

**Senator Chuck Grassley, Ranking Member**  
**Questions for the Record**  
**Judge Florence Pan**  
**Judicial Nominee to the U.S. District Court for the District of Columbia**

1. **In the context of federal case law, what is super precedent? Which cases, if any, count as super precedent?**

Response: The Supreme Court has not used the term "super precedent" to describe any of its decisions. If confirmed, I will apply all binding precedents of the Supreme Court and the District of Columbia Circuit.

2. **Should law firms undertake the pro bono prosecution of crimes?**

Response: I am not aware of any precedent for law firms to undertake the pro bono prosecution of crimes. The prosecution of crimes is a governmental function.

3. **Do you agree with Judge Ketanji Brown Jackson when she said in 2013 that she did not believe in a "living constitution"?**

Response: I do not use labels such as "living Constitution" to describe my view of the Constitution. I believe that the Constitution is an enduring document that Americans can rely upon to safeguard fundamental rights. In addition, the Constitution has been interpreted by the Supreme Court to apply to issues and facts of first impression.

4. **Should a judge yield to social pressure when deciding the outcome of cases?**

Response: No.

5. **Is it possible for private parties—like law firms, retired prosecutors, or retired judges—to prosecute federal criminals in the absence of charges being actively pursued by federal authorities?**

Response: I am not aware of any precedent for a private party to prosecute a federal crime. The prosecution of crimes is a governmental function.

6. **The Federalist Society is an organization of conservatives and libertarians dedicated to the rule of law and legal reform. Would you hire a member of the Federalist Society to serve in your chambers as a law clerk?**

Response: Yes.

7. **Absent a traditional conflict of interest, should paying clients of a law firm be able to prevent other paying clients from engaging the firm?**

Response: I have not worked at a law firm except as a summer associate. I am not familiar with how law firms determine which clients to represent, and I do not have an opinion on this matter.

**8. Should paying clients be able to influence which pro bono clients engage a law firm?**

Response: Please see my response to Question 7.

**9. As a matter of legal ethics do you agree with the proposition that some civil clients don't deserve representation on account of their identity?**

Response: No.

**10. Should judicial decisions take into consideration principles of social "equity"?**

Response: Judicial decisions should reflect a good faith application of the governing law to the facts of the case that is before the court.

**11. Is it ever appropriate for a judge to publicly profess political positions on campaigns and/or candidates?**

Response: No.

**12. Is threatening Supreme Court Justices right or wrong?**

Response: Threatening Supreme Court Justices is wrong.

**13. How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

Response: The answer to this question would depend on the context of the particular comment at issue. Generally, criticism of an opinion focuses on the analysis and the reasoning of the opinion at issue.

**14. Do you think the Supreme Court should be expanded?**

Response: As a sitting judge and as a nominee, it would not be appropriate for me to comment on whether the Supreme Court should be expanded.

**15. Should a defendant's personal characteristics influence the punishment he or she receives?**

Response: 18 U.S.C. § 3553(a)(1) provides that a sentencing court "shall consider" the "history and characteristics of the defendant."

- 16. If the Justice Department determines that the prosecution of an individual is meritless and dismisses the case, is it appropriate for a District Judge to question the Department's motivations and appoint an amicus to continue the prosecution? Please explain why or why not.**

Response: The Justice Department has prosecutorial discretion to dismiss criminal cases. Federal Rule of Criminal Procedure 48(a) provides that "[t]he government may, with leave of court, dismiss an indictment, information or complaint." An Advisory Committee Note states that "[t]his provision will permit the filing of a nolle prosequi only by leave of court. This is similar to the rule now prevailing in many States." Thus, the applicable rule requires the court to grant leave before a case may be dismissed. A court has discretion to determine what information should be considered before it grants the government leave to dismiss a case.

- 17. What is the legal basis for a nationwide injunction? What considerations would you consider as a district judge when deciding whether to grant one?**

Response: A district court has discretion in fashioning suitable relief and defining the terms of an injunction. "Injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Moreover, "the scope of injunctive relief is dictated by the extent of the violation established . . ." *Id.* I would follow the precedents of the Supreme Court and the District of Columbia Circuit in considering whether to grant any injunction.

- 18. What legal standard would you apply in evaluating whether or not a regulation or proposed legislation infringes on Second Amendment rights?**

Response: If confirmed, I will apply the precedents of the Supreme Court and the District of Columbia Circuit in considering challenges under the Second Amendment. *See, e.g., Heller v. District of Columbia*, 554 U.S. 570 (2008); *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011).

- 19. In your view, is a personal philosophical or religious objection to the death penalty on the part of the President a valid justification to abandon the defense of a death sentence on direct appeal?**

Response: As a sitting judge and as a nominee, it would not be appropriate for me to comment on the propriety of how the Executive Branch might choose to exercise its prosecutorial discretion.

