

Responses of Kevin McNulty
Nominee to be United States District Judge for the District of New Jersey
to the Written Questions of Senator Chuck Grassley

- 1. You first interviewed with Senator Lautenberg's judicial selection committee on October 5, 2009. However, your name was not submitted for consideration until September 27, 2011. Do you know why there was a 2 year long evaluation process?**

Response: Senator Lautenberg and his staff have not shared the internal workings of the selection process with me. I believe that the Senator's selection committee operates on a rolling basis to identify a pool of candidates for current and future vacancies. The District Court vacancies that occurred around the time of my initial round of interviews in 2009-2010 were filled by other candidates. In 2011, it became public that there would be two additional vacancies, and I was again considered.

- a. Did either Senator Lautenberg or Senator Menendez raise any concerns regarding your nomination in your interviews with them?**

Response: No.

- b. Did you provide any new information or discuss new topics in your final interview with Senator Lautenberg on July 11, 2011 that were not covered in your initial interview? If so, please explain.**

Response: In the second interview, I updated the Senator as to developments in my career since the first interview, but otherwise the two interviews were substantially similar.

- 2. Some of your work as an attorney involves assisting clients with both government and internal investigations of securities and other types of fraud.**

- a. The SEC came under heavy criticism for its failure to prevent the 2008 financial crisis and the frauds of Bernie Madoff and Enron. Do you think the SEC is effectively regulating the financial industry at present?**

Response: I am aware that there has been criticism of the SEC's performance in this connection. I have not made a study of the effectiveness of SEC regulation, whether currently or in comparison with earlier periods. In the wake of the 2008 financial crisis, legislative and regulatory reforms have been proposed and, to some degree, enacted.

- b. Do you think judicial and civil remedies are a more effective way of preventing and dealing with securities fraud than regulatory actions and executive branch investigations?**

Response: I have not made a study of the comparative effectiveness of judicial/civil, as opposed to regulatory/executive branch, proceedings. Our system as presently constituted clearly provides for both. One or the other might be more effective depending on the kind of case. Massive criminal activity, for example, would best be handled in the judicial system; simple disputes between private parties might best be handled elsewhere. If confirmed as a District Judge, I would faithfully apply the law, and would not attempt to insert myself into the legislative decisions and enforcement priorities committed to other branches of government.

3. **In *United States v. Umbrell, et al.*, you represented a client, the Vice President of Commerce Bank, accused of giving favors to the Philadelphia City Treasurer in exchange for preferential treatment for the bank. You also handled a similar case in *United States v. Murphy*. You worked on these cases before the Supreme Court released its notable decision, *Skilling v. United States*, which helped settle some questions regarding the “honest services statute.”**

- a. **Following *Skilling*, what is your understanding of “honest services” in a bribery or corruption trial? Is that any different from what you argued in *Umbrell* or *Murphy*?**

Response: *Skilling* “hold[s] that [18 U.S.C.] §1346 covers only bribery and kickback schemes.” *Skilling v. United States*, 130 S. Ct. 2896, 2907 (2010). At the time of *Umbrell* and *Murphy*, Third Circuit precedent provided at a minimum that Section 1346 covered concealed self-dealing in violation of state criminal law, in addition to bribery and kickbacks. *See United States v. Panarella*, 277 F.3d 678, 694 (3d Cir. 2002). We argued -- successfully in *Murphy*, unsuccessfully in *Umbrell* -- that certain criminal activity alleged did not fall within the scope of Section 1346 as interpreted by *Panarella*.

4. **Justice Scalia vigorously dissented from the Majority in *Skilling*, noting that he would find the entire “honest services” statute unconstitutional.**

- a. **Justice Scalia wrote in his dissent: “. . . it is obvious that mere prohibition of bribery and kickbacks was not the intent of the statute.” Do you agree?**

Response: Regardless of any personal view I might hold as to whether Point III of the majority opinion or Justice Scalia’s separate opinion better states the intent of the statute, Justice Ginsburg’s majority opinion, joined by Chief Justice Roberts and Justices Stevens, Breyer, Alito and Sotomayor, constitutes binding precedent which, if confirmed as a district judge, I would follow.

