

**Senator Grassley
Questions for the Record**

**Randolph D. Moss
Nominee, U.S. District Judge for the District of Columbia**

- 1. At a recent event on campaign finance law, you stated that an individual's First Amendment rights were "incredibly important" but that the public also had a right "to participate in meaningful ways in the democratic process." You described that public participation as a "core constitutional principle" that had "equal stature" with an individual's First Amendment rights. Justice Breyer's dissenting opinion in *McCutcheon* made similar claims. Justice Breyer wrote: "the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech matters."**

- a. Do you believe that the First Amendment creates a right to "collective speech" in addition to the free-speech rights that an individual enjoys?**

Response: I am unaware of any constitutional rule or precedent that recognizes a right to "collective speech" that is distinct or different from the individual liberties protected by the First Amendment. In various contexts, however, the Supreme Court and other courts have sustained First Amendment challenges brought by associations, corporations, or other groups of individuals. The First Amendment, moreover, protects the right of free association, including the right of individuals to engage as a group in expressive activity.

- b. Please explain the nature of collective speech rights and explain their origin in the constitution? Do you still think they are of "equal stature" with individual rights?**

Response: I am unaware of any constitutional rule or precedent that recognizes "collective speech rights" that are distinct or different from the individual liberties protected by the First Amendment. The First Amendment does, however, protect the right of free association, including the right of individuals to join together to engage in speech. As the Supreme Court recognized in *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not guaranteed."

- c. Please explain what you meant when you said that the public's right to participate in the political process was a "core constitutional principle" of "equal stature" with individual First Amendment rights?**

Response: I made these remarks at an event at the Robert J. Dole Institute of Politics on October 8, 2013. At that event, I observed that cases addressing the constitutionality

of the campaign finance laws raise extremely important First Amendment issues. I also argued that the right of the public to participate in a meaningful way in the democratic process also implicates First Amendment or other core constitutional principles. What I intended to convey was that, when the Supreme Court considers, for example, whether the governmental interest in preventing actual or apparent corruption of the democratic process is sufficient to support a law that limits campaign contributions, it is assessing deeply important interests on both sides of the equation. Indeed, in *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434, 1462 (2014), the Supreme Court held that “[t]he Government has a strong interest, no less critical to our democratic system, in combatting corruption and its appearance.” The Court further held, however, that the aggregate limits on contributions at issue in that case could only be upheld if they adequately furthered a governmental interest in combatting actual or apparent “quid pro quo” corruption and that they failed to do so. If confirmed to serve as a district court judge, I would fully and faithfully apply that decision and all other relevant Supreme Court and D.C. Circuit precedents.

d. How do you think courts should decide what types of speech should be protected as “collective speech”? What legal principles would guide this inquiry?

Response: I am unaware of any constitutional rule or precedent that recognizes “collective speech” rights that are distinct or different from the individual liberties protected by the First Amendment. If confirmed to serve as a district court judge, I would be guided by the Constitution and the precedents of the Supreme Court and Court of Appeals for the D.C. Circuit. To the extent applicable, I would look to precedents involving expressive free association and the rights of associations, corporations, and other groups to engage in protected expression.

2. At a Brookings Institution event in 2008, you were skeptical that the Second Amendment conferred an individual right to keep and bear arms and said that “there is a substantial argument that the amendment is not about protecting individuals versus the state.” You were also skeptical that the Fourteenth Amendment incorporated the protections of the Second Amendment. In the meantime, the Supreme Court has held that the Second Amendment confers an individual right – not a collective right – to keep and bear arms. The Court has also held that the Second Amendment is fully incorporated through the Fourteenth Amendment.

a. In light of your comments on the Second Amendment, please describe which constitutional rights are individual rights as opposed to what Justice Breyer calls collective rights.

Response: I am unaware of any constitutional rights that I would characterize as “collective,” as opposed to “individual.” In particular, as the Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Second Amendment right to keep and bear arms is an individual right, and not a collective right. In my remarks at the Brookings Institution, I did not intend to suggest otherwise, but rather simply meant to flag the question, which the Supreme Court had not yet addressed at that time,

whether that individual right was incorporated under the Fourteenth Amendment and thus binding on the States. In briefly discussing with the other panelists the arguments that might be raised in litigation, I also did not intend to suggest that I had reached any personal conclusions on that question or that I was an expert on the relevant history, and I offered no prediction of the likely outcome in the courts. Subsequently, the Supreme Court definitively resolved the question in *McDonald v. Chicago*, 561 U.S. 742 (2010), and held that the Second Amendment right to keep and bear arms is a fundamental right that is also binding on the States. If confirmed to serve as district court judge, I would fully and faithfully apply both the *Heller* and *McDonald* decisions.

- b. Please explain whether you believe there are other constitutional provisions that confer collective, as opposed to individual, rights.**

Response: I am unaware of any constitutional rights that I would characterize as “collective” as opposed to “individual.”