- 20. In your view, is a personal philosophical or religious objection to the death penalty on the part of a District Judge a valid justification not to impose a death sentence?**

Response: A District Judge must take an oath to faithfully and impartially discharge and perform all the duties incumbent upon him or her as a judge under the Constitution and laws of the United States. Personal philosophical or religious views should not influence a judge's application of the law.

**21. Do you believe potential voter fraud or other election abnormalities are concerns that the Justice Department should take seriously?**

Response: As a sitting judge and as a nominee, it would not be appropriate for me to comment on the policy priorities of the Justice Department.

**22. Do state school-choice programs make private schools state actors for the purposes of the Americans with Disabilities Act?**

Response: As a sitting judge and as a nominee, it would not be appropriate for me to comment on an issue that may arise in litigation before the court. The District of Columbia has a School Choice Incentive Program, and I am not aware of any precedents in this jurisdiction that have addressed this issue.

**23. Does illegal immigration impose costs on border communities?**

Response: I have not studied the issue of illegal immigration and its impact on border communities. I therefore am not able to answer this question.

**24. When was the last time you visited the U.S.-Mexico border?**

Response: I have never visited the U.S.-Mexico border.

**25. When was the last time you visited the U.S.-Mexico border outside of a port of entry?**

Response: Please see my response to Question 24.

**26. Do Blaine Amendments violate the Constitution?**

Response: In *Espinoza v. Montana Dept. of Revenue*, 591 U.S. \_\_\_, 140 S. Ct. 2246 (2020), the Supreme Court considered a scholarship program that was administered in accordance with a Blaine Amendment -- Article X, section 6, of the Montana Constitution, which contains a "no-aid" provision barring government aid to sectarian schools. Montana's administrative rule prohibited families from using the scholarships at religious schools. The Supreme Court held that the administrative rule discriminated against schools and parents based on the religious character of the school; and that the rule failed strict scrutiny and violated the Free Exercise Clause of the First Amendment. The Court held that, under the Supremacy Clause, where there is a conflict between a state constitution's no-aid provision and the Free Exercise Clause, the state court should "disregard" the no-aid provision and decide the case "conformably to the Constitution of the United States."

- 27. Please describe the selection process that led to your nomination to be a United States District Judge, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).**

Response: I previously was nominated by President Obama on April 28, 2016, but the nomination expired. On February 15, 2021, I submitted an application to the District of Columbia Federal Law Enforcement Nominating Commission. I interviewed with that commission on February 27, 2021. On March 23, 2021, I was contacted by the White House Counsel's Office and was informed that I was under consideration. Since that time, I have been in communication with White House staff and officials from the Office of Legal Policy at the Department of Justice. On March 30, 2021, President Biden announced his intent to nominate me, and on June 15, 2021, my nomination was submitted to the Senate.

- 28. During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice? If so, what was the nature of those discussions?**

Response: No.

- a. Did anyone do so on your behalf?**

Response: No.

- 29. During your selection process did you talk with any officials from or anyone directly associated with the American Constitution Society? If so, what was the nature of those discussions?**

Response: No.

- a. Did anyone do so on your behalf?**

Response: No.

- 30. During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

- a. Did anyone do so on your behalf?**

Response: No.

**31. During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundation. If so, what was the nature of those discussions?**

Response: No.

**a. Did anyone do so on your behalf?**

Response: No.

**32. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding your nomination.**

Response: Please see my response to Question 27.

**33. Please explain, with particularity, the process whereby you answered these questions.**

Response: On July 21, 2021, the Office of Legal Policy at the Department of Justice provided these questions to me. I reviewed the questions and drafted my responses. The Office of Legal Policy reviewed my responses and provided limited feedback before I finalized them. The answers are my own.

**Nomination of The Honorable Florence Y. Pan to be United  
States District Judge for the District of Columbia Questions  
for the Record  
Submitted July 21, 2021**

**QUESTIONS FROM SENATOR COTTON**

1. **Since becoming a legal adult, have you ever been arrested for or accused of committing a hate crime against any person?**

Response: No.

2. **Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?**

Response: No.

3. **Was *D.C. v. Heller*, 554 U.S. 570 (2008) rightly decided?**

Response: As a sitting judge and as a nominee, it would not be appropriate for me to comment on whether a Supreme Court precedent was “rightly” decided. If confirmed, I will apply all Supreme Court precedents without regard to any personal opinion about whether any such precedent was rightly decided.

4. **Is the Second Amendment right to keep and bear arms an individual right belonging to individual persons, or a collective right that only belongs to a group such as a militia?**

Response: The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment protects an individual right to keep and bear arms.

