

**Senator Grassley
Questions for the Record**

**Victor Allen Bolden,
Nominee, U.S. District Judge for the District of Connecticut**

1. **Following the Supreme Court’s decision in *Ricci v. DeStefano*, 557 U.S. 557 (2009), you said that the Court “ignored Congress” and that the Court’s “distorted sense of what makes a community prompted [it] to declare that [the] Title VII [rights] of whites had been violated after the City...for the first time in decades took steps *without* a court order to ensure that a hiring process for the Fire Department did not leave African-Americans out in the cold” (emphasis in original).**

- a. **Given your comment, please explain your understanding of what Congress intended to do in Title VII with respect to when employees can intentionally discriminate.**

Response: I became involved in this case after the Supreme Court granted certiorari and made these comments in my professional capacity as the City of New Haven’s lawyer, knowing that my client had for several decades been a party to successful disparate impact litigation brought by African-Americans regarding the hiring practices of the New Haven Department of Fire Services.

On the issue of when Congress intended to permit employers to discriminate intentionally, in *Ricci v. DeStefano*, the Supreme Court held that “under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.” *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009).

- b. **Do you believe Congress intended to set a standard making it easier for employers to intentionally discriminate than the standard the Supreme Court announced in *Ricci*?**

Response: No. I believe Congress intended to ensure that both the disparate treatment and disparate impact elements of Title VII were properly enforced. As the Supreme Court recognized in *Ricci v. DeStefano*, 557 U.S. 557 (2009): “Our task is to provide guidance to employers and courts for situations when these two prohibitions [against disparate treatment and disparate impact] could be in conflict absent a rule to reconcile them. In providing this guidance our decision must be consistent with the important purpose of Title VII – that the workplace be an environment free of discrimination, where race is not a barrier to opportunity.” 557 U.S. at 580.

2. **You contributed to a 1990 UCLA Law Review Article entitled “Racial Reflections: Dialogues in the Direction of Liberation.” Your subsection, “Salvaging Black Males,” argues that black men “have been disturbingly irresponsible” and are**

driven to violence and criminality because of a “pervasively white patriarchal society.”

a. Please explain what you meant by “pervasively white patriarchal society.”

Response: My contribution to that law review article was based on a writing assignment from a law school class more than twenty-five years ago. The phrase “pervasively white patriarchal society” referred to a society where white males were substantially more likely to be in positions of power than others in society. This phrase is not one I use now or have used in more than twenty-five years.

b. In the same article, you wrote that “[b]lack men must take on the awesome task of saying to this society, which is dominated by a white patriarchy, that it must change drastically and that they will not cooperate in the continued oppression of women.” Please explain what you meant by this statement.

Response: The statement referred to my opinion that African-American men must take responsibility for their lives and their actions, regardless of what the larger society does. The statement challenges African-American men to be concerned about society being fair for and to women, ensuring that women are treated with dignity and respect.

3. In a 2013 editorial for the *Connecticut Law Tribune*, you criticized the majority’s decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), and wrote that “states have too much power when it comes to deciding how and whether Americans will vote. With its undue emphasis on state sovereignty, the Supreme Court’s opinion in *Shelby County* will only serve to embolden those states determined to place barriers on those seeking to vote.”

a. Please explain the basis for your claim that “states have too much power when it comes to decision how and whether Americans will vote.” If you no longer believe this, please explain when and why you changed your mind.

Response: As with any editorial published by the Connecticut Law Tribune, this editorial reflected the opinions of a majority of the paper’s editorial board. A majority of the editorial board had concerns with the long lines many voters experienced and the delays in counting votes during the 2012 elections. The editorial I authored on behalf of the editorial board was written with this context in mind. If confirmed, I would faithfully apply Supreme Court and Second Circuit precedent in this area of the law, as I would all areas of the law, without regard to my personal views or the viewpoints I expressed on behalf of the editorial board.

b. Please explain the basis for your belief that the Supreme Court placed “undue emphasis on state sovereignty” in the *Shelby County* decision. If you no longer believe this, please explain when and why you changed your mind.

Response: Please see response to Question 3a.

- c. **Please explain the basis for your belief, as you argue in the article, that Justice Ginsburg’s dissent, and not the majority opinion, provides the correct legal analysis. If you no longer believe that Justice Ginsburg’s dissent provides the correct legal analysis, please explain when and why you changed your mind.**

Response: I appreciate the fact that the role of a writer on behalf of an editorial board is far different than that of a judge. As a judge, only the majority opinion is binding precedent and, if confirmed, I would have no problem faithfully following Supreme Court and Second Circuit precedent, regardless of any personal views I might have.

4. **At a speech before the NAACP in 2006, you said in the context of affirmative action: “Under the guise of seeking racial neutrality, those who do not want race to be considered in addressing racial isolation and economic deprivation are leaving fewer options for those of us trying to bring about racial equality.”**

- a. **Do you believe that opponents of affirmative action use “racial neutrality” as a “guise” to mask their true beliefs? If not, please explain to whom you were referring when you referred to “those” people who use “racial neutrality” as a “guise.”**

Response: No. Earlier, the speech specifically refers only to those “targeting for elimination *all* programs designed to end racial inequality,” including “scholarship programs, minority recruiting programs and summer enrichment programs.” (emphasis in original). I made this speech in my capacity as General Counsel for the NAACP Legal Defense & Educational Fund, Inc.

