

**Senator Grassley
Questions for the Record**

**Paula Xinis,
Nominee, U.S. District Judge for the District of Maryland**

- 1. In a speech you gave in 2013, you expressed the opinion that “courts have not caught up with technology” after discussing a case in which the Court had held that police had committed trespass against a defendant when the officer installed a GPS on the defendant’s car. Please explain what you meant by this statement.**

Response: This statement was on a PowerPoint slide for a presentation to criminal defense attorneys regarding Fourth Amendment issues arising from electronic surveillance. It was designed to heighten audience awareness to rapidly changing surveillance technologies by impressing upon them that courts are seeing application of these technologies for the first time in criminal cases.

- 2. A lot of factors go into sentencing defendants, including prior criminal history and type of crime. Generally, what role should other factors play in deciding a sentence? And specifically, what weight do you give to a defendant who has children at home, who is a small business owner, or who is active in a local church?**

Response: Application of the United States Sentencing Guidelines would be the starting point and principal tool for determining a defendant’s sentence. 18 U.S.C. § 3553(a) further states that the sentencing court shall consider such factors as the nature and circumstances of the offense, and the need for the sentence imposed to reflect the seriousness of the offense, to afford adequate deterrence to criminal conduct, to protect the public from further crimes and to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner. If confirmed, I would consider the Sentencing Guidelines, these statutory factors, and all relevant credible evidence when imposing any sentence.

- 3. You once described the 4th Circuit as the most conservative in the country. What, in your view, makes a circuit conservative or liberal? And, if confirmed, will you make your court a more liberal or a more conservative one?**

Response: This statement was made in an interview regarding the impact of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) on future criminal cases. The Supreme Court in *Apprendi* held that other than a defendant’s prior criminal conviction(s), all facts supporting a statutory mandatory minimum sentence must be plead and proven beyond a reasonable doubt. The statement was meant to highlight that the Fourth Circuit likely would narrowly construe *Apprendi*, and I used the term “conservative” inartfully. If confirmed, I would not consider whether my decisions would be characterized as “liberal” or “conservative.” Rather, I would apply all binding precedent to the facts of every case faithfully and without exception.

- 4. What role, if any, do you believe a federal judge should play in both seeking justice for victims and punishment for the offenders with the need to rehabilitate offenders? Please explain.**

Response: A judge must faithfully apply the United States Sentencing Guidelines and all statutory provisions related to sentencing. This includes consideration of the sentencing factors set forth in 18 U.S.C. § 3553(a) related to punishment and rehabilitation. A judge must also follow the laws applicable to protection of crime victims and participation of victims in sentencing proceedings (18 U.S.C. § 3771), and providing restitution to victims (18 U.S.C. §§ 3663 & 3663A).

- 5. You have said that pre-sentencing reports are often “wrong.” If confirmed, what weight will you give to these reports when making sentencing decisions?**

Response: This statement related to the criminal history section of pre-sentence reports, and was part of a PowerPoint presentation I gave to criminal defense attorneys who represent indigent defendants. The statement was meant to highlight that defense attorneys must diligently obtain criminal history records to determine whether the records available to the pre-sentence report writer were complete and accurate. If confirmed, I would give the pre-sentence report the weight accorded to it by law and would follow the procedures set forth in Rule 32 of the Federal Rules of Criminal Procedure for using the pre-sentence report as a factual predicate for imposing sentence.

- 6. What improvements, if any, do you believe need to be made to our criminal justice system?**

Response: Criminal justice reform involves important issues best addressed by our law and policy makers. If confirmed, I would faithfully apply all criminal laws to the facts of each case before me without regard to any personal views or beliefs.

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

Response: The most important attribute of a judge is a combination of faithful, unbiased, evenhanded application of the law to the facts of each case, while treating each litigant, lawyer or witness who appears before the Court with dignity and respect. I am committed deeply to these principles, and if confirmed, would adhere to them in every case.

- 8. 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 should be respectful, patient, thoughtful and deliberate. Throughout my career as an attorney, I have treated all persons with dignity and respect. Further, during my years as an advocate, I have considered patience and thoughtful deliberation as the hallmarks of my professional reputation. If confirmed, I will follow these precepts in all of my interactions.

- 9. 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: A judge's faithful application of the law and all binding precedent without regard to any personal views is of paramount importance. If confirmed, I will apply all binding precedent to the facts of every case faithfully and without exception.

- 10. 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: First, I would ensure through exhaustive research that no controlling precedent could be applied to decide the matter or issue before me. Next, I would determine whether the plain language of the statute, rule or regulation as applied to the facts would dispose of the issue in question. If the language is ambiguous or not dispositive, I would apply the principles of statutory construction set forth in binding Supreme Court and Fourth Circuit precedent. I would also look to analogous cases in the Supreme Court and the Fourth Circuit, and if none exist, consult analogous cases in other Circuits for persuasive authority.

