internal systems for monitoring the pace and status of criminal cases (subject to the Speedy Trial Act) and civil cases. In civil cases, I would use pretrial conferences and status conferences to encourage thoughtful, targeted discovery plans; monitor and quickly resolve discovery disputes; consider the use of oral rulings on dispositive motions; and set firm trial dates.

12. As a bankruptcy judge, you have experience deciding cases and writing opinions. Please describe how you reach a decision in cases that come before you and to what sources of information you look for guidance.

Response: In reaching any decision, I begin with the relevant provision of the Bankruptcy Code or the relevant rule (usually the Federal Rules of Bankruptcy Procedure or the Federal Rules of Evidence). If the parties agree on the meaning of the statute or rule, I apply it to the particular facts, after hearing argument from the parties. If the parties dispute the meaning of the statutory provision or the rule, I request briefing, and also conduct my own research regarding any binding or persuasive case law. I base the resulting decision on those sources.

13. If confirmed, how do you believe your experience as a bankruptcy judge will help you as a federal district judge?

Response: A bankruptcy judge hears cases ranging from those involving individual debtors or creditors to those involving multi-million dollar corporate entities. Bankruptcy judges often must consider other areas of law, such as criminal law, environmental law, family law and tax law, in resolving bankruptcy questions. Bankruptcy judges must expeditiously move large dockets, involving cases of all sizes and in all stages of litigation, and are constantly aware that delay rarely benefits any party. If confirmed to the district court, all of these experiences would assist me in efficiently managing the broad array of litigation that court must handle.

14. What do you anticipate will be the greatest challenge transitioning from a federal bankruptcy court’s docket to a federal district court’s docket?

Response: A bankruptcy court is not required to balance the demands that the Speedy Trial Act imposes on the criminal docket against the need for efficient and timely resolution of civil cases; if confirmed, I will work to balance those demands. I will also

educate myself on the particular procedural demands of intellectual property cases, a growing segment of the district court case load.

15. **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 full context of this quotation. I believe that judges should decide all cases, whether difficult or not, by applying the relevant law to the facts. A judge’s responsibility, obligation and oath is to set aside the judge’s personal views and beliefs, and to decide all cases based on the Constitution, applicable statutes, regulations, rules and precedent.

16. **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 believe that Justice Kennedy referred to those marriages authorized by state law.

- 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: That is my understanding.

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

Response: Yes.

¹ *United States v. Windsor*, 133 S.Ct. 1675 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. The *Windsor* decision is binding precedent, and I will give this and all other portions of the decision full force and effect.

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. The *Windsor* decision is binding precedent, and I will give this and all other portions of the decision full force and effect.

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.

Response: Yes.

² *Id.* 2689-2690.

³ *Id.* 2691.

⁴ *Id.* (internal citations omitted).

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

Response: Yes. The *Windsor* decision is binding precedent, and I will give this and all other portions of the decision full force and effect.

- 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. The *Windsor* decision is binding precedent, and I will give this and all other portions of the decision full force and effect.

- 17. **According to the website of American Association of Justice (AAJ), it has established a Judicial Task Force, with the stated goals including the following: “To increase the number of pro-civil justice federal judges, increase the level of professional diversity of federal judicial nominees, identify nominees that may have an anti-civil justice bias, increase the number of trial lawyers serving on individual Senator’s judicial selection committees”.**

- a. **Have you had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding your nomination? If yes, please detail what individuals you had contact with, the dates of the contacts, and the subject matter of the communications.**

Response: No.

- b. **Are you aware of any endorsements or promised endorsements by AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ made to the White House or the Department of Justice regarding your nomination? If yes, please detail what individuals or groups made the endorsements, when the endorsements were made, and to whom the endorsements were made.**

Response: No.

⁵ *Id.* (internal citations omitted).

- 18. Please describe with particularity the process by which these questions were answered.**

Response: I received these questions on July 1, 2014. I drafted responses, and sent those responses to the Department of Justice for review. After finalizing the responses, I submitted them for transmission to the Committee.

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

Response: Yes.

Questions for the Record

Senator Ted Cruz

Pamela Pepper,

Nominee, U.S. District Court for the Eastern District of Wisconsin

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: A judge’s obligation is to fairly decide disputes based on the Constitution, applicable statutes, rules, regulations and precedent, setting aside personal views and opinions. My judicial philosophy seeks to fulfill that obligation by patiently and respectfully hearing the arguments of all parties, and then rendering a timely and clearly-reasoned decision. I am not sufficiently familiar with the individual judicial philosophies of the members of the Warren, Burger or Rehnquist Courts to identify a particular justice with a philosophy similar to my own.

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: Yes. The Supreme Court has utilized originalism—particularly, original public meaning—to interpret the Constitution in cases such as *District of Columbia v. Heller*, 554 U.S. 570 (2008). That decision and others constitute binding precedent.

If a decision is precedent today while you’re going through the confirmation process, under what circumstance would you overrule that precedent as a judge?

Response: Lower court judges do not have the authority to overrule binding precedent. I have not done so as a bankruptcy judge; I could not and would not do so as a district court judge, if confirmed.

Explain whether you agree that “State sovereign interests . . . are more properly protected by procedural safeguards inherent in 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: The *Garcia* decision remains binding precedent. As a lower court judge, I would apply this, and all other binding precedent, regardless of my personal views or opinions.

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

Response: While the Supreme Court has found unconstitutional federal statutes regulating non-economic activity as violating the Commerce Clause, *see, e.g., United States v. Lopez*, 514 U.S. 549 (1995), the Court also has held that Congress may regulate "purely local" activities, "though [they] may not be regarded as commerce," which "have a substantial effect on interstate

commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (internal citations omitted). If confirmed to serve on the district court, I would follow all binding Supreme Court and Seventh Circuit precedent regarding Congress' authority under the Commerce Clause.

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

Response: The judicial authority in question first must have jurisdiction over a controversy ripe for determination. If such a controversy exists, the Supreme Court has held that the judiciary has the authority to review whether the President's authority to issue such orders or take such actions comes either from the Constitution or from an act of Congress. *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 529, 585 (1952)).

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

Response: A fundamental right, under the substantive due process doctrine, is one which is "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, 721 (1997) (internal citations omitted). I will follow this precedent and all precedent if confirmed.

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

Response: The Supreme Court has held that certain classifications—race, religion, national origin, gender—as well as classifications which burden a fundamental right, are subject to heightened levels of scrutiny under the Equal Protection Clause. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 472 U.S. 432, 440 (1995). If confirmed, I will follow Supreme Court and Seventh Circuit precedent regarding relevant levels of scrutiny under the Equal Protection Clause.

Do you "expect that [15] years from now, the use of racial preferences will no longer be necessary" in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: If confirmed, I will follow the binding precedent in *Grutter* and other cases ruling on the constitutionality of admissions policies based on particular classifications, and will not rule based on predictions or expectations.