

**Senator Grassley  
Questions for the Record**

**Brenda Kay Sannes,  
Nominee, U.S. District Judge for the Northern District of New York**

1. **Your responses to the Committee’s questionnaire indicate that 90% of your practice has consisted of prosecuting criminal cases The District to which you have been nominated handled well over twice as many civil cases as criminal cases in 2012.**<sup>1</sup>

a. **How are you preparing to handle the civil cases that will make up a majority of your docket if you are confirmed?**

Response: In the event that I am fortunate enough to be confirmed, I have solicited advice from several judges regarding how to prepare to handle civil cases. I have reviewed materials which I received from the Federal Judicial Center regarding civil practice, including the “Civil Litigation Management Manual” and “The Elements of Case Management: A Pocket Guide for Judges.” I have also begun reviewing slip opinions issued by the Second Circuit Court of Appeals in civil cases involving issues that are likely to arise in the Northern District of New York.

b. **Can you tell me a little about the extent of your familiarity with the Federal Rules of Civil Procedure?**

Response: I apply the Federal Rules of Civil Procedure in my work as the Appellate Chief in the United States Attorney’s Office for the Northern District of New York, where I have been responsible for all of the criminal and civil appeals for the past eight years. In most of our civil appeals we have defended rulings on motions to dismiss under Rule 12 or motions for summary judgment under Rule 56. I have also worked on civil cases involving adverse summary judgment rulings under Rule 56, and provided guidance regarding whether to recommend an affirmative government appeal. When I was in civil practice I followed the Federal Rules of Civil Procedure in litigating discovery motions, summary judgment motions, motions to dismiss, and in civil trials.

2. **Your responses to the Committee’s questionnaire provided little in the way of examples of your legal writing. Is there anything further you could share with the Committee to ease any doubts that may exist about whether your experience has prepared you for a lifetime appointment?**

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<sup>1</sup> 1, 740 civil cases were filed in the Northern District of New York during the 12-month period ending in March 31, 2013, *see Federal Judicial Center Caseload Statistics 2013*, Table C, available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C00Mar13.pdf>, and just 514 criminal cases were filed in the Northern District of New York during the 12-month period ending in March 31, 2013, *see Federal Judicial Center Caseload Statistics 2013*, Table D, available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/D00Mar13.pdf>.

Response: During the past eight years as the Appellate Chief in the United States Attorney's Office for the Northern District of New York, I have had extensive experience in writing and editing appellate briefs filed in the Second Circuit Court of Appeals. In addition to editing most of the appellate briefs filed by our office, I have handled my own appellate caseload. I have written approximately eleven appellate briefs a year for the past eight years. Several of the cases in which I have written the appellate brief and handled the oral argument have resulted in published decisions creating new law in the circuit, including *United States v. Cook*, 722 F.3d 477 (2d Cir. 2013), *United States v. Wilson*, 699 F.3d 235 (2d Cir. 2012), *United States v. Ramos*, 685 F.3d 120 (2d Cir. 2012), *United States v. Guzman*, 591 F.3d 83 (2d Cir. 2010), *United States v. Hester*, 589 F.3d 86 (2d Cir. 2009) and *United States v. Richardson*, 521 F.3d 149 (2d Cir. 2008).

- 3. In the recently-decided *Abramski v. United States*,<sup>2</sup> the Supreme Court was divided over how and when to apply the rule of lenity in the construction of criminal statutes. Under which circumstances would you apply the rule, if at all, and if so, how would you do so?**

Response: If confirmed as a district judge, I would follow the precedent of the Supreme Court and the Second Circuit in applying the rule of lenity. The Supreme Court has held that the rule of lenity “only applies if after considering text, structure, history and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended.” *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013).

- 4. If you were to find yourself sentencing a defendant who you thought was innocent, or who had been convicted under a statute you considered unjust, how would you go about sentencing the defendant? Would these concerns factor into your determination?**

Response: I would begin every sentencing proceeding by calculating the Sentencing Guidelines range. I would then consider the statutory sentencing factors in 18 U.S.C. § 3553(a), which include the Sentencing Guidelines range, to impose a sentence that is “sufficient but not greater than necessary” to comply with the purposes in § 3553(a)(2), as required by § 3553(a). I understand that federal crimes are defined by Congress, and that Congress sets sentencing policy. I would apply that law without regard to my personal beliefs.

