

**Senator Grassley
Questions for the Record**

**David J. Hale,
Nominee, U.S. District Judge for the Western District of Kentucky**

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

Response: I consider the ability to decide a case fairly and impartially based upon applicable law and precedent to be the most important attribute of a judge. I believe that I have demonstrated throughout my career that I possess the qualities of fairness, impartiality and respect for precedent.

2. 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 that a judge should be patient, courteous and composed. Litigants and lawyers should always be treated fairly and respectfully. I believe that I have demonstrated throughout my career that I meet these standards.

3. 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 be committed to following all of the precedents of the United States Supreme Court and the Sixth Circuit Court of Appeals. I believe it would be my obligation to faithfully follow the precedents of the higher courts, and to give them full force and effect, regardless of whether I personally agree or disagree with them.

4. Every nominee who comes before this Committee assures me that he or she will follow all applicable precedents and give them full force and effect, regardless of whether he or she personally agrees or disagrees with those precedents. 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

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

- i. Do you understand this statement to be part of the holding in *Windsor*? If not, please explain.**

Response: Yes. It is my understanding that the quoted language is binding legal precedent.

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

Response: It is my understanding that “lawful marriages” refers to marriages deemed lawful by the individual states.

- 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 would follow all precedent from the United States Supreme Court and the Sixth Circuit Court of Appeals.

- 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.

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

Response: Yes. If confirmed, I commit to giving this and all portions of the *Windsor* decision full force and effect.

² *Id.* 2689-2690.

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, I commit to giving this and all portions of the *Windsor* decision full force and effect.

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, I commit to giving this and all portions of the *Windsor* decision full force and effect.

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.

³ *Id.* at 2691.

⁴ *Id.* (internal citations omitted).

⁵ *Id.* (internal citations omitted).

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

Response: Yes. If confirmed, I commit to giving this and all portions of the *Windsor* decision full force and effect.

5. 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: The first step would be to look at the plain language of the applicable statute, regulation or rule at issue. If the language is clear and unambiguous, then I would make a decision by impartially applying it to the facts of the case. If the language is not clear and unambiguous, then I would look for guidance in case law from the United States Supreme Court and Sixth Circuit Court of Appeals that is analogous to the facts of the case at hand. If analogous case law does not exist, then I would seek guidance from other federal appellate court cases for persuasive authority.

6. 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 precedent without regard to my personal views.

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

Response: Statutes enacted by Congress are presumed to be constitutional. A court should consider whether a statute is constitutional only when such an inquiry is necessary to decide the case at hand and should declare a federal statute unconstitutional only when a provision of the Constitution is violated or when Congress has exceeded its authority.

8. 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. I do not believe that foreign law or the views of the “world community” should be relied upon when determining the meaning of the Constitution. If confirmed, I would follow Supreme Court and Sixth Circuit authority regarding the meaning of the Constitution.

9. 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: Throughout my legal career, including my service as United States Attorney, I have demonstrated respect for our judicial system and commitment to the rule of law. If confirmed, my decisions would remain grounded in precedent and the text of the law. No underlying political ideology or motivation will impact my judicial decisions.

10. 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 should be fair and impartial to all parties, regardless of the judge's personal views. Throughout my legal career, including my service as United States Attorney, I believe I have earned a reputation of being fair-minded and reasonable. If confirmed, I would treat all parties fairly and impartially, without regard to my personal views.

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

Response: If confirmed, I intend to actively manage the cases in my court. I would act, in accordance with the Federal Civil and Criminal Rules of Procedure, to set scheduling orders and status and pretrial conferences, as appropriate. I would work diligently to rule on pretrial motions in a timely manner, and to take additional steps to ensure that unreasonable delays are avoided. I would also work cooperatively with the other judges of my district.

12. 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 believe that judges play an important role in controlling the pace and conduct of litigation. In criminal matters, judges are charged with enforcing the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, to ensure the defendant's right to a timely disposition of criminal charges. In civil matters, the rules of procedure provide several tools to ensure the efficient administration of a case. I expect to utilize scheduling orders, as well as regular status and pretrial conferences, to ensure that cases progress appropriately.

13. 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: If confirmed, I would approach each question and case from a neutral point of view, impartially applying precedent to the facts of the case. To reach a decision, I would carefully and fairly evaluate the facts of the case. I would look to the controlling precedent of the Supreme Court and the Sixth Circuit Court of Appeals for guidance. If confirmed, I would work hard to effectively transition from my current role as advocate to that of neutral. I recognize that, as an advocate, I begin work in each new case with a strategy for representing my client. In contrast, as a neutral I would not start a case with a strategy for

reaching an outcome. Instead, I would approach each case with an impartial, open mind. I also recognize that I would need to review areas of the law with which I have little experience. In addition to study and review, I would consult with my colleagues on the bench.

14. 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.

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

Response: I received these questions from the Department of Justice Office of Legal Policy (OLP) on August 5, 2014. Thereafter, I reviewed the questions and drafted responses. I then submitted my responses to OLP and discussed them with someone from that office. I made minor revisions before submitting the responses to the Committee.

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

Response: Yes.

Nominations Hearing

July 29, 2014

Questions from Senator Lee

Questions for David J. Hale (nominated for W.D. Ky.)