5. **Please describe what you believe to be the Supreme Court’s holding in *Greer v. United States*, 593 U.S. \_\_\_\_ (2021).**

Response: In *Rehaif v. United States*, 588 U.S. \_\_\_, 139 S. Ct. 2191 (2019), the Supreme Court held that in a felon-in-possession prosecution under 18 U.S.C. § 922(g), the government must prove that the defendant knew he was a felon at the time that he possessed the firearm. *Greer* considered the standard for appellate courts to order new trials or plea hearings for people convicted under Section 922(g) who initially failed to invoke *Rehaif*. The Supreme Court held that such a defendant may obtain relief under *Rehaif* only if the defendant demonstrates a “substantial possibility” that he or she could produce evidence on remand that the defendant did not, in fact, know his or her felon status, such that the defendant would not be convicted again.

6. **Please describe what you believe to be the Supreme Court’s holding in *Terry v. United States*, 593 U.S. \_\_\_\_ (2021).**

Response: In *Terry*, the Supreme Court held that defendants convicted of drug-trafficking offenses involving “Tier 3” quantities of crack cocaine are not eligible for resentencing under the Fair Sentencing Act and the First Step Act. Although Tier 3 quantities are smaller than Tier 1 and Tier 2 quantities, the First Step Act applies retroactively only to people sentenced for a “covered offense,” which is defined as any offense whose statutory penalties were “modified by section 2 or 3 of the Fair Sentencing Act.” Sections 2 and 3 of the Fair Sentencing Act modified the quantities for Tier 1 and Tier 2 offenses, but not Tier 3 offenses. Thus, the statute does not allow re-sentencing of defendants convicted of offenses involving the smallest amounts of crack cocaine.

7. **Please describe what you believe to be the Supreme Court’s holding in *Jones v. Mississippi*, 593 U.S. \_\_\_\_ (2021).**

Response: The petitioner in *Jones* was a defendant who was convicted of murder as a juvenile, and was sentenced to life without parole. Jones argued that the Supreme Court’s decisions in *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. \_\_\_, 136 S. Ct. 718 (2016), required the sentencing judge to find that Jones was incapable of rehabilitation before imposing a sentence of life without parole. The Supreme Court rejected this argument, ruling that those cases require only that the sentencing court “consider youth as a mitigating factor” when deciding whether to impose a life-without-parole sentence.

8. **Please describe what you believe to be the Supreme Court’s holding in *Tandon v. Newsom*, 593 U.S. \_\_\_\_ (2021).**

Response: In *Tandon*, the Supreme Court enjoined California from enforcing COVID-19 restrictions as applied to religious, in-home gatherings. The Court held that “government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise.” Even though California’s COVID-19 rules limited both secular and religious in-home gatherings to three or fewer households, religious in-home gatherings had to be exempted from that limitation because some businesses were not subject to the same limitation.

9. **Please describe what you believe to be the Supreme Court’s holding in *Sanchez v. Mayorkas*, 593 U.S. \_\_\_\_ (2021).**

Response: In *Sanchez*, the Supreme Court held that noncitizens who have been granted Temporary Protected Status are not eligible for an “adjustment of status” to obtain lawful



permanent residency without leaving the country. The relevant statute, 8 U.S.C. § 1255(a), allows in-country adjustment of status for those who were “inspected and admitted or paroled in the United States.” The Court ruled that “Section 1255 generally requires a lawful admission before a person can obtain [lawful permanent resident] status. Sanchez was not lawfully admitted, and his [Temporary Protected Status] does not alter that fact. He therefore cannot become a permanent resident of this country.”

**10. What is your view of arbitration as a litigation alternative in civil cases?**

Response: Where the parties agree to arbitrate, arbitration is often a good alternative to litigation. Arbitration generally allows the parties to achieve a swifter, more efficient, and less costly resolution of their dispute.

**11. Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.**

Response: On July 21, 2021, the Office of Legal Policy at the Department of Justice provided these questions and the questions of other members of the Committee to me. I reviewed the questions and drafted my responses. The Office of Legal Policy reviewed my responses and provided limited feedback before I finalized them. The answers are my own.

**12. Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers, please also identify the department or agency with which those officials are employed.**

Response: No other individual assisted with writing or drafting my answers.

**SENATOR TED CRUZ**  
**U.S. Senate Committee on the Judiciary**

**Questions for the Record for Florence Y. Pan, to be United States District Judge for the District of Columbia**

**I. Directions**

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible and what efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

## II. Questions

1. **You granted a motion for pretrial release for a schizophrenic man who neglected to take his medication, and then shot at police officers—resulting in the injury and partial paralysis of one of the officers. The Montgomery County Police criticized this ruling, stating that the man “is clearly demonstrated to be a threat to people in the community, whether they are law enforcement officers or residents.” What was the basis for this ruling?**

Response: When I made the ruling in question, I was applying the D.C. bail statute, D.C. Code § 23-1322, which favors release. At the time that the motion for pre-trial release was filed, the circumstances of the defendant had changed dramatically. My recollection is that he was back on his medication, and had maintained a perfect disciplinary record over a substantial period of time at the jail. Moreover, he had been shot in the encounter with the police and had become physically disabled. My recollection is that I placed the defendant on house arrest with a detailed plan for his supervision by the Pretrial Services Agency.

