

**Senator Grassley
Questions for the Record**

**Claude John Kelly III,
Nominee, U.S. District Judge for the Eastern District of Louisiana**

1. For the majority of your post-law school career, you have worked in litigation, with most of your time spent working as a federal public defender. In addition, for five years, you were Certified Lead Counsel for the Capital Defense Project of Southeast Louisiana.

a. How did you become involved in the Project and what legal challenges you were presented with in this capacity?

Response: I was approached by the director of the Project with a job offer while trying a case in Orleans Parish Criminal District court. At that time I had tried two capital cases as second chair and was intrigued by the complexity of preparation, particularly the distinct voir dire skills and mitigation investigation required. I also liked the challenge of defending someone facing the ultimate penalty. The main legal challenge I faced dealt with mental health issues. The vast majority of my capital clients suffered from some serious mental illness or trauma, which requires special consideration under Supreme Court precedent.

b. How has your work in capital defense cases influenced you, or guided you, as an attorney and Chief Federal Defender?

Response: My work in capital defense underscored the need for thorough preparation, no matter what the case. It also taught me the need to not only know the facts and the law involved in every case but also to thoroughly know my client. As Chief Federal Defender I have stressed the need for thorough investigation.

c. If confirmed, how will your work as a federal public defender influence you in your role as a federal judge?

Response: In the same way that a federal prosecutor brings certain experience to the bench, my work as a federal public defender has given me a thorough understanding of the federal criminal justice system and federal criminal law. I feel I am also quite familiar with the federal rules of evidence as well as the jury process and jury selection issues. I understand the importance of the judge knowing the complete factual record of every case and applicable law and treating every individual with respect. I understand the difference between being an advocate and a neutral arbiter and I would always be bound by all controlling precedent.

2. As amended on December 1, 2015, Federal Rule of Civil Procedure 26(b)(1) defines the “scope of discovery” in litigation matters as “any nonprivileged matter that is relevant to any party’s claim or defense *and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.*”

Chief Justice Roberts explained in his 2015 Year-End report that these amendments “make a significant change, for both lawyers and judges.”

- a. What is the effect of this amendment to Rule 26(b)(1)?

Response: The amendment sets reasonable limits on discovery through an increased reliance on a common sense concept of proportionality. It also heightens the role of the judge in effective case management.

- b. If confirmed, how would you assess whether a discovery request is “proportional to the needs of the case”?

Response: I would engage in early face-to-face conferences with the parties, understand the needs of the case and develop a case management plan to ensure a prompt and efficient resolution of the matter.

- c. How, if at all, would your assessment of whether a discovery request is “proportional to the needs of the case” differ from your view of the scope of discovery under the prior version of the rule?

Response: I believe that because lawyers are now required to size and shape their discovery requests to the requisites of the specific case, as opposed to an open ended “reasonably calculated to lead to the discovery of admissible evidence” standard, judges have a firmer position in ensuring the just, speedy, and inexpensive determination of every action and proceeding as mandated in Rule 1 of the Federal Rules of Civil Procedure.

3. The Chief Justice’s 2015 Year-End report also noted reports from litigants that “[a] judge who is available for prompt resolution of pretrial disputes saves parties time and money.”

As amended on December 1, 2015, Rule 16 requires a district judge to issue a scheduling order within “the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.” This amendment shortened both applicable deadlines by 30 days.

- a. Please explain the approach you will take to case management and the tools you will use to manage cases in a just and efficient manner if you are confirmed.

Response: I believe this amendment demonstrates more than ever that judges have a role in controlling the pace and conduct of litigation. I would utilize all available electronic case management tools in the Eastern District of Louisiana. I would actively manage my caseload by utilizing early scheduling conferences in which discovery, motion practice, and unique case issues are discussed and realistic deadlines are set.

b. Please explain and describe any effect the 2015 amendments to the Federal Rules of Civil Procedure will have on your approach to case management if confirmed.

Response: I believe this amendment demonstrates more than ever that judges have a role in controlling the pace and conduct of litigation. I would fully utilize all efforts outlined above to ensure an efficient administration of justice.

4. As you know, parties frequently propose protective orders for the approval of the district judge during the course of discovery. The 2015 amendments to the Federal Rules of Civil Procedure included a change to Rule 26(c)(1)(B) adding “allocation of expenses” to the list of items that may be included in a protective order.

a. How would you evaluate cost-allocation mechanisms included in proposed protective orders, if confirmed?

Response: The amendment provides a basis for recourse to those parties who face abusive discovery requests which are purposely served to drive up the costs of litigation. Potentially connecting the costs of discovery to the party who seeks to benefit from the discovery will cause all parties to evaluate the true necessities of their requests.

b. Under what circumstances, if any, would you consider ordering allocation of expenses pursuant to Rule 26(c)(1)(B) absent suggestion of the parties?

Response: The proportionality analysis dictated by the amended rule would control any order allocating expenses. The relevancy, the amount in controversy, the access to the information, the importance of the information, and a cost benefit analysis should all be considered.

c. Do you understand the 2015 amendment to Rule 26(c)(1)(B) to confer upon the district court a new authority or obligation to manage discovery costs through cost allocation?