5. **Justice Scalia asserted that the Majority essentially rewrote the law so that it would not be interpreted as constitutionally vague.**

- a. Do you think in an attempt to construe all statutes as constitutionally acceptable, courts should be able to take a general penal statute and “pare it down” in order to avoid unconstitutional vagueness?**

Response: In *Skilling*, six Justices assented to a “limiting construction” of the honest services statute that avoided unconstitutional vagueness, citing case law in support of that approach. *See* 130 S. Ct. at 2929-31 & footnotes thereunder. The *Skilling* Supreme Court precedent is binding upon the lower courts and, if confirmed, I would follow it. In general, a lower court judge should confine his or her consideration to whether a statute is constitutional as applied to the case at hand.

- b. Do you believe that is what the Court did in *Skilling*?**

Response: Please see responses to questions 3, 4 and 5(a), above. In *Skilling*, the majority interpreted the honest services statute to cover only bribery and kickbacks, stating that “[r]eading the statute to proscribe a wider range of offensive conduct ... would raise the due process concerns underlying the vagueness doctrine.” 130 S. Ct. at 2931.

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

Response: Fairness, in the sense of impartiality and a sincere, humble commitment to decide cases based on the law and facts, without prejudgment or bias. I believe that I possess these qualities and, if confirmed, I will always strive to embody them.

- 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 must be patient and open-minded; a judge must be respectful, both of the persons before the court and of their time; a judge must be willing to reconsider his or her point of view in light of the evidence and the law. The judge’s modest demeanor and temperament should convey to any reasonable member of the public that all claims, whether successful or not, have received the scrupulous and honest attention of the court. I believe that I meet that 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. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?**

Response: Yes. If confirmed as a district judge, I would follow the decisions of the United States Supreme Court and the United States Court of Appeals for the Third Circuit, as well as any other binding precedents, irrespective of my personal views.

- 9. 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 case of a federal statute, I would of course first consult the statutory text. Where the language is clear, it must be applied, and that ends the matter. If uncertain as to the meaning of the language of a particular section, I would try to ascertain its meaning from the context of the statutory scheme of which it is a part. I would apply analogous case law, first from higher courts, and then from lower courts. Only in cases of ambiguity would I, with caution, draw on legislative history. As for non-statutory issues, if I found no controlling case law from the United States Supreme Court or the Third Circuit (or State appellate courts, in the case of a state-law issue), I would consult persuasive authority from other courts and analogous case law.

- 10. 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 as a district judge, I would follow the precedents of the United States Supreme Court, the United States Court of Appeals for the Third Circuit, and all other binding case law, irrespective of any personal disagreement with such precedents.

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

Response: A statute enjoys a presumption of constitutionality, and should be declared unconstitutional only where Congress has exceeded its powers under the Constitution or has unlawfully infringed a Constitutional right.

- 12. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?**

Response: If confirmed, I would enforce clear deadlines for pretrial discovery and motions. Our district has been fortunate in its Magistrate Judges, whose assistance I would use to expedite case processing, rule on nondispositive matters (or, with consent, on dispositive matters), and encourage the settlement of cases as appropriate. For my own part, I would rule expeditiously to the best of my ability.

- 13. 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, I strongly agree that judges have a responsibility to take on that role, given the ever-increasing size of federal dockets. Expeditiousness is an important component of justice. I would intervene early and often to keep cases on track. Judicious granting of motions to dismiss and for summary judgment, when and to the extent appropriate, also helps to ensure that the court's resources are most efficiently allocated to meritorious cases.

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

Response: I received these questions on March 21, 2012. I drafted these responses on March 22, 2012, and subsequently reviewed them with a representative of the Department of Justice. On March 23, 2012, I authorized the Department of Justice to submit them to the Senate Judiciary Committee.

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

Response: Yes.