

**Senator Grassley  
Questions for the Record**

**Mark A. Kearney,  
Nominee, United States District Judge for the Eastern District of Pennsylvania**

- 1. You have served as a Complex Discovery Master and as a member of the Hearing Committee for the Pennsylvania Supreme Court Disciplinary Board. If confirmed, what have you learned from these experiences that will help you as a federal judge?**

Response: My experiences have taught me how to remain absolutely impartial, to treat the litigants with courtesy and fairness, including to always be prepared and work hard to arrive at the result required consistent with precedent, as soon as practicable. In multiple adjudicative experiences, I listened to extensive evidence, made evidentiary rulings and entered orders. Further, my experiences required cogent and persuasive writing to ensure that the parties, as well as the Courts reviewing my orders and advisory opinions, could appreciate the soundness of my reasoning consistent with precedent.

- 2. The majority of your practice has been in civil litigation.**

- a. Please describe your experience with criminal litigation.**

Response: My criminal litigation experience arises primarily from the overlay between the criminal statutes under Title 18 of the United States Code and various business torts and civil claims, such as the RICO statute, the Computer Fraud and Abuse Act and the federal securities laws. Specifically, I have represented persons alleged to have committed bank, tax and wire fraud in investigations, in negotiations with the United States Attorney and agents of the Internal Revenue Service and Postal Inspector, and in the presentation of materials to prosecutors to address potential charges and sentencing. Also, as co-lead counsel for federally insured institutions, I regularly prepared suspicious activity reports, draft Informations and draft Indictments detailing the liability of subject persons under Title 18 of the U.S. Code alleged to have committed bank fraud. I also represented executives facing criminal charges arising under the federal securities laws, including in negotiations and resolutions with the enforcement division of the Securities and Exchange Commission. While I have tried thirty civil matters to verdict, I have been able to resolve criminal matters for my clients without trial. As a seasoned commercial trial lawyer in the District Courts, I have the benefit of extensive familiarity with the Federal Rules of Evidence applicable in criminal proceedings.

- b. If confirmed, what steps will you take to familiarize yourself with criminal law before taking the bench?**

Response: If confirmed as District Court Judge, I would continue to study the holdings of the United States Supreme Court and the United States Court of Appeals for the Third Circuit with a particular focus on criminal procedure and interpretation of

criminal statutes. I commit to a careful and diligent study of each of the substantive areas of the law which I may face before approaching any case. I anticipate learning new issues in the federal criminal law and procedure, and I would carefully study and apply the established precedent after listening carefully to the facts. I also hope to discuss novel issues of the criminal law, and nuances of criminal procedure with my potential colleagues on the bench both in the Eastern District and throughout the United States, including at numerous seminars made available to me by the Federal Judicial Center.

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

Response: The most important attribute of a judge, as I have learned from appearing before well over a hundred of them in my career, is to be fair and diligent as each matter involves a vitally important aspect of someone's life placed before the judge to assist in a resolution. This privilege of public service requires a commitment to be fair and prepared. This standard requires hard work, a characteristic which I have exhibited since working night crew at supermarkets to pay for college and law school, and in attaining the success and peer accreditation I have had to date in private practice while serving as a leader of the organized Bar and non-profit organizations in Pennsylvania. A judge must also understand his or her limited role in our constitutional democracy. As shown throughout my career, I am fair and patient in listening to every side and work hard to appreciate the issues placed before me.

**4. 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: If confirmed as a District Court Judge, my temperament would be one of courtesy, considerable patience and careful listening to every aspect of a matter placed before me, with the utmost respect for counsel and the litigants. I meet that standard, as evidenced in my experience as a former Complex Discovery Master and a Hearing Committee member of the Pennsylvania Supreme Court's Disciplinary Board.

**5. 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 would faithfully follow the precedent of the United States Supreme Court and the United States Court of Appeals for the Third Circuit regardless of my personal view of any such precedent. My experience has long taught me that the citizens will be most comfortable with the judicial system when they can rely on a judge who, after study and deliberation, consistently applies the precedent existing in that court.

- 6. 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 as a District Court Judge, I expect to occasionally face cases of first impression and would faithfully look to the plain meaning of the statute or Constitutional provision at issue. If the statute or Constitutional provision is unambiguous, I would faithfully apply its plain meaning to the facts. Otherwise, I would look to analogous cases from the United States Supreme Court or from the United States Court of Appeals for the Third Circuit for guidance. If there were no analogous cases in the United States Supreme Court or the Third Circuit, I would look to appellate courts in other Circuits for their guidance in analogous cases as persuasive authority.

- 7. 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: Regardless of my personal views, I would be duty bound to apply the precedent of the United States Supreme Court and the United States Court of Appeals for the Third Circuit, and I would do so. Personal views would not affect my judicial decision process.