- 11. 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 am deeply committed to *stare decisis* and would apply all binding precedent without regard to my personal views.

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

Response: Statutes are presumptively constitutional. If a court can reasonably interpret a statute that allows the statute to survive constitutional challenge, that interpretation should be applied. A statute should be declared unconstitutional only where Congress has clearly exceeded its authority or a statute unequivocally violates a provision of the Constitution.

- 13. 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: It is never appropriate for judges to rely on foreign law or views of the world community when interpreting the United States Constitution.

- 14. 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: No judge should ever be motivated by any political ideology or personal agenda. Rigorous application of precedent and the plain language of the law without regard to personal views are fundamental to the role of a judge. I assure this Committee of my deep commitment to fulfilling my oath and obligations as a neutral arbiter will be unaffected by personal views. My integrity, reputation for honesty, and unblemished record for faithful execution of my oaths and obligations provide further assurance that I would fully execute my duties of impartial, fair decision-making were I so fortunate as to be confirmed.

- 15. 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 both criminal and civil practice, I have put aside all personal views when representing my clients and have faithfully executed my obligations as an advocate and officer of the court. Equally important has been my fair treatment of all individuals throughout my professional life. If confirmed, I would carry forward my deep commitment to treating all who appear before me fairly, impartially, and with dignity and respect.

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

Response: If confirmed, I would manage my caseload consistent with the procedures implemented in the United States District Court for the District of Maryland. Such procedures include electronic case management tools, working closely with United States Magistrate Judges to resolve civil discovery disputes, and holding case management conferences to ensure that cases are moving expeditiously and steadily toward resolution. I would also remain an active participant in the orderly administration of a case, issuing meaningful scheduling orders and requiring litigants to adhere to such orders absent exceptional circumstances.

- 17. 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 play a vital role in controlling the pace and conduct of litigation. If confirmed, I would employ the procedures outlined in my previous answer. Additionally, I would require attorneys appearing before me to adhere to standards of professionalism and civility, and would encourage cooperative resolution of preliminary discovery and other non-dispositive matters to promote efficient resolution of cases.

- 18. Do you believe there is a right to privacy in the U.S. Constitution?**

a. Where is it located?

Response: Although the Constitution does not expressly include the phrase “right to privacy,” the United States Supreme Court has recognized a “right to privacy” in certain contexts. For example, the Court has recognized a privacy right in the freedom from unreasonable searches and seizures embodied in the Fourth Amendment. *See Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013) and *United States v. Jones*, 132 S. Ct. 945, 950 (2012). The Court has similarly recognized a privacy right in such personal freedoms as the right to marry embodied in the Due Process Clause of the Fifth and Fourteenth Amendments, *see Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997), and to free association provided in the First Amendment. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

b. From what does it derive?

Response: Please see Response to Question 18(a).

c. What is your understanding, in general terms, of the contours of that right?

Response: My understanding of this right is based on relevant United States Supreme Court precedent. If I am confirmed and a party asserted a privacy interest, I would faithfully apply binding Supreme Court and Fourth Circuit precedent to determine the Constitutional provision at issue and apply the law to the facts and circumstances of the case before me.

19. 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.” I realize you may not be aware of the specific context of this statement, but do you agree with that statement?

Response: I am not familiar with the context in which President Obama made this statement. A judge must faithfully apply the law to the facts of every case without regard to his or her personal views.

20. 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 29, 2015. I reviewed the questions and personally prepared answers to them. I submitted my answers to the Office of Legal Policy and discussed the same with OLP staff. I then finalized my responses, and permitted the Office of Legal Policy to submit these responses on my behalf.

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

Response: Yes.

**Senator Vitter
Questions for the Record**

**Paula Xinis,
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- 1. What are some acceptable indicia of probable cause when conducting a safety pat down of an individual that would elicit a more probing legal search for contraband or weapons?**
 - a. Would a small lump in the suspect’s front pocket when looking for a weapon warrant a more exacting search?**
 - b. Would the crackling sound of a plastic baggy along with feeling a rigid or semi-rigid substance inside the baggy in the suspect’s pants pocket when looking for a weapon warrant a more exacting search?**

Response: In *Terry v. Ohio*, 392 U.S. 1, 24 (1968), the United States Supreme Court held that an officer may conduct a warrantless pat-down search of a suspect lawfully detained for questioning where the officer reasonably believes that the suspect may be carrying a weapon. In *Minnesota v. Dickerson*, 508 U.S. 366, 375-76 (1993), the Supreme Court further held that if an officer conducting a *Terry* authorized pat-down “feels an object whose contour or mass makes its identity immediately apparent” as contraband, the object may be lawfully seized. *Id.* See also *United States v. Swann*, 149 F.3d 271, 274-75 (4th Cir. 1998). If confirmed, I would faithfully apply controlling Supreme Court and Fourth Circuit precedent to the facts of every case in which this issue is presented.

