

**Response of Gerald Austin McHugh, Jr.
Nominee, United States District Judge for the Eastern District of Pennsylvania
To the Written Questions of Senator Chuck Grassley**

1. During your hearing, I mentioned that you have been very active as a trial lawyer and in speaking out about tort reform. For example, you stated “Given the impact the trial bar has, it is to be expected that powerful and monied interests, like the United States Chamber of Commerce, or demagogues like House Speaker Newt Gingrich, will target trial lawyers with negative ad campaigns.” Please feel free to explain your comments and/or current views regarding the Chamber of Commerce and Speaker Gingrich. Do you believe this language illustrates the appropriate temperament for a federal judge?

Response: Coming from a federal judge, such language would be clearly inappropriate. At the time, I was President of the Philadelphia Trial Lawyers Association, and in that representative capacity, it was my responsibility to respond to political criticism that trial lawyers had a negative impact on society. It did not reflect any personal views, then or now, regarding the Chamber of Commerce or Speaker Gingrich, but rather was meant as a political response to a political criticism. In the article which is quoted above I also admonished trial lawyers against bringing frivolous claims, and exhorted them to practice law in a manner which would defy reproach.

A letter of support sent to Senators Casey and Toomey signed by 18 past presidents of the defense bar in Pennsylvania demonstrates the confidence my past opponents have in my temperament and ability to preside as a judge in an even-handed way.

2. In 1997 you were quoted as saying, “[The law] is something that has a profound impact on the people who are affected by it, [McHugh] said. As the common law evolves, the most important question to answer is what is the practical impact of decisions we make on the people who are affected.”

a. Do you believe this is the most important question to answer as a judge?

Response: No. I cannot recall the context in which this statement was made, but since it occurred shortly after publication of my treatise on Pennsylvania torts, which comprehensively reviewed the evolution of various common law principles, I believe it likely represents an academic reflection on the way in which various appellate decisions have, over time, affected those who appear before the courts. Development of the law is not the role of a district court judge.

b. Would you be inclined to let this perspective affect your judicial decision-making process if confirmed?

Response: No. The duty of a district court judge is to apply the law impartially to the facts before him.

3. You list on your personal website that you have been involved in representing victims of the Lockerbie terrorism in 1998, yet you have made no mention of it in your questionnaire. What involvement, if any, did you have with this case?

Response: I was retained to represent the widow and family of Martin Apfelbaum, a resident of Philadelphia who died in the mid-air explosion. I filed suit against Pan Am under the Warsaw Convention in the Eastern District of Pennsylvania. My suit was then consolidated with actions pending in New York, and stayed pending final resolution of the question of Pan Am's liability. Following affirmance of a judgment against Pan Am by the Second Circuit, my case was remanded to the Eastern District of Pennsylvania for a trial on damages. The case settled pre-trial with the assistance of the assigned judge, the honorable Thomas O'Neill. I did not list it in my questionnaire because my role diminished following transfer, and I felt that my own professional ability was better demonstrated by the international cases I cited, such as *Breen v. Keystone Helicopter*, and *Jaude v. Aeroports de Paris*, where I played a more major role.

4. An author of the Pennsylvania Super Lawyers article in which you are profiled states that you describe yourself as a "product of the Catholic left." What do you mean by that and what influence would this have on your decision-making process, if confirmed?

Response: I was taught that although piety and devotion are religious virtues in their own right, that between Sunday Mass and next Sunday's Mass, we are called to express the values of the Gospel in how we treat others. I believe this is reflected in the *pro bono* and community work I have done. My religious values, although they have helped shape my character, would not influence the duties I would exercise as a federal judge, or serve as the basis for any judicial decision.

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

Response: Integrity is the most important attribute of a judge. I believe that I possess this quality, as confirmed by the trust that others have placed in me with respect to positions I have been asked to hold, which include appointments by the courts, and elections by fellow members of the bar. Also, attorneys whom I routinely oppose, and parties against whom I routinely bring litigation, have entrusted me to mediate important cases and bring about a resolution, and to sit as a sole binding arbitrator in matters of importance to them.