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

Response: All federal statutes are presumed to be constitutional. Under the doctrine of constitutional avoidance, I would look to interpret a statute so that it would result in being constitutional. The only instance in which it would be appropriate for a District Court Judge to declare a statute enacted by Congress unconstitutional is if, consistent with guidance from the Supreme Court and the United States Court of Appeals for the Third Circuit, the statute clearly violates a provision of the Constitution or Congress exceeded its authority.

- 9. 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. It is never proper for judges to rely on foreign law or views of the world community in determining the meaning of the Constitution. The Constitution is a domestic document and judges are to look to domestic law.

- 10. 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: Public trust in our federal judiciary, as well as the efficient administration of the courts, requires that District Court Judges strictly apply the precedent of the United States Supreme Court and United States Courts of Appeals. I assure the Committee that if confirmed, I would issue decisions firmly grounded in precedent and not political ideologies or motivations.

**11. 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 District Court Judge must put aside personal views and be scrupulously fair to all who appear before the Court. As a commercial trial lawyer, I have set aside my personal views to advocate for clients in a wide variety of federal court matters. I assure the Committee and future litigants that I would continue to set aside my personal views and be scrupulously fair to all who appear before me, if I were confirmed.

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

Response: As an advocate in federal courts, I have always sought definite deadlines and direction from the Court on resolving the parties' dispute. If confirmed, I would manage the caseload through the use of early pretrial conferences and the involvement of United States Magistrate Judges to ensure a balanced approach to discovery proportional to the needs of the case, as well as to focus on settlement. I expect to have a civil deputy clerk assist me in setting a reasonable and efficient calendar that counsel and the parties will be required to follow and to have a criminal deputy clerk move criminal matters to resolution in a reasonable and efficient manner consistent with the rights of the government and the accused.

**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, judges have a central role. If confirmed, I would manage the caseload by the prompt holding of Rule 16 and 26 and other pre-trial conferences necessary to set and maintain reasonable and efficient schedules. As a long-time federal trial lawyer, I am well aware that deadlines, and in particular a trial date, have a beneficial impact upon the resolution of matters and the attention placed on those matters by counsel. I am also mindful of the effect of electronic discovery protocols and the need to efficiently manage protocols in proportion to the needs of the case. These matters must be addressed early in the case. I would also appropriately use the services of the Magistrate Judges to the extent consistent with the needs of the disputes. Further, my experience specifically teaches that an initial round of depositions of the key witnesses for a limited period of time may help narrow the issues before a second pre-trial conference. If confirmed, I also expect to rely upon the advice of the talented jurists presently serving the Court.

**14. 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: As an advocate, my role is to zealously protect and advance the interest of my clients consistent with my professional obligations and the rules of civil and criminal procedure. As a judge, I would shed the advocacy role to be impartial at all times. I would expect to carefully examine the submissions of all parties, study the case law and all the competent evidence presented. I would prepare several drafts of opinions that would, consistent with my practice, be revised and amended as I continue to study the case law and revisit the evidentiary record. I expect the most difficult part of this transition would be learning the criminal law and procedure regarding non-white collar crimes.

- 15. 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.” Do you agree with this statement?**

Response: If confirmed as a District Court judge, my responsibility would be to apply the precedent of the United States Supreme Court and the United States Court of Appeals for the Third Circuit to every case, regardless of its difficulty. My responsibility would be to fairly and impartially apply the law to the studied facts in evidence and not invoke my perspectives, concerns or values onto the precedent.

- 16. 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.”<sup>1</sup>**

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

Response: Yes, Justice Kennedy’s statement qualifies the *Windsor* holding.

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

Response: I understand that Justice Kennedy is referring to the marriages of

---

<sup>1</sup> *United States v. Windsor*, 133 S.Ct. 2675 at 2696.

“those persons who are joined in same-sex marriages made lawful by the state” (133 S. Ct. at 2695) and “those whom the state, by its marriage laws, sought to protect in personhood and dignity”. *Id.* at 2697.

**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, the Supreme Court’s opinion is limited to those circumstances in which states have legalized or permitted same-sex marriage.

**iv. Are you committed to upholding this precedent?**

Response: Yes, if confirmed as a District Court judge, I commit to give full force and effect to *Windsor* as well as any applicable holding of the Supreme Court or Third 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.”<sup>2</sup>**

**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. All portions of the Supreme Court’s decision in *Windsor* are binding precedent upon the District Court.

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

Response: Yes, if confirmed as a District Court judge, I commit to give full force and effect to *Windsor* as well as any applicable holding of the Supreme Court or Third Circuit Court of Appeals.

**c. Justice Kennedy also wrote, “The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens.”<sup>3</sup>**

**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.**

---

<sup>2</sup> *Id.* 2689-2690.

<sup>3</sup> *Id.* 2691.

Response: Yes. All portions of the Supreme Court’s decision in *Windsor* are binding precedent upon the District Court.

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

Response: Yes, if confirmed as a District Court judge, I commit to give full force and effect to *Windsor* as well as any applicable holding of the Supreme Court or Third Circuit Court of Appeals.