- b. **Do you believe that “racial isolation and economic deprivation” cannot be addressed except by race-conscious means? If not, please explain how race-neutral means can address “racial isolation and economic deprivation.”**

Response: No. In that same speech, just a few paragraphs later, I stated the following: “Let me be clear. I am not saying that race-targeted programs are the *only* way to address racial inequality. My point is that we cannot and must not eliminate [scholarship programs, minority recruiting programs and summer enrichment programs] as part of the broader solution to racial inequality in this nation.” (emphasis in original).

5. **In 1990, the *Harvard BlackLetter Law Journal* published your article entitled “Judge Not, That Ye Be Not Judged: A Dramatic Call for a More Enlightened Approach to Judicial Decision-Making in Race Discrimination Cases.” You noted that this article, which you wrote in the style of a script for a three-act play, “is intended to be a visionary statement on how judges ought to look at themselves and how they consider deciding cases.” The article concludes with “God” expounding the four principles that define proper judicial decisionmaking. I asked you about this article at your confirmation hearing last week and want to follow-up on your answers. To each question, you testified that you would apply the facts to the law, but you did not answer my questions concerning whether you still believed the principles that**

you expounded upon in your article. Accordingly, please answer, with specificity, each subpart of this question.

- a. The first principle you wrote states: “[I]f the decision before [the judge] affects society’s dispossessed and oppressed, the decision must be made in a way that eases their burden and does not add to their woes.” Do you still believe that a judge should decide cases in this manner? If not, please explain why you believed so in 1990 and what has subsequently changed your perspective.**

Response: Thank you for the opportunity to provide clarity on this unusual law review article and I apologize for any confusion this work of fiction has caused nearly a quarter-century later. I do not believe a judge should base his or her decisions on the principles discussed in the article. Instead, I wrote this play many years ago as a law student and it has not informed my professional work as a lawyer nor would it inform my work as a judge, if I were confirmed. My years of practice as a lawyer have instilled in me an appreciation of the importance of judges being fair and impartial and deciding matters based on the relevant facts and applicable law.

- b. The second principle you wrote states: “[T]he judge must consider how she or he would want to be treated if they [sic] were in the same circumstance as the person they [sic] are about to affect with their [sic] decision.” Do you still believe that a judge should decide cases in this manner? If not, please explain why you believed so in 1990 and what has subsequently changed your perspective.**

Response: Please see response to Question 5a.

- c. The third principle you wrote states: “A judge has to be held accountable when their [sic] talent is not used to re-structure a legal system gone awry, if that is what needs to be done.” Do you still believe that it is a judge’s role is “to re-structure a legal system gone awry”? If not, please explain why you did believe so in 1990 and what has subsequently changed your perspective.**

Response: Please see response to Question 5a.

- d. Please explain what you meant by the phrase “legal system gone awry.”**

Response: Please see response to Question 5a.

- e. The fourth principle you wrote states: “[J]udges must be mindful of the ‘fruits’ or consequences of their decisions.” If not, please explain why you believed so in 1990 and what has subsequently changed your perspective.**

Response: Please see response to Question 5a.

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

Response: It is essential for a judge to be fair and impartial and to decide matters based on the relevant facts and applicable law. I do possess this attribute and have

demonstrated a commitment to being fair and impartial throughout my professional career. For example, as the Corporation Counsel for the City of New Haven, Connecticut, I have issued formal legal opinions for the City of New Haven on a variety of issues fairly, impartially and based on the relevant facts and applicable law.

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: A judge should be fair, even-tempered, open-minded and capable of deciding every matter based on the relevant facts and applicable law. A judge also should be diligent in ascertaining all relevant precedent before making a decision, and treat litigants, fellow judges and court personnel in a respectful and professional manner. If I am fortunate enough to be confirmed, I believe my professional record demonstrates that 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. 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 fully committed to following the precedents of higher courts faithfully and giving them full force and effect, regardless of any personal feelings I might have.

9. **Every nominee who comes before this Committee assures me that he or she will follow all applicable precedents and give them full force and effect, regardless of whether he or she personally agrees or disagrees with those precedents. 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: It is my understanding that the Court's opinion is referring to same-sex marriages made lawful by state law.

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

- iii. Is it your understanding that this holding and precedent is limited only to those circumstances in which states have legalized or permitted same-sex marriage?**

Response: Yes.

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

Response: Yes. If confirmed, I would be committed to upholding faithfully and fully the precedent in *Windsor* as well as all other precedent of the Supreme Court and the Second Circuit.

- b. Throughout the Majority opinion, Justice Kennedy went to great lengths to recite the history and precedent establishing the authority of the separate States to regulate marriage. For instance, near the beginning, he wrote, “By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States.”²**

- i. Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.**

Response: Yes.

