

**Senator Grassley
Questions for the Record**

**Mark Howard Cohen
Nominee: U.S. District Judge for the Northern District of Georgia**

- 1. You were on the Northern District of Georgia Magistrate Judge Selection Panels for several years. What qualities did you look for when you considered potential judges and do you possess those qualities?**

Response: The qualities that I looked for in interviewing candidates for a position as a United States Magistrate were an appropriate judicial temperament, a commitment to adhere to the rule of law and precedent, and a history of hard work and respect for both litigants and counsel. I believe that I possess those qualities.

- 2. According to your questionnaire, the entirety of your legal practice has been in civil matters.**
 - a. What steps have you taken and do you plan to take to get up to speed in criminal matters?**

Response: I clerked for a United States Magistrate for the Northern District of Georgia for two years at the beginning of my legal career, but have not had much exposure to federal criminal law or procedure since that time. After my nomination, I began to familiarize myself with the United States Sentencing Guidelines which, although no longer mandatory, still help to ensure consistency and uniformity in sentencing. I also have reviewed the Federal Rules of Criminal Procedure and the materials relating to adjudicating criminal matters that have been provided to me by the Federal Judicial Center. Finally, I have contacted several active District Court judges and observed various public criminal proceedings in an effort to get “up to speed” and will continue to utilize these jurists as a resource through my confirmation proceedings.

- b. What do you believe is the purpose of sentencing?**

Response: There are several potential purposes in issuing a sentence in a criminal matter. First is to punish the defendant for the specific act committed and provide an incentive to obey the law in the future. Second is deterrence, which is to discourage the defendant or other members of society from committing the same act. Third is to protect the public (if the sentence includes incarceration) from the danger of exposure to the defendant for a period of time. Fourth is rehabilitation of the offender to assist him or her in the transition back into society.

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

Response: The most important attribute of a judge is the ability to hear and decide cases based on applicable law and precedent and with complete impartiality. I believe that I possess this attribute.

- 4. 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 treat each person who appears before the Court with respect and civility. A judge also should be open-minded, prepared to listen, and patient. I believe that I possess those qualities.

- 5. 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 as a district judge, I will faithfully apply the legal precedents of the Supreme Court and the Eleventh Circuit Court of Appeals to all cases which come before me regardless of whether I agree or disagree with those precedents.

- 6. 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, I understand this statement and the majority opinion to be binding precedent.

- ii. What is your understanding of the set of marriages to which Justice Kennedy refers when he writes "lawful marriages"?**

Response: In *Windsor*, Justice Kennedy's use of the term "lawful marriages" refers to "marriages made lawful by the State." 133 S. Ct. 2675, 2695 (2013).

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. *See Windsor*, 133 S. Ct. at 2695 (“The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. . . . The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. . . . This opinion and its holding are confined to those lawful marriages.”).

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

Response: Yes, as well as any other relevant precedent of the Supreme Court and the Eleventh Circuit Court of Appeals.

- 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, along with all other portions of the *Windsor* majority opinion.

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

Response: Yes, along with all other portions of the *Windsor* majority opinion.

- 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, along with all other portions of the *Windsor* majority opinion.

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

Response: Yes, along with all other portions of the *Windsor* majority opinion.

² *Id.* 2689-2690.

³ *Id.* 2691.

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, along with all other portions of the *Windsor* majority opinion.

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

Response: Yes, along with all other portions of the *Windsor* majority opinion.

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, along with all other portions of the *Windsor* majority opinion.

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

Response: Yes, along with all other portions of the *Windsor* majority opinion.

7. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: In deciding cases of first impression, I would first look to the text of the applicable constitutional provision, statute, or regulation. If the text is clear and unambiguous, I would decide the case based on the plain meaning of the text. If the text is ambiguous, I would look to the rules of statutory construction established by the Supreme Court and the Eleventh Circuit to assist in interpreting the text. Although I recognize that decisions from other circuits are not binding, I also would consider as persuasive authority those precedents from other circuits that have interpreted the same or similar texts. If these sources still did not resolve the issue, and in limited circumstances, I would examine the legislative intent of the provision as may be exemplified by its legislative history.

