Senator Grassley
Questions for the Record

Ann Marie Donnelly,
Nominee, U.S. District Judge for the Eastern District of New York

1. **As a judge, you have experience deciding cases and writing opinions. Please describe how you reach a decision in cases that come before you and to what sources of information you look for guidance. How will you handle, for instance, cases of first impression?**

   Response: I first familiarize myself with the complete factual record of a case. I review the submissions of both parties, and request oral argument when I believe that it will be helpful. I study applicable statutes and precedent, and apply the law to the relevant facts. I then prepare an opinion that clearly explains the reasons for my conclusions. In a case of first impression that does not involve statutory interpretation, I look at cases in my jurisdiction involving similar issues and consult decisions from other jurisdictions. I have not had a case of first impression involving the interpretation of a statute; if I were to confront such an issue, I would employ the canons of statutory construction.

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

   Response: In imposing a sentence, a federal judge should give deference to the Federal Sentencing Guidelines. A federal judge must also consider the factors outlined in 18 U.S.C. Section 3553(a)(2): the nature of the offense and the defendant's history and circumstances, as well as the need for the sentence to reflect the seriousness of the crime, to promote respect for the law, to provide a just punishment for the offense, to deter criminal conduct, to protect the public and to provide the defendant with any necessary training and treatment. If confirmed, I will follow Supreme Court and Second Circuit precedent.

3. **How much discretion do you think is appropriate for judges to have during sentencing?**

   Response: If confirmed, I will give deference to the Federal Sentencing Guidelines. A federal judge should begin by consulting the guidelines, which although advisory, are a critical tool to ensuring uniformity and predictability in sentencing. A federal judge must also consider the factors set forth in 18 U.S.C. 3553(a)(2). The Supreme Court has determined that lower court judges have discretion to depart from the guidelines if there are aggravating or mitigating circumstances not adequately reflected in the guidelines.

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

Response: The most important attribute of a judge is fidelity to the rule of law. The foundations of this philosophy are impartiality, adherence to binding precedent, an even and respectful temperament, and a recognition of the limits of a district judge's authority under our Constitution. I believe that I have demonstrated a strong commitment to the rule of law throughout my six years on the New York Supreme Court.

5. 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: An appropriate judicial temperament is vital to the fair and efficient functioning of a courtroom. A judge must treat all who appear before her with patience, dignity and respect, and yet maintain appropriate control of the courtroom and the docket. I believe that I have achieved this balance in state court, and that I have always demonstrated the appropriate judicial temperament.

6. 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: Throughout my time as a state court judge, I have always followed binding precedent, regardless of any personal opinion. If confirmed to be a federal district judge, I will continue to do so.

7. 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 look to the text of the statute; if the statutory language is unambiguous, I would base my decision on the statute's plain meaning. If there were any ambiguity in the language, I would apply the canons of statutory construction, including looking to Supreme Court and Second Circuit case law interpreting analogous statutes, and case law from other jurisdictions.

8. 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: As a federal district judge, I would be bound by decisions of the Supreme Court and the Second Circuit, and would apply that precedent, regardless of any personal opinions about the merits of that precedent.

9. 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, and 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.

10. 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. Judges must base their decisions on binding precedent from the Supreme Court and the circuit courts in their jurisdictions.

11. 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: As a judge on New York's Supreme Court, I have always based my decisions on established precedent and the rule of law, without regard to any personal opinion or ideology. If confirmed as a district court judge, I will continue that practice.

12. 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: My tenure as a state court judge is the best evidence I can provide of my commitment to the rule of law and to treat all litigants fairly and impartially. If confirmed as a federal court judge, I will continue to abide by that commitment.

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

Response: As a judge in one of the busiest court systems in the country, I have been obligated to manage heavy calendars, issue prompt and clear rulings, and conduct trials efficiently and fairly. If confirmed as a district court judge, I will make use of all case management tools available in the Eastern District of New York. I will take an active role in scheduling, and will hold conferences with lawyers, set realistic and firm timetables, and encourage resolutions where appropriate. I will also consult with magistrate judges to manage my docket. I will set definite and reasonable trial schedules, and issue decisions promptly.

14. 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: Judges play a vital role in moving cases along fairly and efficiently. If confirmed as a district court judge, I will take the steps outlined in Question 13.

