

Senator Grassley
Questions for the Record

Kathleen Marie Sweet
Nominee, U.S. District Judge for the Western District of New York

- 1. How would you define “originalism” and how would you describe your judicial philosophy or approach to cases?**

Response: The Supreme Court has indicated that originalism is the interpretation of text “guided by the principle that the 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) (internal citation and quotations omitted). If confirmed, my judicial approach would be to apply governing case law to the facts of the case before me.

- 2. The majority of your legal practice has occurred in state court. What steps have you taken, or will you take, to get up to speed on the federal system?**

Response: Although most of the cases I have handled during my career have been in state court, I have litigated several federal cases and have acted as a certified mediator in the Western District of New York. In addition, I have begun to review materials provided by the Federal Judicial Center and I have attended continuing legal education programs presented by the Federal Practice Committee of the Bar Association of Erie County. Since my nomination I have also observed several proceedings in civil and criminal matters in the Western District of New York.

- 3. The entirety of your practice has been litigating civil matters. What steps have you taken, or will you take, to get up to speed on criminal matters?**

Response: Since I was recommended for this position I have reviewed in detail the Federal Rules of Criminal Procedure and I have read a number of Supreme Court decisions in criminal matters. I will pursue additional educational opportunities so that I can master criminal law and be fully prepared to address criminal cases in the event I am confirmed.

- 4. Do you believe that a judge’s gender, ethnicity, or other demographic factor has any or should have any influence in the outcome of a case? Please explain.**

Response: No, a judge’s gender, ethnicity or other demographic factors should have no influence in the outcome of a case. None of those personal characteristics would affect my decisions or how I would treat parties, lawyers, witnesses or court personnel.

5. **With respect to the individual Second Amendment right to keep and bear arms, please provide examples of regulations that would be too restrictive, such that the rights guaranteed by the Second Amendment are abridged.**

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that statutes banning handgun possession in the home violated the Second Amendment. In that case the District of Columbia had generally prohibited the possession of handguns and had required residents to keep unloaded, disassembled or trigger locked any other registered gun in their possession. The Supreme Court held such prohibition and restriction violated the Second Amendment. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that the Second Amendment right to keep and bear arms is fully applicable to the states by virtue of the Fourteenth Amendment. In that case, two Illinois cities had enacted handgun bans effectively banning handgun possession by almost all private citizens. In *New York State Rifle and Pistol Association v. Cuomo*, 804 F.3d 242 (2d Cir. 2015), the Second Circuit held that a New York law prohibiting possession of a magazine for a firearm loaded with more than seven rounds violated the Second Amendment.

6. **You were a part of the New York State Bar Association Task Force on Criminal Discovery and signed onto the majority's findings. The task force suggested several changes to New York's criminal system, including a broadening of discovery available to defendants.**

- a. **Why did you join the task force?**

Response: I accepted the invitation of New York State Bar Association President Seymour James to join the Task Force. He felt I could contribute to the work of the Task Force, particularly in discussions of the exchange or disclosure of expert witness information and reports, which is a routine and more standardized practice in the civil cases I handle on a daily basis.

- b. **The minority was concerned that the changes might impact the cooperation of civilian witnesses. How did you resolve these concerns?**

Response: The minority's concerns were given serious consideration and the majority sought to address those concerns in the recommendations of the Task Force by including additional measures of protection for cooperating civilian witnesses and prescribing the timing and scope of disclosure of civilian witness information and statements. The majority report also encouraged enhanced penalties for witness tampering or intimidation. The majority recommendation sets forth broad grounds and flexible standards for protective orders and the suspension of discovery when likely dangers to witnesses exist. Where a protective order is denied, the prosecution could obtain expedited appellate review under the Task Force's proposed reforms.

7. **As amended on December 1, 2015, Federal Rule of Civil Procedure 26(b)(1) defines the “scope of discovery” in litigation matters as “any nonprivileged matter that is relevant to any party’s claim or defense *and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.*”**

Chief Justice Roberts explained in his 2015 Year-End report that these amendments “make a significant change, for both lawyers and judges.”

- a. What is the effect of this amendment to Rule 26(b)(1)?**

Response: The amendment codified and highlighted the longstanding common law goals of the judiciary which include allowing all appropriate and necessary discovery while discouraging or prohibiting discovery abuses and excesses.

- b. If confirmed, how would you assess whether a discovery request is “proportional to the needs of the case”?**

Response: I would try to ensure that the parties have all necessary discovery relevant to the claims and defenses they have pled. To do that I would identify the matters germane to the controversy and where possible prohibit the parties from encumbering the litigation with excessive, irrelevant or costly discovery pursuits that do not serve the needs of the case.

- c. How, if at all, would your assessment of whether a discovery request is “proportional to the needs of the case” differ from your view of the scope of discovery under the prior version of the rule?**

Response: Discovery under the amended rule takes into account the parties’ relative access to materials sought and not just whether the materials sought may lead to or are calculated to lead to admissible evidence.

