

Senator Grassley
Questions for the Record

Gerald Pappert,
Nominee: U.S. District Judge for the Eastern District of Pennsylvania

1. **You have served in a variety of legal settings, including as an associate and partner of various law firms, as Executive Vice President, General Counsel and Secretary of a corporation, and as First Deputy Attorney General and the Attorney General of the Commonwealth of Pennsylvania. How have these legal experiences helped prepare you for the federal bench?**

Response: My legal experiences have helped prepare me for the federal bench in a number of ways. I have represented clients in private practice and learned how important it is for lawyers and judges to demonstrate to the litigants that the process is available and fair to all. In the Attorney General's Office, I learned how law intersects with government and public policy. As the General Counsel of a public company, I learned how the law pertains to, and often dictates, the company's business strategy. I also gained an appreciation for the rights of the shareholders and the duty a company's management owes to the entity's public owners.

Most importantly, my career has given me an appreciation for all aspects of the civil and criminal justice systems. I have been a prosecutor and I have also done some criminal defense work. In private practice I primarily represented defendants in civil litigation, though I did have some smaller plaintiffs' cases as well. As Attorney General, I brought a number of cases on behalf of the Commonwealth and its citizens. As General Counsel of a public company, I oversaw litigation where the company was a plaintiff as well as a defendant. These experiences have combined to teach me that there are two sides to every issue. I know to give equal weight to the rights and positions of the plaintiff or prosecutor and the defendant. I have learned to keep an open mind, no matter the issue, and to never prejudge anyone's position. More than anything else, I believe this broad background in the law has helped prepare me to be a good federal judge.

2. **Over the course of your career, you have been active in politics; and you have donated to candidates of both parties. Please provide answers to the following questions:**

- a. **If confirmed, are you confident that you will be able to set aside your political views from how you would apply the law to the facts of any given case?**

Response: Yes. If I am fortunate enough to be confirmed, I am confident I would be able to set aside any views I might have, political or otherwise, from how I apply the law to the facts in any case before me.

b. In your view, should political considerations influence judicial decision-making in any way, shape or form?

Response: No. Political considerations, however defined, should not influence judicial decision-making in any way. A judge should apply the law, including all applicable precedent, to the facts of the case and make the best decision possible based on the law and the facts.

c. In your view, what are the differences in responsibility between an advocate and a judge?

Response: An advocate's responsibility is to take one side of an issue – his or her client's – and argue that position. While being cognizant of the potential strengths and weaknesses of the other side's position, an advocate is in a way closed minded to any arguments against those of the client. A judge, by contrast, must be the antithesis of an advocate. A judge's responsibility is to keep an open mind and give equal weight to all sides, making a decision only after giving each side equal consideration and applying the facts of the case to the applicable law, including all precedent.

3. What are some qualities or characteristics that you have seen in judges (state or federal) that you would hope to avoid, if confirmed?

Response: Arrogance, poor temperament, disregard for the anxieties and fears of the litigants and a failure to understand the pressures and responsibilities of the lawyers are characteristics I have seen in judges which I am determined to avoid if I have the honor to be confirmed as a District Court judge.

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

Response: There are many attributes that are important for a good judge to possess, including integrity, knowledge of the law, good temperament, the ability to keep an open mind and be fair, and a thoughtful, conscientious and dedicated approach to the job. I respectfully believe that I possess these and other important attributes.

5. 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 must be humble, patient, respectful and courteous to the lawyers and litigants who come before him or her as well as to the jurors who sacrifice their time to serve a vital role in our system of justice. These qualities, along with the ability to be fair and impartial, combine to shape a judge's temperament. I respectfully believe that I possess these qualities.

6. **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 respect and understand the role of *stare decisis* in our legal system. Adhering to this principle helps ensure the stability and reliability that is crucial to, among others, litigants, lawyers and judges at all levels. If confirmed, I would remain fully committed to following Supreme Court and Third Circuit precedent, whether or not I personally disagree with the precedent at issue.

7. **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. This statement is part of the holding in *Windsor*.

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

Response: By “lawful marriages” Justice Kennedy 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, I will faithfully uphold all Supreme Court precedent.

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

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

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

Response: Yes. This and all other portions of the Court’s opinion are binding precedent entitled to full force and effect.

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

Response: Yes.

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. This and all other portions of the Court’s opinion are binding precedent entitled to full force and effect.

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

Response: Yes.

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. This and all other portions of the Court’s opinion are binding precedent entitled to full force and effect.

² *Id.* 2689-2690.

³ *Id.* 2691.

⁴ *Id.* (internal citations omitted).

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

Response: Yes.

- 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. This and all other portions of the Court’s opinion are binding precedent entitled to full force and effect.

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

Response: Yes.

- 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 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 the absence of controlling precedent that is dispositive on an issue with which I am presented, I would look to the text of the statute or constitutional provision at issue, canons of statutory construction adopted by the Supreme Court and Third Circuit, and any guidance or persuasive authority promulgated by the Supreme Court and Third Circuit. If necessary, I would also look to related or analogous decisions of those and other courts.

- 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 I am given the privilege of serving as a judge on the United States District Court, my personal view or belief that the Supreme Court or Third Circuit had incorrectly decided a matter would not be relevant. I would follow Supreme Court and/or Third Circuit precedent and apply that precedent to the issue or case before me.

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

⁵ *Id.* (internal citations omitted).

Response: Statutes enacted by Congress are presumed to be constitutional. It is appropriate for a federal court to declare a statute unconstitutional only where the constitutional question cannot be avoided and the statute is clearly inconsistent with the Constitution. Statutes should be interpreted to avoid constitutional problems where more than one plausible interpretation is possible. *Clark v. Martinez*, 543 U.S. 371 (2005).