2. **During your confirmation hearing in 2016, you responded the following to Senator Tillis, “I think that would be inappropriate as a judge to do anything but follow the law. I think that judges are bound by the law, they swear an oath to uphold the law, and they should faithfully apply the law to the facts that are before them. So I would not agree with any type of philosophy that would yield to social pressure or any – any other factors in decision making by a judge.”**

**Do you agree with what you said before, and if so, do you consider yourself a textualist or an originalist? If not, what’s the difference between those philosophies and your own philosophy?**

Response: I agree with my prior statement. I do not use labels such as “textualist” or “originalist” to describe my view of the law. I believe that the text is the starting point and the foundation of all constitutional and statutory interpretation. I believe that the original intent and the original public meaning of the provision in question are important considerations in interpreting the Constitution.

3. **Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice’s philosophy from Warren, Burger, Rehnquist, or Robert’s Courts is most analogous with yours.**

Response: As a trial judge for the past 12 years on the District of Columbia Superior Court, my judicial philosophy has been to be well prepared, to be open-minded, to give all litigants a meaningful opportunity to be heard, and to apply the law to the facts of each case that comes before me. I do not identify with any particular Supreme Court Justice in terms of judicial philosophy. I believe that a judge should follow precedent and should

decide only those matters that are necessary to the resolution of the case. I believe that judges should set aside their personal views and opinions, and even-handedly apply the law.

4. **Does the Constitution's meaning evolve and adapt to new circumstances even if the document is not formally amended? If so, when?**

Response: I believe that the Constitution is an enduring document that Americans can rely upon to safeguard fundamental rights. In addition, the Constitution has been interpreted by the Supreme Court to apply to issues and facts of first impression.

**Questions for the Record for Florence Pan  
From Senator Mazie K. Hirono**

1. **As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:**

- a. **Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

Response: No.

- b. **Have you ever faced discipline, or entered into a settlement related to this kind of conduct?**

Response: No.

**Senator Mike Lee**  
**Questions for the Record**  
**Florence Pan, D.D.C.**

**1. How would you describe your judicial philosophy?**

Response: As a trial judge for the past 12 years on the District of Columbia Superior Court, my judicial philosophy has been to be well prepared, to be open-minded, to give all litigants a meaningful opportunity to be heard, and to apply the law to the facts of each case that comes before me.

**2. What sources would you consult when deciding a case that turned on the interpretation of a federal statute?**

Response: In interpreting a federal statute, I would begin with the text. If the plain meaning of the language in the statute were clear, that would be dispositive. I would also rely on precedents of the Supreme Court and the District of Columbia Circuit. If there were no such precedents, I would look to canons of statutory construction, the structure of the statute, precedents from other courts, and legislative history.

**3. What sources would you consult when deciding a case that turned on the interpretation of a constitutional provision?**

Response: In interpreting a constitutional provision, I would first examine the text of the provision. I would rely on the precedents of the Supreme Court and the District of Columbia Circuit. I also would consider the original intent and original public meaning of the provision.

**4. What role do the text and original meaning of a constitutional provision play when interpreting the Constitution?**

Response: The text and the original meaning of a constitutional provision play very important roles in interpreting the Constitution. The text is the starting point of any analysis of a constitutional provision. The Supreme Court has often placed great weight on original meaning in interpreting the Constitution. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008).

**5. How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?**

Response: Please see my response to Question 2.

- a. Does the “plain meaning” of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?**

Response: The plain meaning of a statute or constitutional provision generally refers to the public understanding of the relevant language at the time of enactment. The Supreme Court, however, has recognized and relied upon the evolution of social norms in certain contexts, such as in considering cruel and unusual punishment under the Eighth Amendment. *See Trop v. Dulles*, 356 U.S. 86 (1958) (Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”). If confirmed, I would be bound by the precedents of the Supreme Court and the District of Columbia Circuit, regardless of whether that precedent relied on original public meaning.

**6. What are the constitutional requirements for standing?**

Response: Article III limits the exercise of federal court jurisdiction to cases or controversies. To establish standing to bring a case, a plaintiff must demonstrate (1) that they personally have suffered an actual or threatened injury; (2) that the injury is fairly traceable to the challenged conduct of the defendant; and (3) that the injury is likely to be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

**7. Do you believe Congress has implied powers beyond those enumerated in the Constitution? If so, what are those implied powers?**

Response: In *McCulloch v. Maryland*, 17 U.S. 316, 418 (1819), the Supreme Court held that under the Necessary and Proper Clause, congressional power encompasses implied and incidental powers that are “conducive” to the “beneficial exercise” of an enumerated power. Chief Justice Marshall wrote, “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.”

**8. Where Congress enacts a law without reference to a specific Constitutional enumerated power, how would you evaluate the constitutionality of that law?**

Response: When evaluating the constitutionality of a law that was enacted without reference to a specific enumerated power, I would follow the precedents of the Supreme Court and the District of Columbia Circuit. I would carefully consider the arguments of the parties and my own independent legal research.