8. **The Chief Justice’s 2015 Year-End report also noted reports from litigants that “[a] judge who is available for prompt resolution of pretrial disputes saves parties time and money.”**

As amended on December 1, 2015, Rule 16 requires a district judge to issue a scheduling order within “the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.” This amendment shortened both applicable deadlines by 30 days.

- a. **Please explain the approach you will take to case management and the tools you will use to manage cases in a just and efficient manner if you are confirmed.**

Response: If confirmed I would seek guidance from judicial colleagues and work hard to move cases through the system with deliberate attention to getting them resolved. I would encourage mediation and engage the magistrate judges of our district so that cases might be resolved as soon as possible and at whatever stage is appropriate for a particular case.

- b. **Please explain and describe any effect the 2015 amendments to the Federal Rules of Civil Procedure will have on your approach to case management if confirmed.**

Response: If confirmed I would firmly and justly invoke and apply the amendments to encourage more expeditious resolution of cases at whatever stage they can be resolved. I would apply cost allocation mechanisms when appropriate “to protect a party from annoyance, embarrassment, oppression or undue burden or expense”. Rule 26(c)(1).

9. **As you know, parties frequently propose protective orders for the approval of the district judge during the course of discovery. The 2015 amendments to the Federal Rules of Civil Procedure included a change to Rule 26(c)(1)(B) adding “allocation of expenses” to the list of items that may be included in a protective order.**

- a. **How would you evaluate cost-allocation mechanisms included in proposed protective orders, if confirmed?**

Response: I would consider the parties’ submissions and the factors listed in the Rule and would analyze the need for the discovery sought and the likely expense associated with it.

- b. **Under what circumstances, if any, would you consider ordering allocation of expenses pursuant to Rule 26(c)(1)(B) absent suggestion of the parties?**

Response: Absent an application by a party I would not likely consider ordering allocation of expenses pursuant to Rule 26(c)(1)(B).

- c. **Do you understand the 2015 amendment to Rule 26(c)(1)(B) to confer upon the district court a new authority or obligation to manage discovery costs through cost allocation?**

Response: No.

- d. **How, if at all, do you understand the cost-allocation provisions of Rule 26(c)(1)(B) to relate to those found in Rule 37?**

Response: Cost allocation provisions of Rule 26(c)(1)(B) are distinct from the sanction remedies under Rule 37. If confirmed I would carefully apply the cost allocation provisions, mindful of the difference between those and the penalties that may be assessed when a party unreasonably resists or fails to cooperate in the discovery process.

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

Response: I believe the most important attribute of a judge is neutrality. To me that means not only impartiality but a sense of fair play at all stages and as to all participants in a litigated matter. I do believe that I have these qualities.

11. 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: I believe the most important elements of judicial temperament include a disposition that conveys in a convincing fashion an impartial demeanor. A judge should also convey humility and a recognition that cases are not about the judge but rather about the process of trying to achieve justice for the parties. I do believe that I meet that standard.

12. 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 would abide by the binding precedent of the Supreme Court and the Second Circuit. Any personal opinion I may have would play no role whatsoever in how I would decide cases or issues.

13. 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: If confirmed and confronted with what is truly a case of first impression on which there is no controlling precedent, I would look at the language of the relevant statute, regulation or rule. In the event that the matter could not be resolved on the plain language of the statute, regulation or rule, I would look to Supreme Court and Second Circuit decisions for guidance from cases where those courts had interpreted similar statutes, regulations or rules. I would endeavor to make narrow such a decision and to limit it to the facts and circumstances of the controversy before the court, so as to avoid any unintended or unnecessarily broad impact from a decision I might make.

- 14. 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 relevant decision of the higher court in every instance regardless of any personal opinion I might hold about the wisdom of the decision.

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

Response: When Congress enacts a law or any part of a law that it is not authorized by the Constitution to enact, a federal court is obligated to strike it as unconstitutional. This is a rare event and one of last resort. It should be avoided if a case can be decided on other grounds.

- 16. 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: It is inappropriate to rely on foreign law or the world community to determine the meaning of the Constitution. Federal judges should determine the meaning of the Constitution from its plain language and from the decisions of the Supreme Court and circuit courts.

- 17. 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 have never been guided by any political ideology during my career as an attorney. I can assure the Committee that if confirmed I would conduct myself in the same manner as a judge and my decisions would be grounded in binding precedent and the text of the law rather than any political ideology or motivation.

- 18. 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 do not prejudge people or issues and, if I am confirmed, every individual and party will be treated with respect and equal consideration in my court room.

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

Response: I would seek guidance from judicial colleagues and work hard to move cases through the system with deliberate attention to getting them resolved. I would encourage

mediation and engage the magistrate judges of our district so that cases might be resolved as soon as possible and at whatever stage is appropriate for a particular case.