- 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: No. The Constitution is a domestic document that should be interpreted based on domestic sources. If I am confirmed for a seat on the District Court, I would never rely on foreign law or the views of the “world community” unless required to do so by Third Circuit or Supreme Court precedent.

- 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: The United States Code, 28 U.S.C. §455, and the Code of Conduct for United States Judges require a judge to be impartial and objective and to decide matters absent any political ideology or motivation. Political ideology or motivation should never affect the way a judge decides an issue or case. Adhering to precedent as opposed to any personal, ideological or political views is the best and most appropriate way to ensure stability and predictability in our judicial system. I will do that.

- 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: A judge’s personal views have no place in the performance of his or her duties, particularly judicial decision making. I can assure this Committee that if confirmed I would administer justice fairly and impartially and would not allow any personal views to interfere with my solemn obligations to faithfully apply precedent and make the best decisions I can make based on the law and the facts before me.

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

Response: If confirmed, I would be actively involved in managing my caseload, working with the Clerk of the Court and all other appropriate court personnel. I would establish policies and procedures governing the conduct of matters before me and would confer as needed with counsel to ensure that my docket is run effectively and efficiently, consistent with my obligations to be fair, impartial and thorough. I would participate with counsel if necessary to settle discovery and pre-trial disputes, narrow the issues for trial or be a constructive participant in evaluating cases for potential settlement.

- 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: Yes, judges have an important role to play in controlling the pace and conduct of litigation. If confirmed, I would proceed as outlined in my previous answer to ensure that all matters to which I am assigned are resolved as thoroughly, fairly and efficiently as possible.

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

Response: I have not yet had the privilege of serving as a judge. If confirmed, I would reach decisions by applying the facts of the matter before me to the law, particularly Third Circuit and Supreme Court precedent, and making the best decisions I can make in a fair and impartial manner.

- 17. 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.

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

Response: I received these questions on July 31, 2014. After conducting research and drafting my responses, I reviewed those responses with a representative of the Office of Legal Policy in the Department of Justice. I continued reviewing and editing my responses on September 2, 2014 and then authorized the Office of Legal Policy to submit them on my behalf to the Committee.

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

Response: Yes.

Questions for the Record
Senator Ted Cruz

Gerald Pappert,
Nominee: U.S. District Judge for the Eastern District of Pennsylvania

1. **Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice’s judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.**

Response: I do not know enough about the full body of work of any single Justice to be able to state whose judicial philosophy is most analogous to mine. If I am fortunate enough to be confirmed for a seat on the United States District Court, I would handle each matter to which I am assigned with an open mind and in a fair and impartial manner. I would faithfully follow Supreme Court and Third Circuit precedent with a respect for the principles of judicial restraint and an understanding of the separation of powers and the proper role of an Article III judge. I would apply the law, including all precedent, to the facts of the case and make the best decision I can.

2. **Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?**

Response: The Supreme Court looked to original public meaning when interpreting a constitutional provision in *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I would faithfully follow all Supreme Court precedent regarding the appropriate method to interpret the constitutional provision at issue, including looking to the Constitution’s text and original sources such as the Federalist Papers.

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

Response: If I am confirmed to serve on the United States District Court, I would be bound by Supreme Court and Third Circuit precedent. There are no circumstances under which I would attempt to overrule binding precedent.

4. **Explain whether you agree that “State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.” *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).**

Response: This quote from the *Garcia* case constitutes binding precedent. If confirmed, I would faithfully follow it, as well as all other binding precedent from the Supreme Court and Third Circuit Court of Appeals, such as *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

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

Response: Supreme Court jurisprudence on the scope of the Commerce Clause has focused on economic activity and noted that permissible categories of regulation under the Commerce Clause include the use of the channels of interstate commerce, instrumentalities of interstate commerce and activities with a substantial relation to interstate commerce. The Court has struck down statutes absent a nexus to economic activity. See *United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995).

At least one Justice on the Court has opined that Congress' power under the Commerce Clause may extend to regulation of non-economic activity "if that regulation is a necessary part of a more general regulation of interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J. concurring.)

As a District Court judge, I would be bound by the rulings of the Third Circuit and Supreme Court on the scope and limitations of the Commerce Clause and I would follow that and all other precedent faithfully.

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

Response: In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court articulated the judicially enforceable limits on the President's authority to issue executive orders or actions. The President's authority must derive from an Act of Congress or the Constitution. If confirmed, I would follow Supreme Court and Third Circuit precedent when deciding any case involving executive orders or actions.

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

Response: The Supreme Court has defined a right as "fundamental" for purposes of the substantive due process doctrine when it is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations and internal quotation marks omitted.) If confirmed, I would follow all Supreme Court and Third Circuit precedent when deciding whether a right is "fundamental" for substantive due process purposes.

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

Response: The Supreme Court has defined two levels of heightened scrutiny or scrutiny above a "rational basis" review. Under intermediate scrutiny, applied to classifications such as gender that often bear "no relation to ability to perform or contribute to society", the state action must serve important governmental objectives and must be substantially related to the achievement of those objectives. To survive a strict scrutiny analysis,

applied to classifications such as race, alienage and national origin, the state action must be narrowly tailored to a compelling governmental interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-441 (1985). If confirmed, I would faithfully apply Supreme Court and Third Circuit precedent to determine the level of scrutiny applicable to any matter that comes before me.

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

Response: In her majority opinion in *Grutter*, Justice O’Connor anticipated that the use of racial preferences would no longer be necessary in public higher education 25 years after that decision. I do not have any personal expectations in this regard. If confirmed, I would follow the Court’s holding in *Grutter*, as well as any additional guidance and precedent such as *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).