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 good judge must be patient, open-minded, and civil to all who appear before him. As set forth above, I believe that the responsibilities entrusted to me by others in the resolution of important disputes demonstrate that I am able to meet that 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.

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: The oath sworn by a judge to uphold the law necessarily requires that a judge respect and follow all binding precedents, regardless of a judge's individual beliefs. I am firmly committed to following that rule.

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: If a case of first impression arises under a statute, the benchmark for decisions should be the text of the statute itself. If the text is clear, my analysis would end. If no answer is apparent from the text, the next sources of information would be precedent from the Supreme Court and Third Circuit. Absent such guidance, I would consult other federal precedent, which while not binding, may offer persuasive guidance on the question before me.

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: A district court judge is duty bound to apply precedent from the Supreme Court or Court of Appeals regardless of his or her view as to the error of such courts. I would be required to follow that law, and would do so without hesitation.

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

Response: In the first instance, if the issue of constitutionality is truly ripe for decision by the court, the statute should be presumed to be constitutional. If there is a way to construe a statute which renders it constitutional, the court should adopt such construction. If, however, in a case fairly presented, a statute as written or as applied either exceeds the authority of Congress, or otherwise plainly violates the Constitution, it is the responsibility of a judge to so declare.

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, although in limited circumstances, principles of British common law in effect as of the time of the adoption of the Constitution might shed light on its construction.

12. What assurance 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 takes an oath faithfully to discharge the duties of his office. To make any decision based on any consideration other than the precedent or text of the law would be a profound violation of that oath, which I would not commit. In addition to that personal assurance, I believe that my bi-partisan participation in the drafting of six separate statutes, all signed by Republican governors, and the widespread support of my nomination from across the bar, is evidence that I have no political agenda in submitting my name for appointment.

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

Response: Over the course of my career, I have frequently been requested to serve as a mediator and, in some cases, as a sole binding arbitrator. That invitation has been extended by counsel whom I regularly oppose, and even by parties against whom I regularly bring litigation. In a case against Drexel College of Medicine, Drexel asked me to defend it. The Plaintiff was proceeding under a precedent I had established, but I accepted representation and secured Drexel's dismissal from the case. In connection with my application to the Advisory Committee established by Senators Casey and Toomey, 18 past presidents of the defense bar in Pennsylvania, 18 past Chancellors of the Philadelphia Bar Association, and 67 Fellows of the American College of Trial Lawyers, who represent a wide variety of different interests, joined group letters of support to the Senators. I would point to that as evidence that although my career has typically involved the representation of plaintiffs, among the leaders of the bar in Pennsylvania, I am viewed as someone who can set aside personal views and be fair to all.

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

Response: My intention would be to hold a Rule 16 conference shortly after the filing of each case assigned to me, at which time reasonable deadlines will be established. In the Eastern District of Pennsylvania, each judge is assigned a deputy clerk for purposes of docket management. My proposed course of action would be to supervise closely the responsibilities of the deputy clerk, while reserving law clerks for substantive legal research and analysis. I would create an internal calendar alert system for purposes of compliance with the Speedy Trial Act.

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: The quality of justice dispensed by the court is in part a function of the efficiency with which courts operate. I believe that a judge should use the Federal Rules of Civil Procedure to hold prompt Rule 16 conferences, and to establish reasonable deadlines for a case that will allow a fair determination on the merits in a timely fashion.

16. You have spent your entire 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 the most difficult part of this transition for you?

Response: Having served as a federal district court clerk, state appellate court clerk, hearing officer for the Disciplinary Board of the Supreme Court of Pennsylvania, and arbitrator in a number of matters, I have experience in decision-making that will assist me in a transition to the bench. I expect to look to the briefs and arguments of counsel, to read the critical statutes or cases and to review the relevant evidence. One challenge will be deeper familiarization with criminal law, with which I have less experience.