Response: While not conferring a new authority or obligation, the amendment does expressly recognize the court’s authority in the federal rules.

d. How, if at all, do you understand the cost-allocation provisions of Rule 26(c)(1)(B) to relate to those found in Rule 37?

Response: The Rule 26 amendments now explicitly recognize a court's authority to enter protective orders that allocate expenses for discovery or disclosure which are called for in Rule 37's orders and sanctions. Rule 37 gives the court guidance on these matters particularly with respect to the preservation and loss of electronically stored information and the associated costs of such.

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

Response: I believe the most important attribute of a judge is integrity. Integrity of a judge is earned through a total commitment to the rule of law, an unwavering demeanor of respect to all before the court, and a work ethic which results in the efficient and fair administration of justice. I do believe I possess these attributes.

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 judge must have patience and respect for all who come before the court. The judge's temperament should demonstrate that he has done the hard work necessary to adjudicate the matter with courtesy, knowledge and fairness. I believe that I have these traits and I have demonstrated them during my years of practicing law as a prosecutor, public defender, and private practitioner.

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. 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 understand and believe in the importance of stare decisis and binding precedent. If confirmed as a federal district judge, I will faithfully follow the precedent of the United States Supreme Court and the Court of Appeals for the Fifth Circuit.

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 the issue involved the interpretation of a statute, I would first turn to the text of the statute. If the statutory language is unambiguous, I would apply the statute's plain meaning. If there was ambiguity in the language, I would turn to analogous rules of construction contained in Supreme Court and Fifth Circuit precedent.

- 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: I would always apply the decisions of the Supreme Court and Fifth Circuit. As a federal district judge, I would be bound by those decisions, regardless of any personal opinions.

- 10. 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. Federal courts should avoid addressing the constitutionality of federal statutes unless the resolution of the case requires it. A judge is empowered to declare a statute unconstitutional only when it is clear that the statute is in conflict with the Constitution or exceeds congressional authority.

- 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. I do not believe that rulings of foreign law or “the world community” have any role in the interpretation of the United States Constitution.

- 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: A judge should never have a personal agenda or be motivated by any political ideology. The strict application of the plain language of the law and precedent is the fundamental role of a judge. My integrity and reputation for honesty, whether as a prosecutor, a public defender, or a civil litigant, provide assurance that I would fully execute my duties as a fair, impartial, conscientious judge if I am fortunate enough to be confirmed.

- 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: During my career as an attorney, which has included criminal practice as both a prosecutor and defense attorney, and civil practice as a plaintiff’s attorney, I have always put aside any personal views and have been fair to all while executing my obligations as both an advocate and officer of the court. I am committed to treating all who appear before me fairly, impartially and with respect.

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

Response: If confirmed, I would manage my caseload by relying on the procedures used in the Eastern District of Louisiana. These include electronic case management tools and close

work with the United States Magistrate Judges to resolve discovery disputes. I will remain available to litigants for conferences and issue meaningful scheduling orders. I will also undoubtedly rely on the advice and experience of my fellow judges if confirmed.

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. I believe judges play a vital role in controlling the pace and conduct of the litigation. A judge's role is not only to execute his duties fairly, but also efficiently. If confirmed, I would employ the steps outlined in Question 14.

16. 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: I would begin by having a complete understanding of the facts, the arguments, and the procedural posture of the case. I would read the written submissions of the parties, review the authority cited, and consider oral argument when needed. I would do independent research and apply the law as set forth in the decisions of the Supreme Court and Fifth Circuit. I believe the most difficult part of the transition will be my lack of experience in federal civil law matters.

17. 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: I am not aware of the complete context of this statement. As a judge, I would make my decisions based on binding precedent, not on any personal feelings or emotions.

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

Response: I received these questions in the late afternoon of May 25, 2016 from the Department of Justice, Office of Legal Policy. I submitted the initial draft of my answers to that office for review and then finalized my responses before sending them to the Committee.

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

Response: Yes they do.

Written Questions of Senator Jeff Flake
U.S. Senate Committee on the Judiciary
Claude John Kelly III
Judicial Nominations
May 18, 2016

1. **What is your approach to statutory interpretation? Under what circumstances, if any, should a judge look to legislative history in construing a statute?**

Response: I would always look to the text of the statute. If the text is unambiguous, I would base my decision on the statute's plain meaning. If there was any ambiguity, I would apply the canons of statutory construction, including looking to Supreme Court and Fifth Circuit case law. I would look to legislative history as appropriate, according to Supreme Court and Fifth Circuit guidance.

2. **What is the proper scope of the 10th Amendment to the Constitution? In what circumstances should a judge apply it?**

Response: The 10th Amendment is a very important limiting principle. All powers not delegated to the federal government are reserved for the states. I will faithfully adhere to the strictures of this amendment. The Supreme Court has offered guidance on when to apply the 10th Amendment. *See New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). I would apply this and all other precedent as directed by the Supreme Court.