- 2. In your work as a criminal defense attorney, you have given many presentations on sentencing issues, and how to mitigate sentences. In these presentations, you recommended bringing in Bureau of Prison experts to attest to the prison systems “infirmities” and “help craft alternatives to prison.” What are the crimes that you deem worthy of alternatives to prison and what alternative would you suggest for each one?**

Response: For any federal criminal case, the starting point and primary tool to determine the appropriate sentence is the United States Sentencing Guidelines. Certain offenses are also subject to statutory mandatory minimum terms of imprisonment that a sentencing court must apply absent narrowly tailored exceptions set forth in 18 U.S.C. § 3553(e) and (f). This statute at 18 U.S.C. § 3553(a) further states that the court shall consider when imposing sentence the nature and circumstances of the offense, and the need for the sentence imposed to reflect the seriousness of the offense, to afford adequate deterrence to criminal conduct, to protect the public from further crimes and to provide the defendant with needed educational

or vocational training, medical care or other correctional treatment in the most effective manner. If confirmed, I would apply the Sentencing Guidelines, the statutory factors, and all relevant credible evidence when imposing any sentence.

3. What is your philosophy on judicial precedent and would you apply prior binding case law that resulted in a court decision that you personally disagree with?

Response: With regard to applying binding case law, I firmly believe that judges are duty bound to following the binding precedent of the United States Supreme Court and respective Courts of Appeals regardless of any personal views. If confirmed, I will faithfully apply all relevant and binding precedent without regard to any personal views.

4. What is your opinion of the constitutionality of the majority ruling NLRB v. Canning and what would be your allowable time frame between pro forma sessions of the senate before the president can soundly exercise his recess appointment power? Is it 3 days? 4? 5?

Response: In *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2567 (2014), the United States Supreme Court concluded that “the phrase ‘the recess’ applies to both intra-session and inter-session recesses. If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. And a recess lasting less than 10 days is presumptively too short as well.” *Id.* (internal citations and quotations omitted). If confirmed, I would faithfully apply all Supreme Court precedent, including *Canning*, as well as any other binding precedent from the Fourth Circuit.

5. In your opinion, is it an undue burden on a woman seeking an abortion under Planned Parenthood v. Casey if a state requires that doctors performing the procedures have admitting privileges at one of the hospitals in the state to protect women’s health and, as a result, all abortion clinics in the state are shut down?

Response: In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the United States Supreme Court reaffirmed the holding of *Roe v. Wade*, but set a new standard for reviewing the constitutional validity of laws restricting abortions. The Court announced, in a plurality opinion, that if a state law imposes an “undue burden” or its “purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability,” the law does not pass constitutional muster. *Id.* at 878. Because this issue is being litigated in various federal courts throughout the country and may be raised in future cases over which I may preside, I do not believe it prudent for me to address this issue further. If confirmed, I would faithfully follow all binding precedent of the Supreme Court and the United States Court of Appeals for the Fourth Circuit for all matters, including those involving abortion.

6. **The Court's ruling on the right to privacy in Griswold v. Connecticut laid the foundation for Roe v. Wade. From your perspective, is Roe v. Wade settled law?**

Response: *Roe v. Wade*, 410 U.S. 113 (1973), as affirmed, modified and clarified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and *Gonzales v. Carhart*, 550 U.S. 124 (2007), is binding Supreme Court precedent.

7. **How do you reconcile the 2nd Amendment rights under the Constitution to keep and bear arms made applicable to states under the 14th Amendment in McDonald v. City of Chicago with the more recent crop of lower federal court rulings upholding gun control laws, such as laws requiring gun registration, laws making it illegal to carry guns near schools and post offices, and laws banning bottom loading semi-automatic pistols for protection?**

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that individuals retain the right to keep and bear arms under the Second Amendment. The Court in *Heller* also noted the right to bear arms is not unlimited and that rational basis scrutiny would not be an appropriate level of review. *Id.* at 626, 628, n.27. The Fourth Circuit, applying *Heller*, has announced a two-pronged test to determine the constitutionality of a federal gun-control statute. *See United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010). Under *United States v. Chester*, a court must determine first whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guaranteed right to keep and bear arms. If the "challenged regulation burdens conduct that was in the scope of the Second Amendment," the Court must next determine what level of scrutiny it should apply in reviewing the constitutionality of the statute. *Id.* If confirmed, I will faithfully apply binding precedent in all cases, including those related to the constitutionality of firearms regulations.