- 5. 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.**

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<sup>2</sup> 134 S.Ct. 421 (2013).

**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>3</sup>**

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

Response: Yes.

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

Response: I believe that Justice Kennedy is referring to “same-sex marriages made lawful by the State.” 133 S. Ct. at 2695.

**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 as a district judge, I would faithfully apply the *Windsor* decision and all other Supreme Court and Second Circuit precedents.

**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>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: I understand this portion of the opinion to be stating a settled principle of law.

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

Response: Yes. If confirmed as a district judge, I would faithfully apply the *Windsor* decision and all other Supreme Court and Second Circuit precedents.

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<sup>3</sup> *United States v. Windsor*, 133 S.Ct. 2675 at 2696.

<sup>4</sup> *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.”<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: I understand this portion of the opinion to be stating a settled principle of law.

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

Response: Yes. If confirmed as a district judge, I would faithfully apply the *Windsor* decision and all other Supreme Court and Second Circuit precedents.

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>6</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: I understand this portion of the opinion to be stating a settled principle of law.

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

Response: Yes. If confirmed as a district judge, I would faithfully apply the *Windsor* decision and all other Supreme Court and Second Circuit precedents.

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>7</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: I understand this portion of the opinion to be stating a settled principle of law.

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<sup>5</sup> *Id.* 2691.

<sup>6</sup> *Id.* (internal citations omitted).

<sup>7</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 judge, I would faithfully apply the *Windsor* decision and all other Supreme Court and Second Circuit precedents.

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

Response: I believe that the most important attribute of a judge is to be fair and impartial. A judge should approach each case with an open mind, listen carefully to the parties' positions, and faithfully apply binding precedent. I believe that I possess this attribute and, if confirmed, would constantly strive to be fair and impartial.

**7. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?**

Response: I believe that a judge should be open-minded, fair, patient, respectful, thoughtful, diligent and humble. I believe that I have demonstrated these qualities throughout my legal career and, if confirmed to serve as a district judge, would be committed to demonstrating these qualities in my work as a judge.

**8. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. 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 as a district judge, I would be committed to faithfully following precedent, regardless of my personal beliefs.

**9. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

Response: In cases of first impression with no controlling precedent I would begin with the text of the applicable provision. If the language was unambiguous, I would apply the provision as written. If the text did not resolve the issue, I would apply the canons of statutory construction. I would consider decisions from other circuit courts of appeal and other district courts which addressed the issue. I would also look to case law from the Supreme Court, circuit courts of appeal and other district courts in analogous cases.

**10. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?**

Response: If confirmed as a district judge, I would apply precedent faithfully, without regard to my personal beliefs.

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

Response: A statute enacted by Congress is presumed to be constitutional. Under the doctrine of constitutional avoidance, a district court should avoid declaring a statute unconstitutional if there is a plausible alternative interpretation. A federal court should declare a statute unconstitutional only in the rare circumstance when Congress has clearly exceeded its authority under the Constitution in enacting the statute or when the statute violates the Constitution. If confirmed as a district judge, I would apply the standards established by the Supreme Court and the Second Circuit Court of Appeals in considering the constitutionality of a statute.

**12. 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 not proper for judges to rely on foreign law or the views of the “world community” in determining the meaning of the Constitution.

**13. 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: I assure the Committee that if I am confirmed as a district judge my decisions would be grounded in precedent and the text of the law rather than an underlying political ideology or motivation. I have performed my responsibilities as a federal prosecutor, enforcing federal criminal law for the past twenty-five years, without any underlying political ideology or motivation.

**14. 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: I assure the Committee that if I am confirmed as a district judge I would put aside any personal views and treat everyone appearing before me fairly, with respect and consideration. During my work as a federal prosecutor I believe that I have developed a reputation for fairness and that I have treated defense counsel, witnesses, victims and defendants fairly and with respect.

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

Response: I have experience managing a heavy caseload as the Appellate Chief in my office, responsible for all of the office’s appellate work, and the management of the appellate caseload. If confirmed as a district judge, I would take an active role in managing

my caseload, utilizing the reports that are available under the district court's electronic filing system. I would establish reasonable and firm deadlines for discovery and trial and, at the same time, encourage the parties to consider settlement options. I would work diligently to promptly rule on motions. I would explore other ways in which I could effectively manage the caseload.