⁴ *Id.* (internal citations omitted).

⁵ *Id.* (internal citations omitted).

- 8. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?**

Response: A district judge is bound by the precedent of the Supreme Court and the Court of Appeals in his or her circuit. I would apply any binding Supreme Court or Eleventh Circuit precedent without regard to any personal belief.

- 9. 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 have the presumption of constitutionality, and courts must exercise judicial restraint prior to declaring a statute unconstitutional. When reviewing a statute enacted by Congress, courts should avoid constitutional issues, if possible, and endeavor to interpret the statute in a manner that upholds its constitutionality. If the court must further address the constitutional issue, it should strike down a statute only if it is clearly shown that Congress has exceeded its authority under the Constitution or acted contrary to a provision of the Constitution.

- 10. In your view, is it ever proper for judges to rely on foreign law, or the views of the “world community”, in determining the meaning of the Constitution? Please explain.**

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

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

Response: A judge’s ruling should never be affected by political ideology or motivation. If confirmed as a district judge, I will be committed to rendering impartial decisions based upon an application of the rule of law to the particular facts of the cases before me. This is evidenced by those times in my career when I acted either as an administrative law judge or special master and rendered decisions on such an impartial basis.

- 12. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?**

Response: I have been a civil litigator for more than 30 years, during which time I have represented individuals, government agencies, corporations, and small businesses. Throughout my career, I have zealously represented my clients’ interests within the bounds of the law without regard to my personal beliefs. I have endeavored to maintain the highest ethical standard and to treat people with fairness and respect. If confirmed as a district judge, I pledge to decide cases based upon an impartial application of the law, after considering with an open mind the arguments of all parties before the court. I will treat all

parties before me with fairness, respect, civility, and patience in accordance with my oath of office.

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

Response: In my experience as a practicing litigator, I have learned that active management of cases by district judges promotes their fair and timely resolution. If confirmed as a district judge, in accordance with the Federal Rules of Criminal and Civil Procedure as well as the Local Rules of the Northern District of Georgia, I would establish scheduling orders with firm discovery deadlines and trial dates. With the assistance of the staff of my chambers and the Clerk's office, I would consider motions and discovery disputes promptly and convene status conferences to ensure that cases move forward expeditiously. If appropriate, I also would engage the assistance of magistrate judges and encourage settlement and dispute resolution through mediation.

14. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: Yes. The parties always should have the opportunity to discuss with the court the proper pace and manner in which the litigation should proceed. The court, however, must ensure that the case proceeds in a fair and timely manner giving consideration to the relevant facts and circumstances of the individual case. Trial judges have a number of tools available to them to control the pace of litigation, including issuing scheduling orders, convening regular status conferences, and establishing firm trial dates. I also would endeavor to decide motions promptly and efficiently resolve discovery disputes.

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

Response: If confirmed, I intend to resolve legal issues based on applicable constitutional and statutory provisions, in conjunction with Supreme Court and Eleventh Circuit precedent. I am fortunate to have had substantial litigation experience in the Northern District of Georgia. However, aside from my clerkship with a United States Magistrate Judge, I have not had much experience in federal criminal matters. I will fully familiarize myself with the United States Sentencing Guidelines and thoroughly avail myself of the substantial experience of my colleagues on the district court and the material and training provided by the Federal Judicial Center to assist me in making as smooth a transition as possible.

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 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 these questions via email on May 20, 2014. I personally drafted responses and provided them to representatives of the Department of Justice, Office of Legal Policy, on May 21, 2014 for review. After receiving comments and putting my responses in final form, I authorized the Department of Justice to submit my responses to the Senate Judiciary Committee on my behalf.

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

Response: Yes.