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: As a member of AAJ, in the spring of 2011, I contacted its Public Affairs Office and asked if AAJ involved itself in federal judicial nominations. I was referred to a Mr. John Bowman, and advised to forward my resume, which I did. Shortly thereafter, again in the spring of 2011, Mr. Bowman called me, and we briefly discussed my interest in the federal bench, and my perception of my reputation within the legal community in Pennsylvania. Sometime thereafter, in a second conversation, he advised me that AAJ would be supportive of my appointment.

- 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: I was advised that AAJ would support my candidacy, but I am not aware of any specific acts that were taken on my behalf.

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

Response: I drafted my answers to these questions and presented them to the Department of Justice, Office of Legal Policy, for review. I then made some revisions and finalized my answers for submission to the Committee.

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

Response: Yes.

**Response of Gerald Austin McHugh, Jr.
Nominee, United States District Judge for the Eastern District of Pennsylvania
To the Written Questions of Senator Ted Cruz**

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

Response: As a practicing lawyer, I have not had the occasion to develop a judicial philosophy. In writing my treatise on Pennsylvania tort law, and in teaching judges, other lawyers, and law students at the University of Pennsylvania, I have tried to follow an approach of rigorous intellectual honesty, reading cases accurately, not attempting to strain the bounds of precedent, and focusing on the specific facts of the case. I would expect to bring the same approach to the bench. Given the demands of professional practice I have not had the opportunity to focus upon the judicial philosophy of particular justices.

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: If confirmed as a district court judge, I would consider originalism where guided by appellate precedent to employ that approach. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008) the majority of the Supreme Court employed original public meaning to interpret the Second Amendment. As a district court judge my responsibility would be to consult and follow the appellate authority applicable to the specific issue before me.

If a decision is precedent today while you’re going through the confirmation process, under what circumstances would you overrule that precedent as a judge?

Response: As a district court judge, there would be no circumstance I can identify where I would be empowered to overrule an existing precedent.

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 statement was part of a majority opinion of the Supreme Court. If I am fortunate enough to be confirmed, I would be bound to apply this and all binding precedent from higher courts.

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

Response: In *United States v. Lopez*, 514 U.S. 549, 558 (1995), the Supreme Court held that Congress may 1) “regulate the use of the channels of interstate commerce,” 2) “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate

commerce”, and 3) “regulate those activities having a substantial relation to interstate commerce.” It reiterated those principles in *United States v. Morrison*, 529 U.S. 598 (2000). As a district court judge, I would apply those decisions as well as all other binding Supreme Court precedent concerning the Commerce Clause.

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

Response: The power of the Executive Branch is conferred by both the Constitution and by specific acts of Congress. If a President, or his or her Administration, were to exceed the scope of lawful power, a federal court presented with a justiciable case or controversy would be empowered to enjoin such unlawful actions, as established by a series of cases, notably *Youngstown Sheet & Tube Co. v Sawyer*, 343 U.S. 579 (1952).

When do you believe a right is “fundamental” for purposes of the substantive due process doctrine?

Response: The Supreme Court has held that a right is fundamental where it is deeply rooted in our country’s history and implicit in the concept of “ordered liberty”. See e.g. *Washington v. Glucksberg*, 343 U.S 579 (1997). If confirmed as a judge, I would apply that and all other binding precedents.

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

Response: Heightened scrutiny is the controlling standard when the classification being evaluated involves such things as race, religion, gender, or any other classification the Supreme Court has identified as “suspect,” and also controls where a classification would burden the exercise of a fundamental right. *City of Cleburne v. Cleburne Living Center*, 521 U.S. 702 (1997).

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: If an issue concerning racial preferences were before me, I would apply *Grutter* and other relevant precedent, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), to the factual record before me.