**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.’”<sup>4</sup>**

**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. All portions of the Supreme Court’s decision in *Windsor* are binding precedent upon the District Court.

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

Response: Yes, if confirmed as a District Court judge, I commit to give full force and effect to *Windsor* as well as any applicable holding of the Supreme Court or Third Circuit Court of Appeals.

**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.’”<sup>5</sup>**

**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. All portions of the Supreme Court’s decision in *Windsor* are binding precedent upon the District Court.

---

<sup>4</sup> *Id.* (internal citations omitted).

<sup>5</sup> *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 as a District Court judge, I commit to give full force and effect to *Windsor* as well as any applicable holding of the Supreme Court or Third Circuit Court of Appeals.

- 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 from the Office of Legal Policy at the Department of Justice on July 31, 2014. I carefully reviewed the questions and analyzed the case law to prepare my responses. Thereafter, I submitted my answers to the Office of Legal Policy and made revisions before submitting my answers to the Committee.

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

Response: Yes, these answers entirely reflect my true and personal views.



**Senator Cruz  
Questions for the Record**

**Mark A. Kearney,  
Nominee, United States District Judge for the Eastern District of Pennsylvania**

**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: If confirmed as a District Court Judge, I would work to be fully prepared and scrupulously fair with each party always mindful of the crucial responsibility in this public service. Judicial philosophy requires strict adherence to precedent to ensure consistency. Judges must decide only the issues presented to avoid confusion through dicta on immaterial issues. I am committed to ensuring consistency and predictability based upon precedent of the United States Supreme Court and the United States Court of Appeals for the Third Circuit. I am not familiar enough with the judicial philosophies of Justices to identify a philosophy similar to one which I hope to apply, although I expect that each Justice worked hard to be fair and impartial.

**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 strictly follow the cases from the Supreme Court and the Third Circuit which have examined the original public meaning of Constitutional provisions, including *District of Columbia v. Heller*, 554 U.S. 570 (2008).

**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 as a District Court Judge, I would be bound by the precedent of the United States Supreme Court and the Third Circuit and would not overrule any such 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: Consistent with my strict adherence to United States Supreme Court precedent, I will follow the Supreme Court’s decision in *Garcia* and all holdings from the Supreme Court and the United States Court of Appeals for the Third Circuit regardless of any personal views.

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

Response: Analysis of Congress’ Commerce Clause power, in accord with the holdings of the United States Supreme Court and the United States Court of Appeals for the Third Circuit,

focuses on economic activity, permitting regulation of the use of the channels of interstate commerce, instrumentalities of interstate commerce and activities in substantial relation to interstate commerce. For example, in *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court invalidated a statute identifying the carrying of fire arms in a school zone as a federal offense, and detailing the three broad categories of activity that Congress may regulate under the Commerce Clause. *See also, United States v. Kukafka*, 478 F.3d 531 (3d Cir. 2007) and *United States v. Whited*, 311 F.3d 259 (3d Cir. 2002).

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

Response: A District Court Judge must closely scrutinize the executive orders or executive actions of a President to ensure, consistent with Supreme Court precedent, that such conduct stems either from an act of Congress or from the Constitution itself. In *Medellin v. Texas*, 552 U.S. 491, 524 (2008), the United States Supreme Court adopted the “tripartite” scheme detailed in Justice Jackson’s concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) to distinguish the levels of scrutiny applied to a President’s executive orders and actions. If I am confirmed as a District Court Judge, I would closely scrutinize the actions taken and the facts presented, and faithfully apply the precedent of the Supreme Court and the United States Court of Appeals for the Third Circuit.

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

Response: If confirmed as a District Court Judge, I would faithfully apply the precedent of the United States Supreme Court and the United States Court of Appeals for the Third Circuit defining 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) (internal quotations omitted). The Supreme Court requires judges to carefully understand “the asserted fundamental liberty interest”. *Id.* at 721. I would strictly follow the Third Circuit holdings including in *McCurdy v. Dodd*, 352 F.3d 820 (3d Cir. 2003), to ensure that the fundamental guarantees of the due process doctrine are extended only as consistent with the precedent of the Supreme Court in *Glucksberg*.

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

Response: If confirmed as a District Court Judge, I would strictly adhere to the precedent of the United States Supreme Court and United States Court of Appeals for the Third Circuit in applying the two tiers of review above the rational basis review for Equal Protection Clause analysis. Specifically, the Supreme Court and United States Court of Appeals for the Third Circuit define an intermediate scrutiny for classifications such as gender that generally provide no sensible ground for differential treatment and a more strict scrutiny for classifications such as race, alienage and national origin that are “so seldom relevant to the achievement of any

legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy”. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985).

**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 confirmed as a District Court Judge, personal expectations or predictions, if any, would have no role in my strict application of the binding precedent of the United States Supreme Court and United States Court of Appeals for the Third Circuit.