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

Response: Yes. If confirmed, I would apply faithfully this portion and all portions of the Supreme Court’s decision in *Windsor* as well as all other decisions of the Supreme Court and the Second Circuit.

- 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?**

² *Id.* at 2689-2690.

³ *Id.* at 2691.

Response: Yes. If confirmed, I would apply faithfully this portion and all portions of the Supreme Court's decision in *Windsor* as well as all other decisions of the Supreme Court and the Second Circuit.

- 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.

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

Response: Yes. If confirmed, I would apply faithfully this portion and all portions of the Supreme Court's decision in *Windsor* as well as all other decisions of the Supreme Court and the Second Circuit.

- e. Justice Kennedy wrote, "The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'"⁵

- i. Do you understand this portion of the Court's opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes.

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

Response: Yes. If confirmed, I would apply faithfully this portion and all portions of the Supreme Court's decision in *Windsor* as well as all other decisions of the Supreme Court and the Second Circuit.

10. 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?

⁴ *Id.* (internal citations omitted).

⁵ *Id.* (internal citations omitted).

Response: If confirmed and faced with a case of first impression, I would begin with the text and structure of the constitutional, statutory or regulatory provision at issue, to the extent that the case involved such a provision, and look for its plain meaning. To the extent that the plain meaning of the relevant text did not yield a clear answer, I would apply the means of statutory construction adopted by the Supreme Court and the Second Circuit. I also would review and apply, to the extent applicable, closely related or analogous Supreme Court and Second Circuit decisions as well as such decisions of other circuits.

- 11. 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: If confirmed, I would apply that decision regardless of my personal beliefs.

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

Response: A statute enacted by Congress is presumed to be constitutional. A federal court should declare a statute enacted by Congress unconstitutional only where the constitutional question cannot be avoided and the statute is clearly inconsistent with the Constitution.

- 13. 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: If confirmed, I would interpret the meaning of the Constitution consistent with the Supreme Court and Second Circuit precedent applicable to the specific provision at issue. As a result, unless a specific Supreme Court or Second Circuit decision requires that a district judge rely on foreign law or the views of the “world community” in determining the meaning of the Constitution, there is no basis for doing so.

- 14. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?**

Response: I believe unequivocally in the rule of law. It is essential to this nation’s success and I am committed to maintaining it. If confirmed, I would only issue decisions grounded in precedent and the text of the law, rather than any ideology or other motivation. In my professional career, I have presented arguments to courts grounded in precedent and the text of the law. Also, as the City of New Haven’s Corporation Counsel, I have issued formal legal opinions to various public officials and these legal opinions have been grounded in precedent and the text of the law.

- 15. 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: If confirmed, I would set aside any personal views and treat all litigants fairly, regardless of their background or circumstances. I would decide cases solely based on the relevant facts and the applicable law. As my professional record demonstrates, I would fulfill my professional obligations without regard to my personal views, if any. For example, as the City of New Haven's Corporation Counsel, I have issued formal legal opinions based on the relevant facts and the applicable law.

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

Response: If confirmed, I would manage my caseload by establishing reasonable and efficient schedules at the outset of a case's filing and identifying unique issues likely to complicate a case's prompt resolution. I would encourage the parties in complex litigation to engage in periodic status conferences and would use Magistrate Judges to assist with case management, facilitate an efficient discovery process and engage the parties in settlement discussions, if a resolution short of a trial seems possible. I also would try to decide motions, especially dispositive ones, as promptly as possible.

17. 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. Judges can and do play a significant role in controlling the pace and conduct of litigation. If confirmed, I would manage my caseload by establishing reasonable and efficient schedules at the outset of a case's filing and identifying unique issues likely to complicate a case's prompt resolution. I would encourage the parties in complex litigation to engage in periodic status conferences and would use Magistrate Judges to assist with case management, facilitate an efficient discovery process and engage the parties in settlement discussions, if a resolution short of a trial seems possible. I also would try to decide motions, especially dispositive ones, as promptly as possible. All of these steps would contribute to controlling the pace and conduct of litigation, ensuring that cases filed are either tried or resolved as quickly as possible to minimize the time and expense of litigation.

18. You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?

Response: If confirmed, I would decide cases by considering the relevant facts presented by the parties and applying the binding precedent to those facts. In making decisions, I would consider the submissions of the parties and conduct independent legal research to ensure that I apply binding precedent to the case. The most difficult part of the transition would be developing greater knowledge of criminal law, given that my legal practice has been focused primarily on civil matters.

19. According to the website of American Association for Justice (AAJ), it has established a Judicial Task Force, with the stated goals including the following: "To

increase the number of pro-civil justice federal judges, increase the level of professional diversity of federal judicial nominees, identify nominees that may have an anti-civil justice bias, increase the number of trial lawyers serving on individual Senator's judicial selection committees".

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

Response: No.

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

Response: No.

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

Response: I received these questions on August 5, 2014. After reviewing them, I conducted legal research and drafted my answers. I reviewed my responses with a representative of the Office of Legal Policy of the Department of Justice. I continued reviewing and editing my responses until I authorized the Office of Legal Policy to submit them to the Committee on my behalf.

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

Response: Yes.