**9. Does the Constitution protect rights that are not expressly enumerated in the Constitution? Which rights?**

Response: The Supreme Court has held that some rights are not expressly enumerated in the Constitution, but are nevertheless protected under the Due Process Clause of the Fifth and Fourteenth Amendments. Such rights are “deeply rooted in

the Nation's history and traditions" and "implicit in the concept of ordered liberty." See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

**10. What rights are protected under substantive due process?**

Response: Some of the rights that the Supreme Court has held are protected under the doctrine of substantive due process include: The right to use contraception; the right of interracial couples to marry; the right to an abortion; the right to engage in intimate sexual conduct; and the right of same-sex couples to marry.

**11. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v. New York*, on what basis do you distinguish these types of rights for constitutional purposes?**

Response: If confirmed, I will not rely on my personal beliefs in considering the scope of substantive due process protections. I would note that in footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), Justice Harlan Fiske Stone distinguished between statutes dealing with economic and social-welfare legislation and those that implicate the essence of ordered liberty. Justice Stone wrote that there may be a "narrower scope for operation of the presumption of constitutionality" where non-economic constitutional rights are concerned.

**12. What are the limits on Congress's power under the Commerce Clause?**

Response: The Supreme Court has held that, under the Commerce Clause, Congress may regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and activities that substantially affect interstate commerce. See *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

**13. What qualifies a particular group as a "suspect class," such that laws affecting that group must survive strict scrutiny?**

Response: The Supreme Court has held that strict scrutiny is warranted when the government classifies people based upon "traditional indicia of suspectness," including those that pertain to "an immutable characteristic determined solely by accident of birth." See *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974); see also *United States v. Carolene Products, Co.*, 304 U.S. 144, 152 n.4 (1938). The Supreme Court has determined that race, religion, national origin, and alienage are suspect classes subject to strict scrutiny.

**14. How would you describe the role that checks and balances and separation of powers play in the Constitution's structure?**



Response: Checks and balances and separation of powers are important structural protections that prevent the excessive accumulation of power in any one branch of the government.

15. **How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?**

Response: In reviewing whether the governmental action was lawful, I would rely on the precedents of the Supreme Court and the District of Columbia Circuit. For example, Justice Robert H. Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), provides a framework for evaluating the exercise of unenumerated executive powers.

16. **What role should empathy play in a judge's consideration of a case?**

Response: In considering a case, a judge should apply the governing law to the facts of the case that is before the court. A judge should not allow his or her personal views or emotions to influence his or her rulings.

17. **What's worse: Invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?**

Response: An error in constitutional interpretation is a bad outcome, whether it results in the invalidation or the upholding of a statute. Upholding a statute, however, validates the independent judgment of a coordinate branch of government, and therefore is less disruptive than overturning a statute.

18. **From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?**

Response: One reason that fewer statutes were struck down between 1789 and 1857 is that Congress passed far fewer statutes during that period of time. The downside of "aggressive" exercise of judicial review is that it results in the overturning of laws that have been passed and approved by democratically elected officials in the legislative and executive branches of the government. The downside of judicial passivity is that it suggests a failure by the courts to uphold their obligation to review legislation to ensure that it comports with the requirements of the Constitution.

19. **How would you explain the difference between judicial review and judicial supremacy?**

Response: I understand judicial review to describe the routine process of courts considering and ruling upon claims that challenge the lawfulness of legislation or government conduct. I understand judicial supremacy to refer to the principle that the Supreme Court's interpretation of the Constitution is authoritative.

20. **Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that “If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.” How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?**

Response: As a sitting judge and as a nominee, it would not be appropriate for me to comment on how elected officials should fulfill their duties. The rule of law, however, requires all members of society to respect duly rendered judicial decisions.

21. **In Federalist 78, Hamilton says that the courts are the least dangerous branch because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.**

Response: It is the duty of a judge to apply the law to the facts of the case before the court. In this respect, a judge does not employ force or will, but only uses judgment to interpret the law, as it was written by the legislative branch and approved by the executive. Officials in the legislative and executive branches may seek to implement the will of the people who elected them, through legislation and policy initiatives. That is not the function of a judge.

22. **As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?**

Response: As a trial judge, it is my duty to apply binding precedents. If confirmed, I will apply all precedents of the Supreme Court and the District of Columbia Circuit. If a party raises a good faith challenge to a precedent, I am nevertheless bound to apply the precedent. Only the Court of Appeals sitting en banc or the Supreme Court would have the authority to overrule the precedent.

23. **When sentencing an individual defendant in a criminal case, what role, if any, should the defendant's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges' sentencing analysis?**

Response: Group identity is not one of the factors that may be considered in imposing a sentence under 18 U.S.C. § 3553(a).