- 3. As an undergraduate at Hamilton College, you wrote an article entitled “Why the United States Has Failed to Evolve: An Analysis of Current Western Interest Intermediation Systems.” The article compares political and economic centralization – what you refer to generally as “corporatism” – in Europe and the United States. You wrote:**

The United States’ political system is based on the principle of participation. Hence, there has always been a cultural hostility express towards organized groups which attempt to dominate policy formation. It is felt that such groups jeopardize the fundamental principles of the United States....I believe that the public of the United States would respond hostilely to any politician endorsing a shift in policy-making emphasis from the legislative branch to a collaborative tripartite system (i.e., a system in which employers, labor, and the government frequently interact through more or less institutionalized channels)

- a. I recognize that you wrote this article during your undergraduate years. Nonetheless, please explain whether these comments still reflect your views.**

Response: As the question notes, I wrote this article as an undergraduate, over thirty years ago. Although I do not have a clear recollection of my thinking at the time, as I now read the article, I believe I was describing why the United States has not adopted a system in which particular organizations are granted a “representational monopoly” in policy formation. As I read the article, I noted that a system in which the government designates particular representatives—such as representatives of employers, labor and the government—to develop policy would be at odds with the strong tradition of pluralism and democracy in the United States. It is currently my view that efforts to adopt such a “representational monopoly” would be at odds with those traditions.

4. 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. The Court expressly states that its holding applies only “to those lawful marriages.”

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

Response: My understanding is that the Court was referring to “same-sex marriages made lawful by the State.”

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 to serve as a district court judge, I would fully and faithfully apply this and all other Supreme Court and D.C. Circuit precedents.

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.

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

² *Id.* 2689-2690.

Response: Yes.

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

Response: Yes. If confirmed to serve as a district court judge, I would fully and faithfully apply the *Windsor* decision and all other Supreme Court and D.C. Circuit precedents.

- 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. If confirmed to serve as a district judge, I would fully and faithfully apply the *Windsor* decision and all other Supreme Court and D.C. Circuit precedents.

- 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 to serve as a district court judge, I would fully and faithfully apply the *Windsor* decision and all other Supreme Court and D.C. Circuit precedents.

- 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**

³ *Id.* 2691.

⁴ *Id.* (internal citations omitted).

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 to serve as a district court judge, I would fully and faithfully apply the *Windsor* decision and all other Supreme Court and D.C. Circuit precedents.

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

Response: The most important attribute of judge is the ability impartially to decide cases based on the law and facts—and the law and facts alone. I believe I possess this ability and, if confirmed, would be committed to doing so every day of my tenure as a judge.

6. **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 open-minded, fair, decisive, and hardworking. It is particularly important, moreover, that a judge understand his or her role as a public servant, who only has that authority provided by the law. I believe that I have the appropriate temperament, and, if confirmed to serve as a district court judge, I would constantly strive to live up to this standard.

7. **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 absolutely committed to following Supreme Court and D.C. Circuit precedents and, as a district court judge, would not depart from any Supreme Court or D.C. Circuit precedent, even if I personally disagreed with that decision. The obligation of a lower court judge to follow the precedents of higher courts is a bedrock principle in the law, which I would faithfully follow.

8. **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**

⁵ *Id.* (internal citations omitted).

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: If confronted with a case of first impression, I would start with the relevant constitutional, statutory, or regulatory text. If the text did not resolve the question, I would look to Supreme Court and D.C. Circuit precedents involving analogous or related questions and, in the absence of a relevant Supreme Court or D.C. Circuit precedent, I would look to precedents from other circuits and from district courts. In addition, I would look to the relevant precedents regarding the appropriate “tools of interpretation” to apply in particular circumstances. For example, in appropriate cases, I would apply the framework established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or would consider the purpose and history of the provision at issue.

- 9. 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 to serve as a district court judge, I would fully and faithfully apply all relevant Supreme Court and D.C. Circuit decisions, regardless of whether I agreed with those decisions on the merits.

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

Response: All statutes enacted by Congress are presumed constitutional and courts should approach constitutional challenges to legislation cautiously. Where a statute violates the Constitution, however, it is the duty of a federal court with jurisdiction over a live case or controversy to enforce the Constitution and, if necessary, to declare the statute unconstitutional.

- 11. 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: In my view, the Constitution is purely domestic law and neither foreign law nor the views of the “world community” can change the meaning of the Constitution. The Supreme Court has, on very rare occasion, considered foreign law in deciding constitutional cases, and, if confirmed to serve as a district court judge, I would be bound by that precedent. Moreover, in appropriate circumstances, courts may consider 18th century British common law in applying particular constitutional provisions. *See, e.g., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) (“ . . . the Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English courts in the late 18th century”)

- 12. 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: In every job I have held since graduating from law school, I have endeavored to do my very best to perform the unique role demanded in each particular position—whether as a law clerk, an advocate, or a lawyer for the government at the Office of Legal Counsel—and I believe that I have succeeded in doing so. In particular, I think that the opinions that I authored while at the Office of Legal Counsel reflect a fealty to the law and a commitment to getting it right. If confirmed to serve as a district court judge, I would commit myself to meet this new challenge and to strive to do my very best to perform the unique role of a judge: that is, to be open-minded and to decide cases fairly based solely on the law and fact.