**16. 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: I believe that a district court judge has a critical role in controlling the pace and conduct of litigation. If confirmed as a district judge, I would play an active role in managing my cases, ensuring that the Speedy Trial Act is followed in criminal cases, and that reasonable, firm deadlines are set in all cases. I would work diligently to promptly rule on motions. I would explore other ways in which I could work to control my docket.

**17. 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 understand that the role of an advocate is entirely different from the role of a district judge. If confirmed as a district judge, I would approach each case with an open mind; carefully and respectfully consider each party's position; faithfully apply binding precedent; and work diligently to issue decisions promptly. If there is no binding precedent I would look for guidance in analogous case law from the Supreme Court or Second Circuit, as well as other circuit court and district court decisions. I expect that the most difficult part of the transition for me would be the challenge of learning civil practice and new areas of civil law.

**18. 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.

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

Response: I received these questions on July 1, 2014. I researched and drafted my response to the questions and provided a draft response to the Department of Justice Office of Legal Policy on July 2, 2014. I reviewed them with a representative of that office on July 2nd and July 3rd, and asked that my responses be submitted to the Committee after that review.

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

Response: Yes.



**Questions for the Record**  
**Senator Ted Cruz**

**Responses by Brenda K. Sannes,**  
**Nominee, U.S. District Judge for the Northern District of New York**

**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 believe that a district judge should approach each case with an open mind; carefully and respectfully consider each party’s position; faithfully apply binding precedent; and work diligently to issue decisions promptly. I am not familiar enough with the judicial philosophies of the Supreme Court Justices from the Warren, Burger or Rehnquist Courts to opine on which Justice’s judicial philosophy is most analogous with mine.

**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 judge, I would follow the precedent of the Supreme Court and the United States Court of Appeals for the Second Circuit regarding the interpretation of the Constitution. The Supreme Court has stated that “*the public understanding* of a legal text in the period after its enactment or ratification” is a “critical tool of constitutional interpretation.” *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (emphasis in original).

**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 judge I would not, and could not, overrule 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: If confirmed as a district judge, I would be bound to follow *Garcia*, without regard to any personal agreement or disagreement with its reasoning.

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

Response: The Supreme Court has identified three general categories of regulation within Congress’ Commerce Clause power. Congress may: (1) “regulate the channels of interstate commerce”; (2) “regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce”; and (3) “regulate activities that substantially affect interstate

commerce.” *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); *see also United States v. Lopez*, 514 U.S. 549, 558-59 (1995). If confirmed as a district judge I would follow the Supreme Court and Second Circuit precedent regarding the limits of Congress’ Commerce Clause authority.

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

Response: The Supreme Court has stated that the President’s authority to act “must stem either from an act of Congress or from the Constitution itself.” *Medellin v. Texas*, 552 U.S. 491, 524 (2008); *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). The Court has noted that the President’s authority is “at its maximum” when the President acts pursuant to an express or implied authorization of Congress; that the President can “only rely upon his own independent powers” when he acts without a congressional grant or denial of authority; and that the President’s power “is at its lowest ebb” when the President “takes measures incompatible with the expressed or implied will of Congress.” *Medellin*, 552 U.S. at 524-25. If confirmed as a district judge I would follow the Supreme Court and Second Circuit precedent defining the limits of executive action.

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

Response: The Supreme Court has stated that the Due Process Clause “protects 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) (citations omitted). If confirmed as a district judge I would follow the Supreme Court and Second Circuit precedent regarding whether a right is “fundamental” for purposes of the substantive due process doctrine.

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

Response: The Supreme Court has held that classifications by race and national origin are subject to strict scrutiny. *See City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Classifications based on alienage ordinarily are subject to strict scrutiny. *See Bernal v. Fainter*, 467 U.S. 216, 219-20 (1984). Classifications based upon gender and illegitimacy are subject to heightened review. *See Cleburne*, 473 U.S. at 440-41. If confirmed as a district judge I would follow Supreme Court and Second Circuit precedent in determining what classifications are subject to heightened scrutiny under the Equal Protection Clause.

**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 judge I would follow the precedent established by the Supreme Court in *Grutter* and *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013), and any applicable Second Circuit precedent. I do not know how the controlling precedent will evolve in the next fifteen years.