24. **The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?**

Response: I am not familiar with this quote, or the context in which it was made. I equate the concept of equity with fairness.

25. **Is there a difference between "equity" and "equality?" If so, what is it?**

Response: I understand "equity" to mean fairness. I understand "equality" to mean treating people in the same way.

26. **Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 24)?**

Response: I am not aware of any Supreme Court decision that has considered or applied the Equal Protection Clause to the precise definition of "equity" from the above quote.

27. **How do you define "systemic racism?"**

Response: I understand "systemic racism" to refer to a form of racism that is embedded through laws and regulations within a society or an organization.

28. **How do you define "critical race theory?"**

Response: I understand "critical race theory" to refer to a body of legal scholarship that seeks to critically examine the law as it intersects with issues of race.

29. **Do you distinguish "critical race theory" from "systemic racism," and if so, how?**

Response: I understand “critical race theory” to be an academic subject. I understand “systemic racism” to be a label that seeks to describe a form of racism.

30. **In 2012, you granted supervised release to a defendant who allegedly fired a gun at several police officers, injuring one. The Montgomery County Police criticized your decision, saying “[t]his man is clearly demonstrated to be a threat to the people in the community, whether they are law enforcement officers or residents . . . [w]e are disappointed with the judge’s decision to release him back into the community.” Please explain your decision in that case.**

Response: The defendant was mentally ill and had not been taking his medication when the incident occurred. When I made the ruling in question, I was applying the D.C. bail statute, D.C. Code § 23-1322, which favors release. At the time that the motion for pre-trial release was filed, the circumstances of the defendant had changed dramatically. My recollection is that he was back on his medication, and had maintained a perfect disciplinary record over a substantial period of time at the jail. Moreover, he had been shot in the encounter with the police and had become physically disabled. My recollection is that I placed the defendant on house arrest with a detailed plan for his supervision by the Pretrial Services Agency.

31. **Given the disturbing rise in violent crime and murder we are seeing throughout the country, will you commit to prioritize protecting public safety if confirmed as a federal judge?**

Response: Public safety is an important consideration and a priority to me in all criminal cases.

**Senator Ben Sasse**  
**Questions for the Record**  
**U.S. Senate Committee on the Judiciary**  
**Hearing: “Nominations”**  
**July 21, 2021**

**For all nominees:**

- 1. Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?**

Response: No.

- 2. Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

Response: No.

**For all judicial nominees:**

- 1. How would you describe your judicial philosophy?**

Response: As a trial judge for the past 12 years on the District of Columbia Superior Court, my judicial philosophy has been to be well prepared, to be open-minded, to give all litigants a meaningful opportunity to be heard, and to apply the law to the facts of each case that comes before me.

- 2. Would you describe yourself as an originalist?**

Response: I do not use labels such as “originalist” to describe my view of the law. I believe that original public meaning is an important consideration in interpreting the Constitution.

- 3. Would you describe yourself as a textualist?**

Response: I do not use labels such as “textualist” to describe my view of the law. I believe that the text is the starting point and the foundation of all constitutional and statutory interpretation.

- 4. Do you believe the Constitution is a “living” document? Why or why not?**

Response: I do not use labels such as “living document” to describe my view of the Constitution. I believe that the Constitution is an enduring document that Americans can

rely upon to safeguard fundamental rights. In addition, the Constitution has been interpreted by the Supreme Court to apply to issues and facts of first impression.

**5. Please name the Supreme Court Justice or Justices appointed since January 20, 1953 whose jurisprudence you admire the most and explain why.**

Response: I admire Justice Sandra Day O'Connor and Justice Ruth Bader Ginsburg, who were the first women appointed to the Supreme Court. They have been important role models for me. Each of them overcame many barriers and challenges in their professional lives, and they were exemplary public servants.

**6. Was *Marbury v. Madison* correctly decided?**

Response: As a sitting judge and as a nominee, I do not think it would be appropriate for me to comment on the "correctness" of a Supreme Court precedent. If confirmed, I will apply all binding Supreme Court precedents, without regard to any personal opinions about their "correctness." However, there are a small number of constitutional decisions that are foundational to our system of justice. *Marbury v. Madison* is one of those decisions.

**7. Was *Lochner v. New York* correctly decided?**

Response: As a sitting judge and as a nominee, I do not think it would be appropriate for me to comment on the "correctness" of a Supreme Court precedent. If confirmed, I will apply all binding Supreme Court precedents, without regard to any personal opinions about their "correctness."

**8. Was *Brown v. Board of Education* correctly decided?**

Response: As a sitting judge and as a nominee, I do not think it would be appropriate for me to comment on the "correctness" of a Supreme Court precedent. If confirmed, I will apply all binding Supreme Court precedents, without regard to any personal opinions about their "correctness." However, there are a small number of constitutional decisions that are foundational to our system of justice. *Brown v. Board of Education* is one of those decisions.