13. 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: Nothing is more central to the role of a judge than putting aside personal views and being fair to everyone who appears before the court. I understand that a judge only has that authority he or she is given by the law, and that any decision that is not based solely on the law and facts is illegitimate. If confirmed to serve as a district court judge, I would strive to be the very best judge possible—that is, to decide cases fairly, without personal bias, and based exclusively on the governing law and facts.

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

Response: Based on my experience as a litigator, I understand the importance of deciding motions and cases promptly and ensuring that the parties are held to a reasonable schedule. If confirmed to serve as a district court judge, I would promptly meet with counsel to set a schedule for motions, discovery, and trial. I would then actively manage my docket to ensure that the parties move forward with reasonable dispatch and, in criminal cases, I would enforce the Speedy Trial Act. I would also work hard to expeditiously decide matters pending before the court.

15. 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 play a significant role in controlling the pace and conduct of litigation and that they have a duty to ensure that cases are resolved in an efficient and timely manner. If confirmed to serve as a district court judge, I would promptly meet with counsel to set a schedule for motions, discovery, and trial. I would then actively manage my docket to ensure that the parties move forward with reasonable dispatch and, in criminal cases, I would enforce the Speedy Trial Act. I would also work hard to expeditiously decide matters pending before the court.

16. 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: Although I have spent much of my legal career as an advocate, I served for approximately five years in the Office of Legal Counsel at the U.S. Department of Justice. In that capacity, I endeavored to provide legal advice based on the best view of the law, and not simply arguable positions. If confirmed to serve as a district court judge, I would approach each and every case with an open mind and would decide cases fairly, based on the governing law and facts. I would thoroughly consider the briefs and arguments submitted by the parties and, where appropriate, the relevant evidence presented. I would also look to Supreme Court and D.C. Circuit precedents as binding authority, would review all of the relevant textual provisions, would look to the decisions of other courts, and would consider any other material that the parties rely upon. If confirmed to serve as a district court judge, I anticipate that the most difficult part of the transition for me would involve gaining additional experience and expertise regarding criminal law and trial practice. If confirmed, I will commit substantial time and effort to reviewing the relevant statutes and rules, will take advantage of judicial training and education opportunities, and will, as appropriate, seek guidance and advice from other judges on the court.

17. **Your questionnaire indicates you are a member of the American Constitution Society for Law and Policy. There is nothing wrong with membership in such groups, but I do have a question about how the goals of that organization might affect your judgments, if confirmed. Peter Edelman, as chair of the board of directors for American Constitution Society for Law and Policy, stated he would help to engage a younger audience about how the law can improve the lives of everyday citizens. “What we want to do is promote a conversation — the idea of what a progressive perspective of the constitution is and what it means for the country.” He also indicated that a goal of the organization is “countering right-wing distortions of our Constitution.” Also, some of the stated goals and missions of the organization are “countering right-wing distortions of our Constitution” and “debunking conservative buzzwords such as ‘originalism’ and ‘strict construction’ that use neutral-sounding language but all too often lead to conservative policy outcomes.”**

- a. **What is your view of the role of the courts on improving the lives of everyday citizens?**

Response: I am not familiar with Mr. Edelman’s comments and do not know what he had in mind. The role of the courts, in my view, is to treat everyone who appears before them fairly and to decide cases based on the governing law and facts. To the extent courts operate fairly and efficiently, they benefit the public.

- b. **Can you please identify what “right-wing distortions of the Constitution” you are concerned about or feel need to be countered or why concepts such as originalism and strict construction need to be “debunked?”**

Response: I am not familiar with Mr. Edelman's comments and do not know what he had in mind. If confirmed to serve as a district court judge, I would not regard it as my role to counter any purported "right-wing distortions of the Constitution" or to "debunk" concepts such as originalism and strict construction. Rather, I would fully and faithfully apply the decisions of the Supreme Court and the D.C. Circuit and would decide cases based solely on the governing law and facts.

- c. What does the idea of a progressive perspective of the constitution mean for the country, in your view?**

Response: I am not familiar with Mr. Edelman's comments and do not know what he had in mind. In my view, the meaning of the Constitution should not be informed by anyone's views of politics or public policy. If confirmed to serve as a district court judge, I would fully and faithfully adhere to Supreme Court and D.C. Circuit precedents in interpreting the Constitution.

- d. Can you please identify what "right-wing distortions of the Constitution" you are concerned about or feel need to be countered?**

Response: I am not familiar with Mr. Edelman's comments and do not know what he had in mind. If confirmed to serve as a district court judge, I would not seek to counter any purported "right-wing distortions of the Constitution," but rather would fully and faithfully adhere to the governing law in interpreting the Constitution.

- e. If you are confirmed as a federal judge how would you seek to promote a "progressive perspective of the Constitution; or counter "right-wing distortions of the Constitution?"**

Response: I would not do either.

- 18. 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.

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

Response: I received the written questions on the evening of May 27, 2014, and personally researched and drafted my responses to the questions. On May 29, I provided a draft of my responses to the Justice Department's Office of Legal Policy and reviewed them with a representative of that office. I continued to research and edit my responses and authorized the Office of Legal Policy to submit them to the Committee on my behalf on June 2.

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

Response: Yes.