- 1. Mr. Hale, do you believe that the Constitution protects rights not expressly specified in the Constitution? If so, what is the textual vehicle for that — substantive due process, the Privileges or Immunities Clause, or elsewhere?**

Response: If confirmed, I would faithfully follow Supreme Court and Sixth Circuit precedent regarding the protection of rights not expressly specified in the Constitution. For example, the Supreme Court has interpreted the substantive due process clause to include certain rights not specified in the Constitution. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Court held that a right is fundamental for the purposes of the substantive due process doctrine when it is “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.” *Id.* at 720-21 (internal citations and quotations omitted).

- a. Do you believe that the Constitution provides for a right to privacy?**

Response: I understand that the Supreme Court has not found a comprehensive right to privacy in the Constitution, but has referred to privacy in holdings regarding the guarantees of the Bill of Rights. If confirmed, I would follow applicable Supreme Court and Sixth Circuit precedent regarding privacy issues.

- 2. Mr. Hale, what are the limits on Congress’s Commerce Clause power?**

Response: In *United States v. Lopez*, 514 U.S. 549 (1995) (internal citations omitted), the Supreme Court held that a statute criminalizing firearm possession in a local school zone exceeded Congress’ Commerce Clause power. The Supreme Court enumerated three broad categories of activity which Congress may regulate pursuant to the Commerce Clause: 1) “the use of the channels of interstate commerce”; 2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities”; and 3) “activities having a substantial relation to interstate commerce.” *Id.* at 558 (internal citations omitted); *see also United States v. Morrison*, 529 U.S. 598 (2000). If confirmed, I would follow the *Lopez* and *Morrison* holdings, as well as all other binding precedent of the Supreme Court and Sixth Circuit.

- a. Do you believe that Congress has at any time overstepped its authority under that provision since *Wickard*, other than in *Lopez* and *Morrison*?**

Response: I am not aware of any cases, other than *Lopez* and *Morrison*, where the Supreme Court has struck down a statute because it determined that Congress exceeded its Commerce Clause power. If confirmed, I would follow applicable Supreme Court and Sixth Circuit precedent regarding Congress's power to regulate under the Commerce Clause.

**Questions for the Record
Senator Ted Cruz**

**Responses of David J. Hale
Nominee, United States District Judge for the Western District of Kentucky**

- 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 have never served as a judge and accordingly I have not developed a specific judicial philosophy. However, if confirmed, I would work hard to be an able and respected District Judge. I would follow applicable precedent from the Supreme Court and the Sixth Circuit Court of Appeals. I would act fairly and impartially in each case that comes before me. I would treat litigants, lawyers and members of the public fairly and respectfully. I would decide cases in a timely manner.

With respect to identifying analogous judicial philosophies, I have not studied the opinions of the Warren, Burger or Rehnquist Courts sufficiently enough to be able to determine which Justice's judicial philosophy I would consider most like mine.

- 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: Yes. Consistent with the Supreme Court's holding in cases such as *District of Columbia v. Heller*, 554 U.S. 570 (2008), I would look to the original public meaning in interpreting the Constitution. If confirmed, I would apply *Heller* and all other binding precedent from the Supreme Court and the Sixth Circuit Court of Appeals.

- 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 confirmed, I would not 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: If confirmed, I would follow *Garcia* as well as all other binding precedent from the Supreme Court and the Sixth Circuit Court of Appeals, without regard to my personal views.

5. 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 (1995), the Supreme Court held that a statute criminalizing firearm possession in a local school zone exceeded Congress' Commerce Clause power. The Supreme Court enumerated three broad categories of activity which Congress may regulate pursuant to the Commerce Clause: 1) "the use of the channels of interstate commerce"; 2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and 3) "activities having a substantial relation to interstate commerce." *Id.* at 558 (internal citations omitted); *see also United States v. Morrison*, 529 U.S. 598 (2000). If confirmed, I would follow the *Lopez* and *Morrison* holdings, as well as all other binding precedent of the Supreme Court and Sixth Circuit Court of Appeals.

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, 585 (1952), the Supreme Court stated that the President's authority to issue an executive order or take executive action "must stem from either an act of Congress or from the Constitution itself." If confirmed, I would follow the *Youngstown* holding as well as all other binding precedent of the Supreme Court and the Sixth Circuit Court of Appeals.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court held that a right is fundamental for the purposes of the substantive due process doctrine where it is "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." *Id.* at 720-21 (internal citations and quotation marks omitted). If confirmed, I will follow the *Washington v. Glucksberg* holding as well as all other binding precedent of the Supreme Court and the Sixth Circuit Court of Appeals.

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

Response: In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985), the Supreme Court held that legislative classifications based upon race, alienage, national origin and gender, or laws that impinge on personal rights protected by the Constitution, are subject to heightened scrutiny. If confirmed, I would follow the *City of Cleburne* holding as well as all other binding precedent of the Supreme Court and the Sixth Circuit Court of Appeals.

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: I do not have personal expectations regarding the future use of racial preferences in public higher education. If confirmed, I would follow the *Grutter v. Bollinger* holding as well as all other binding precedent of the Supreme Court and the Sixth Circuit Court of Appeals.