**9. Was *Bolling v. Sharpe* correctly decided?**

Response: Please see my response to Question 7.

**10. Was *Cooper v. Aaron* correctly decided?**

Response: Please see my response to Question 7.

**11. Was *Mapp v. Ohio* correctly decided?**

Response: Please see my response to Question 7.

**12. Was *Gideon v. Wainwright* correctly decided?**

Response: As a sitting judge and as a nominee, I do not think it would be appropriate for me to comment on the “correctness” of a Supreme Court precedent. If confirmed, I will apply all binding Supreme Court precedents, without regard to any personal opinions about their “correctness.” However, there are a small number of constitutional decisions that are foundational to our system of justice. *Gideon v. Wainwright* is one of those decisions.

**13. Was *Griswold v. Connecticut* correctly decided?**

Response: Please see my response to Question 7.

**14. Was *South Carolina v. Katzenbach* correctly decided?**

Response: Please see my response to Question 7.

**15. Was *Miranda v. Arizona* correctly decided?**

Response: Please see my response to Question 7.

**16. Was *Katzenbach v. Morgan* correctly decided?**

Response: Please see my response to Question 7.

**17. Was *Loving v. Virginia* correctly decided?**

Response: As a sitting judge and as a nominee, I do not think it would be appropriate for me to comment on the “correctness” of a Supreme Court precedent. If confirmed, I will apply all binding Supreme Court precedents, without regard to any personal opinions about their “correctness.” However, there are a small number of constitutional decisions that are foundational to our system of justice. *Loving v. Virginia* is one of those decisions.

**18. Was *Katz v. United States* correctly decided?**

Response: Please see my response to Question 7.

**19. Was *Roe v. Wade* correctly decided?**

Response: Please see my response to Question 7.

**20. Was *Romer v. Evans* correctly decided?**

Response: Please see my response to Question 7.

**21. Was *United States v. Virginia* correctly decided?**

Response: Please see my response to Question 7.

**22. Was *Bush v. Gore* correctly decided?**

Response: Please see my response to Question 7.

**23. Was *District of Columbia v. Heller* correctly decided?**

Response: Please see my response to Question 7.

**24. Was *Crawford v. Marion County Election Board* correctly decided?**

Response: Please see my response to Question 7.

**25. Was *Boumediene v. Bush* correctly decided?**

Response: Please see my response to Question 7.

**26. Was *Citizens United v. Federal Election Commission* correctly decided?**

Response: Please see my response to Question 7.

**27. Was *Shelby County v. Holder* correctly decided?**

Response: Please see my response to Question 7.

**28. Was *United States v. Windsor* correctly decided?**

Response: Please see my response to Question 7.

**29. Was *Obergefell v. Hodges* correctly decided?**

Response: Please see my response to Question 7.

**30. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for an appellate court to reaffirm its own precedent that conflicts with the original public meaning of the Constitution?**

Response: An appellate court, sitting en banc, may overrule a precedent of the court. Rule 35 of the Federal Rules of Appellate Procedure provides that an “en banc rehearing is not favored and ordinarily will not be ordered unless (1) en banc consideration is



necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance.”

- 31. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for an appellate court to reaffirm its own precedent that conflicts with the original public meaning of the text of a statute?**

Response: Please see my response to Question 30.

- 32. If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant? If so, how so?**

Response: This is not a factor that may be considered in imposing a sentence under 18 U.S.C. § 3553(a).

**Questions from Senator Thom Tillis**  
**for Florence Y. Pan**  
**Nominee to be United States District Court Judge for the District of Columbia**

- 1. Do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?**

Response: Yes.

- 2. What is judicial activism? Do you consider judicial activism appropriate?**

Response: I understand "judicial activism" to describe when a judge advances a personal agenda or relies on personal opinions and preferences in deciding cases. Judicial activism is not appropriate.

- 3. Do you believe impartiality is an aspiration or an expectation for a judge?**

Response: I believe that impartiality should be expected and required of any judge.

- 4. Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?**

Response: No.

- 5. Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?**

Response: When faithfully applying the law, the outcome is not always the most desirable. Nevertheless, a judge's duty is to faithfully apply the law in every instance. It is the legislature's job to amend the law if the outcomes of the law's application are undesirable.

- 6. Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?**

Response: No.

- 7. What will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?**

Response: If confirmed, I will apply all applicable precedents of the Supreme Court and the District of Columbia Circuit in considering challenges under the Second Amendment. *See, e.g., Heller v. District of Columbia*, 554 U.S. 570 (2008); *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011).

- 8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits? Should local officials be able to use a crisis, such as COVID-19 to limit someone's constitutional rights? In other words, does a pandemic limit someone's constitutional rights?**

Response: If confirmed, I will apply all applicable precedents of the Supreme Court and the District of Columbia Circuit in evaluating challenges under the Second Amendment. The Supreme Court considered a challenge to COVID-19 restrictions that burdened constitutional rights in *Tandon v. Newsom*, 593 U.S. \_\_\_\_ (2021). The Court applied strict scrutiny to those restrictions and granted an injunction against enforcing the restrictions with respect to persons exercising their rights under the Free Exercise Clause.

