

**Senator Chuck Grassley
Questions for the Record**

**Pamela Harris
Nominee, United States Circuit Judge for the Fourth Circuit**

1. In your response to question 2(b) of my questions for the record, you said that you “believe that the Supreme Court appropriately may exercise restraint in a prudential sense, deciding cases narrowly – what I referred to as ‘tak[ing] small steps, not [] big steps’ – so that contentious social issues are resolved to the greatest extent possible by the democratic process.”¹ But in the same response, you also said that “in issuing a decision, whether narrow or broad, the role of any court is to apply law and precedent to the facts, without regard to public opinion on the underlying issue or whether that decision will be popularly received.”²

You stated that it is appropriate for courts to ensure “that contentious social issues are resolved to the greatest extent possible by the democratic process” by “deciding cases narrowly.” How should courts determine whether cases implicate “contentious social issues” if they are to decide cases “without regard to public opinion”?

Response: The Supreme Court has described itself as exercising restraint in cases involving matters of significant “public concern” that are the subject of substantial “democratic action,” allowing such issues to be decided by the democratic process. *Washington v. Glucksberg*, 521 U.S. 702, 716 (1997). In *Glucksberg*, for example, in declining to recognize a constitutional right to physician-assisted suicide, the Supreme Court reviewed an extensive series of state-level ballot initiatives and legislative changes, *id.* at 716-19, concluding that “[t]hroughout the Nation, Americans are engaged in an earnest and profound debate” over physician-assisted suicide, and that its holding would “permit[] this debate to continue, as it should in a democratic society,” *id.* at 735. I do not believe that the Supreme Court understands itself, in such cases, to be rendering decisions based on public opinion, but rather to be applying constitutional law and precedent in a way that defers to an actively engaged democratic process. *Id.* at 716. More specifically, I do not believe the Supreme Court, in such cases or any others, bases its decisions on what it perceives to be the weight of public opinion on an issue or on whether it believes its ruling will be well received by the public. If confirmed as a circuit judge, I would follow Supreme Court and Fourth Circuit precedent on any question regarding deference to the political process, and base decisions on impartial application of law and precedent to fact without regard to whether they would enjoy popular support.

¹ Pamela Harris, Response to Sen. Grassley’s Questions for the Record, at 2(b).

² *Id.*

2. In your response to question 4(b) of my questions for the record, you said that “‘the preferences’ to which [you] w[ere] referring” were “principles like equality and liberty and individual dignity.”³ While on an ACS panel, you stated that “[p]eople often ask: show me, prove to me that you’re doing this honestly, show me where your *personal policy preferences* diverge from the Constitution. Show me that you’re not just reading them to be the same thing”⁴ (emphasis added).

- a. Were you suggesting that people ask you to show where “principles like equality and liberty and individual dignity,” which “virtually all of us” agree with, “diverge from the Constitution”?

Response: No. To the contrary, I was suggesting that general principles like equality, liberty and individual dignity are both embraced by virtually all Americans, myself included, and reflected in the Constitution. I made that observation in the course of explaining why I rejected the suggestion that there is a need for a “better” Constitution.

- b. Where do your personal beliefs as to what government ought to do diverge from “[your] own best reading of [what] the Constitution” requires, permits, or prohibits?

Response: Thank you for the opportunity to clarify. The point of my original comments was that the Constitution was a forward-thinking document for its day, given the general principles – such as liberty and equality – contained therein, and that I generally embraced those principles personally, as well. In other words, I did not suggest then – nor am I suggesting now – that my personal beliefs diverge from the general principles reflected in the Constitution. But most importantly, if I were confirmed as a judge, I would assume a role in which my commitment to the Constitution would become a matter of solemn obligation: As a circuit judge, it would be my duty to decide cases arising under the Constitution according to that document’s text and Supreme Court and Fourth Circuit precedent construing it, regardless of any personal beliefs I might have, and I would faithfully carry out that duty.

³ Pamela Harris, Response to Sen. Grassley’s Questions for the Record, at 4(b).

⁴ Pamela Harris, Panelist, “The ACS National Convention: Keeping Faith with the Constitution,” American Constitution Society, June 19, 2009 (“People often ask (in panels like this): Show me, prove to me that you’re doing this honestly, show me where your personal policy preferences diverge from the Constitution. Show me that you’re not just reading them to be the same thing. And I always feel unapologetically, you know, left to my own devices, my own best reading of the Constitution, it’s pretty close to where I am. Because I think the Constitution is a profoundly progressive document. I think it’s born of a progressive impulse. I think particularly, as amended in the Reconstruction era, it is committed to principles like equality and liberty and individual dignity, and I’m a profoundly liberal person so we [the Constitution and I] match up pretty well. I make no apologies for that. I think it’s a great document. And I think as amended, and as interpreted, and the method, with the people of good will, applying the methodology that’s talked about in this book, it is something we can all be really proud of.”).

3. Do you believe that “social movements reconstitute what it is we’re talking about when we talk about American constitutional tradition”?⁵ Or is “the only sense in which [you] believe that constitutional provisions or principles evolve” is when “[c]ourts are sometimes called upon to apply those original provisions to new facts or circumstances, and in that sense, their application may change over time”?⁶ Please explain.

Response: I believe that constitutional provisions or principles “evolve” only in the sense that courts may apply those original provisions to new facts or circumstances over time. This understanding was the foundation of my work as a Supreme Court and appellate litigator. My arguments always were premised on the interpretive approaches employed and endorsed by the Supreme Court and appellate courts.

On the academic panel from which the first quoted remark is taken, I was suggesting that social movements play a role in shaping popular discussion and public understandings of general constitutional principles like equality. My comment was not focused on judicial decision-making, and I did not mean to suggest that judges do or should base their decisions on social movements or their agendas. I understand decisions like *Brown v. Board of Education*, 347 U.S. 483, 492-94 (1954), for instance, which I had been discussing earlier on the panel, to be based only on the original equal protection principle of the Fourteenth Amendment, applied by the Supreme Court in 1954 to the contemporary circumstances then before it. I can assure the Committee that if confirmed as a judge, I would faithfully follow the methodological precedents of the Supreme Court and the Fourth Circuit, basing decisions only on the interpretive sources used by those courts, and doing so without regard to any comments I might have made on a panel.

⁵ Pamela Harris, Panelist, “Our Enduring Constitution: Applications and Interpretations,” American Constitution Society, June 14, 2008.

⁶ Pamela Harris, Response to Sen. Grassley’s Questions for the Record, at 6(a).