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

Response: While the Constitution does not include a specific "right to privacy," the Supreme Court has recognized a right to privacy in the following contexts: a First Amendment protection in "the freedom to associate and privacy in one's associations," (*NAACP v. Alabama*, 357 U.S. 449, 462 (1958)); a Fourth Amendment right of privacy in the home and in one's person and possessions (*Mapp v. Ohio*, 367 U.S. 643, 656 (1961); *see also Riley v. California*, 134 S. Ct. 473 (2014)); a Fifth Amendment "zone of privacy" in the Self Incrimination Clause (*Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Boyd v. United States*, 116 U.S. 616, 630 (1886)); and a Third Amendment privacy right in the prohibition against the nonconsensual quartering of soldiers (*Griswold*, 381 U.S. at 484; *Katz v. United States*, 389 U.S. 347, 350 n.5 (1967)). The Court has also held that the Due Process Clause of the Fourteenth Amendment includes a right to marital privacy, (*Griswold, supra*) and protects liberties that 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 quotations and citations omitted).

a. Where is it located?

Response: Please see above.

b. From what does it derive?

Response: Please see above.

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

Response: Please see above.

16. 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: As a state court judge, I make my decisions based on binding precedent, not on any personal feelings about the litigants or the issues. If confirmed, I will continue to adhere to this practice.

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

Response: The Office of Legal Policy at the Department of Justice forwarded these questions to me on May 13, 2015. I reviewed the questions, and did research where

necessary. I then drafted answers, discussed them with an attorney for the Office of Legal Policy, and then finalized them for submission to the Committee.

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

Response: Yes.

Senator Vitter
Questions for the Record

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1. **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: The Supreme Court recently held that the President is empowered to make recess appointments during any recess of sufficient length, and that "in light of historical practice, a recess of greater than three days but less than ten days is presumptively too short to fall within the [Appointments] Clause;" the Court used the word "presumptively" to leave open the possibility that some "very unusual circumstance…could demand the exercise of the recess-appointment power during a shorter break." *NLRB v. Canning*, 134 S. Ct. 2550, 2567 (2014). If confirmed, I would apply this precedent and any applicable Second Circuit case law.

2. **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: The constitutionality of a law that mandates state hospital admitting privileges for doctors who perform abortions is currently the subject of litigation. Neither the Supreme Court nor the Second Circuit have ruled on this issue. As a judicial nominee, I do not believe that it would be appropriate for me to address this subject.

3. **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 clarified and modified by subsequent cases (*see, e.g., Gonzales v. Carhart*, 550 U.S. 124 (2007); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)) is binding Supreme Court precedent, and lower courts must follow it.

4. **Do you agree that the ruling in Baker v. Nelson precludes the federal courts from hearing cases regarding state definitions of marriage? Do you think that US v. Windsor contradicts the Court's previous ruling in Baker?**

   Response: In 1971, the Minnesota Supreme Court rejected a constitutional challenge to a state law that restricted marriage to members of the opposite sex. *Baker v. Nelson*, 291 Minn. 310 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972). The plaintiff appealed to the Supreme Court, at a time when the Court was required to accept the appeal as a matter of right, and the Court dismissed the case "for want of a substantial federal question." The precedential significance of the Supreme Court's dismissal is limited, since a "summary affirmance is an affirmance of the judgment only." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Court found that it had jurisdiction to consider whether the federal Defense of Marriage Act precluded Ms. Windsor from claiming a federal tax exemption as a surviving spouse. *Windsor* is established precedent that a district court judge is obligated to follow.

5. **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: The philosophy to which I have adhered in my six years on the state court bench, and to which I will adhere if confirmed as a district court judge, is one of strict adherence to binding precedent, regardless of personal beliefs.

6. **How do you reconcile the 2nd Amendment basic right 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), made applicable to the states in *McDonald v. City of Chicago*, 561 U.S. 742 (2008), the Court struck down an ordinance that banned the possession of handguns in the home. The Court ruled that the Second Amendment protects the right to keep and bear arms, but cautioned that "[l]ike most rights, the right secured by the Second Amendment is not unlimited," and that nothing in the decision "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27. Since *Heller* and *McDonald*, the Second Circuit has had occasion to consider various laws regulating the possession of firearms. *See, e.g., Burgess v. Town of*

Wallingford, 569 Fed. Appx. 21 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1401 (2015); *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013), *cert. denied sub nom. Kwong v. de Blasio*, 134 S. Ct. 2696 (2014); *United States v. Bryant*, 711 F.3d 364 (2d Cir. 2013), *cert. denied sub nom. Bryant v. United States*, 134 S. Ct. 904 (2013); *Kachalsky v. County of Westchester*, 710 F.3d 81 (2d Cir. 2012), *cert. denied sub nom. Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013). If confirmed, I will follow the binding precedent of the Supreme Court and the Second Circuit.

7. Do you support suspending capital punishment sentencing pending the Supreme Court's decision on the use of lethal injection drugs in Oklahoma?

Response: The Supreme Court recently heard arguments on this issue in *Glossip v. Gross*, and stayed the executions of the petitioners pending the Court's decision. As a judicial nominee, I do not believe that it would be appropriate for me to opine on this subject. If confirmed, I will follow binding precedent from the Supreme Court and the Second Circuit.