- 9. What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?**

Response: If confirmed, I will follow the precedents of the Supreme Court and the District of Columbia Circuit with respect to claims of qualified immunity. The Supreme Court has held that government officials are entitled to qualified immunity unless they have violated a plaintiff's "clearly established" statutory or constitutional rights.

- 10. Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?**

Response: As a sitting judge and as a nominee, it would not be appropriate for me to comment on whether the law of qualified immunity provides sufficient protection for law enforcement officers. If confirmed, I will apply all applicable legal precedents. Whether additional protections are needed is a matter for the legislature to consider.

- 11. What do you believe should be the proper scope of qualified immunity protections for law enforcement?**

Response: Please see my response to Question 10.

- 12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?**

Response: As a judge on the District of Columbia Superior Court for the past 12 years, and as an Assistant United States Attorney for the 10 years before that, I have never had occasion to consider or to apply the Supreme Court's cases regarding patent eligibility. I do not have any opinion on these cases.

**13. How would you apply current patent eligibility jurisprudence to the following hypotheticals. Please avoid giving non-answers and actually analyze these hypotheticals.**

- a. *ABC Pharmaceutical Company* develops a method of optimizing dosages of a substance that has beneficial effects on preventing, treating or curing a disease or condition for individual patients, using conventional technology but a newly-discovered correlation between administered medicinal agents and bodily chemicals or metabolites. Should this invention be patent eligible?**

Response: As a nominee, I do not think it would be appropriate for me to analyze how hypothetical cases should be resolved because similar issues may come before the court if I am confirmed. As a judge on the District of Columbia Superior Court for the past 12 years, and as an Assistant United States Attorney for the 10 years before that, I have not had the opportunity to review the patent cases that would be relevant to analyzing this hypothetical. But as a judge with substantial experience on the bench, I have often encountered new areas of the law. When that happens, I become deeply familiar with the applicable law before rendering a decision, by thoroughly reviewing the authorities cited by the parties and by doing independent legal research. If confirmed, I will give the same careful attention to any patent cases that come before me.

- b. *FinServCo* develops a valuable proprietary trading strategy that demonstrably increases their profits derived from trading commodities. The strategy involves a new application of statistical methods, combined with predictions about how trading markets behave that are derived from insights into human psychology. Should *FinServCo*'s business method standing alone be eligible? What about the business method as practically applied on a computer?**

Response: Please see my response to Question 13a.

- c. *HumanGenetics Company* wants to previewatent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if *HumanGenetics Company* wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?**

Response: Please see my response to Question 13a.

- d. *BetterThanTesla ElectricCo* develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should *BetterThanTesla*'s billing system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?**

Response: Please see my response to Question 13a.

- e. ***Natural Laws and Substances, Inc.* specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?**

Response: Please see my response to Question 13a.

- f. **A business methods company, *FinancialServices Troll*, specializes in taking conventional legal transaction methods or systems and implementing them through a computer process or artificial intelligence. Should such implementations be patent eligible? What if the implemented method actually improves the expected result by, for example, making the methods faster, but doesn't improve the functioning of the computer itself? If the computer or artificial intelligence implemented system does actually improve the expected result, what if it doesn't have any other meaningful limitations?**

Response: Please see my response to Question 13a.

- g. ***BioTechCo* discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTech Co* invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?**

Response: Please see my response to Question 13a.

- h. **Assuming *BioTechCo*'s diagnostic test is patent eligible, should there exist provisions in law that prohibit an assertion of infringement against patients receiving the diagnostic test? In other words, should there be a testing exemption for the patient health and benefit? If there is such an exemption, what are its limits?**

Response: As a sitting judge and as a nominee, it would not be appropriate for me to comment on whether the law should include the provisions posited. This is a matter that should be addressed by the legislature.

- i. ***Hantson Pharmaceuticals* develops a new chemical entity as a composition of matter that proves effective in treating TrulyTerribleDisease. Should this new chemical entity be patent eligible?**

Response: Please see my response to Question 13a.

- j. ***Stoll Laboratories* discovers that superconducting materials superconduct at much higher temperatures when in microgravity. The materials are standard superconducting materials that superconduct at lower temperatures at surface gravity. Should *Stoll Labs* be able to patent the natural law that superconductive materials in space have higher superconductive temperatures? What about the space applications of superconductivity that benefit from this effect?**

Response: Please see my response to Question 13a.

- 14. Based on the previous hypotheticals, do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?**

Response: If confirmed, I will apply the Supreme Court's precedents to the best of my ability, regardless of any personal opinion about their clarity or consistency. Because I am not yet familiar with patent law, I am unable to discuss how I would apply the Supreme Court's ineligibility tests.