3. **Does current standing doctrine foster or impede the ability of litigants to obtain relief in our legal system?**

Response: The standing doctrine stems from the case or controversy requirement of the judicial power of Article III of our Constitution. The Supreme Court has provided guidance in many cases including *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). I do not have an opinion about the standing doctrine fostering or impeding litigants. I would follow Supreme Court and Fifth Circuit precedent.

Questions for the Record
Senate Judiciary Committee
Senator Thom Tillis

Questions for Mr. Claude John Kelly III

- 1. Some individuals have argued that the United States Constitution is a “living document,” subject to different interpretations as society changes. Do you subscribe to this point of view?**

Response: I do not subscribe to the theory of a living Constitution. Constitutional issues should be decided by looking to the text of the Constitution and applying binding Supreme Court and Circuit precedent.

- 2. What role, if any, should societal pressure or popular opinion play in interpreting statutes or the United States Constitution?**

Response: Societal pressure or popular opinion should play no role in interpreting statutes or the United States Constitution. If confirmed as a judge, I would always follow the plain language of the statute and apply binding precedent of the Supreme Court and Fifth Circuit.

- 3. Please define judicial activism. Is judicial activism ever appropriate?**

Response: Judicial activism is the exercise of judicial duties with an agenda. It is result driven notwithstanding binding precedent from superior courts. I do not feel it is ever appropriate.

- 4. When, if ever, is it appropriate for a federal court to rule that a statute is unconstitutional?**

Response: Statutes enacted by Congress are presumptively constitutional. Constitutionality should only be addressed if it is necessary to the disposition of the case and then, only narrowly. A federal statute should not be declared unconstitutional unless it violates the Constitution or exceeds congressional authority.

- 5. What is a fundamental right? From where are these rights derived?**

Response: Fundamental Rights have been defined as “those fundamental rights and liberties which are, 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 citations omitted). If confirmed as a judge, I would apply all governing Supreme Court and Fifth Circuit precedent for purposes of evaluating fundamental rights.

- 6. Do you believe the First Amendment or any other provision of the United States Constitution protects private citizens and businesses from being required to perform services that violate their sincerely held religious beliefs?**

Response: In *Locke v. Davey*, 540 U.S. 712, 718 (2004) the Supreme Court recognized that: “The Religion Clauses of the First Amendment provide: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’” The Court recognized that “the Establishment Clause and the Free Exercise Clause are frequently in tension [but that] ‘there is room for play in the joints.’” *Id.* (internal citation omitted). *See also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) addressing First Amendment protection for religious beliefs. I would apply this and all applicable Supreme Court and Fifth Circuit precedent to any case presenting a question of citizens being required to provide services that violate their sincerely held religious beliefs.

- 7. What level of scrutiny is constitutionally required when a statute or regulation related to firearms is challenged under the Second Amendment of the United States Constitution?**

Response: The Supreme Court held that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation,” and that it therefore protects the right to keep and bear arms for the purpose of self-defense in the home. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 749-50 (2010). The Court declined to establish a clear level of scrutiny. The Fifth Circuit has held that “[i]f the law burdens conduct that falls within the Second Amendment’s scope, we then proceed to apply the appropriate level of mean-ends scrutiny. We agree with the prevailing view that the appropriate level of scrutiny depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.” *Nat. Rifle Ass’n of America, Inc. v. McCraw*, 719 F. 3d 338, 346-47 (5th Cir. 2013) (internal quotation and citation omitted). I would always follow the guidance of the Supreme Court and the Fifth Circuit if I am fortunate enough to be confirmed.

- 8. Do you believe it is constitutional for states to require voters to show photo identification before being eligible to cast their vote?**

Response: In *Crawford v. Marion County (Indiana) Election Board*, 553 U.S. 181, 204 (2008), the Supreme Court held that Indiana's interests for its voter identification law were neutral and sufficiently strong to reject the facial attack to the statute and that the application of the statute was "amply justified by the valid interest in protecting 'the integrity and reliability of the electoral process.'" (internal citation omitted). I will follow this and all Supreme Court and Fifth Circuit precedent if confirmed as a judge.

- 9. One challenge you will face as a federal judge is managing a demanding caseload. If confirmed, how will you balance competing priorities of judicial efficiency and due process to all litigants involved in the cases on your docket? Will you give certain cases priority over others? If so, please describe the process you will use to make these decisions.**

Response: If confirmed as a judge, I will make use of all case management tools available in the Eastern District of Louisiana. I will take an active role in scheduling and will hold conferences with lawyers whenever needed. I will set realistic and firm timetables and encourage resolution wherever appropriate. I will also consult with magistrate judges to manage my docket. I will set definite and reasonable trial schedules and issue decisions promptly.

- 10. Do you believe the death penalty is constitutional? Would you have a problem imposing the death penalty?**

Response: The United States Supreme Court has held that the death penalty is constitutional. If confirmed as a judge, I will follow this and all precedent of the Supreme Court.