- 20. 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 do believe that judges have a role in controlling the pace and conduct of litigation. If confirmed, I will fully and fairly consider the interests, needs and strategic positions of the parties, but I will not defer to them nor relinquish control over the pace of litigated matters assigned to me. I would hold parties accountable to scheduling orders and would encourage mediation whenever possible.

- 21. 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.” While you may not be familiar with the specific context of this statement, do you agree with it?**

Response: I am not familiar with the context of the President’s statement as reflected in the question. Personal values must be set aside by judges and jurors when they carry out their roles as neutral and impartial agents of the court.

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

Response: I reviewed the questions upon receipt on June 29, 2016. On July 5, 2016, I sent my responses to the Office of Legal Policy. I discussed my responses with staff from the Office of Legal Policy. I finalized my responses and authorized the Office of Legal Policy to submit them on my behalf.

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

Response: Yes.

Questions for the Record
Senate Committee on the Judiciary
Senator Thom Tillis

Kathleen Marie Sweet
Nominee, U.S. District Judge for the Western District of New York

- 1. Some individuals have argued that the United States Constitution is a “living document,” subject to different interpretations as society changes. Do you subscribe to this point of view?**

Response: No, I do not believe that societal changes should influence interpretation of the Constitution.

- 2. What role, if any, should societal pressure or popular opinion play in interpreting statutes or the United States Constitution?**

Response: None.

- 3. Please define judicial activism. Is judicial activism ever appropriate?**

Response: As I understand it judicial activism involves a judge’s application of his or her own personal views rather than binding case law in order to reach a particular outcome on an issue before the judge. It is never appropriate.

- 4. When, if ever, is it appropriate for a federal court to rule that a statute is unconstitutional?**

Response: When Congress enacts a law or any part of a law that it is not authorized by the Constitution to enact, a federal court is obligated to strike it as unconstitutional. This is a rare event and one of last resort. It should be avoided if a case can be decided on other grounds.

- 5. What is a fundamental right? From where are these rights derived?**

Response: A fundamental right is one guaranteed by the Constitution. Fundamental rights are those listed within the Bill of Rights, the Constitution, or recognized by the United States Supreme Court. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997).

- 6. Do you believe the First Amendment or any other provision of the United States Constitution protects private citizens and businesses from being required to perform services that violate their sincerely held religious beliefs?**

Response: In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court held that “[a]lthough a law targeting religious beliefs as such is never permissible, if the object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest”. 508 U.S. at 533. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court held that the Religious Freedom Restoration Act of 1993 included within its protections the exercise of religion by a for-profit corporation and found that the contraceptives mandate sought to be enforced by the Secretary of Health and Human Services under the Patient Protection and Affordable Care Act failed to satisfy the least restrictive means requirement. The Court held that the mandate substantially burdened the exercise of religion and it was stricken as unconstitutional.

- 7. What level of scrutiny is constitutionally required when a statute or regulation related to firearms is challenged under the Second Amendment of the United States Constitution?**

Response: The Supreme Court has not articulated a test or level of scrutiny to be applied to such a challenge. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), however, the Court did note that the “rational basis” test “could not be used to evaluate the extent to which a legislature may regulate a specific enumerated right ... [such as] the right to keep and bear arms” (See Footnote 27). In *New York State Rifle and Pistol Association v. Cuomo*, 804 F.3d 242 (2d Cir. 2015), the Second Circuit applied intermediate scrutiny and held that a court need only inquire “whether the challenged laws are ‘substantially related’ to the achievement of [a] governmental interest”. 804 F.2d at 261.

- 8. Do you believe it is constitutional for states to require voters to show photo identification before being eligible to cast their vote?**

Response: The Supreme Court has held that it is constitutional for a state to require voters to show photo identification to be eligible to vote. *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

- 9. One challenge you will face as a federal judge is managing a demanding caseload. If confirmed, how will you balance competing priorities of judicial efficiency and due process to all litigants involved in the cases on your docket? Will you give certain cases priority over others? If so, please describe the process you will use to make these decisions.**

Response: If confirmed I would balance the competing priorities of judicial efficiency and due process to all litigants by setting and enforcing discovery scheduling orders,

encouraging mediation and by applying myself diligently to move cases as quickly as justice will allow. Pursuant to the Sixth Amendment and the Speedy Trial Act of 1974, criminal cases where a defendant's liberty is at stake will have priority over civil cases. Otherwise, no party or litigant will have priority or any advantage over any other.

10. Do you believe the death penalty is constitutional? Would you have a problem imposing the death penalty?

Response: The Supreme Court has held that the death penalty is constitutional. *Gregg v. Georgia*, 428 U.S. 153 (1976). I would dutifully follow all binding precedent from the Supreme Court and the Second Circuit, including implementation of the death penalty.