

**Senator Grassley
Questions for the Record**

**Mary McElroy
Nominee, U.S. District Judge for the District of Rhode Island**

- 1. You have spent the majority of your career in criminal defense work. What do you anticipate will be the biggest challenge, if confirmed?**

Response: If I am fortunate enough to be confirmed, I anticipate that the biggest challenge I will face would be in expanding my knowledge of certain areas of complex civil litigation in which I have less experience. I look forward to this challenge and will call upon my earlier experiences in general civil practice and my civil litigation experiences as the director of an administrative agency. I will also utilize the training provided by the Administrative Office of the United States Courts to gain the necessary background in all areas of the law.

- 2. In an interview, you described the Rhode Island probation violation standard as being “perhaps unconstitutional.” Can you elaborate on that statement? What makes the probation violation standard possibly unconstitutional?**

Response: As an advocate within the criminal justice system I have pointed out areas of concern for practitioners. Within the office of the public defender, we have discussed potential constitutional challenges to both the legal and factual standards of proof for probation violations. We initially focused on the low legal standard that Rhode Island uses – that of “reasonable satisfaction” - as a potential area for constitutional challenge. (See *State v. Sylvia*, 871 A.2d 954, 957 (R.I. 2005) and *State v. Gromkiewicz*, 43 A.2d 618, 623 (R.I. 2012) for the legal standard of proof). However, more recently the agency has determined that the factual standard of proof as applied in the state may be an area for challenge as well. Rhode Island probationers must comply with the implied condition of probation that they “keep the peace” and “remain on good behavior” and all that is required to find a probation violation is a violation of that condition regardless of whether a new criminal act or a violation of specific term of probation has been alleged. See *State v. Prout*, 116 A.3d 196,202 (R.I. 2015). From the position of the Public Defender, the standard lacks specificity and provides no meaningful notice as to what constitutes behavior that would violate probation. For that reason it could be found to be unconstitutionally vague.

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

Response: Impartiality- which includes the setting aside of personal opinions, biases or preconceptions and determining matters based on the facts and the law- is the most

important attribute for any judge. I believe that I possess and have demonstrated impartiality throughout my career and if confirmed would be an impartial and fair judge.

4. **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: My view is that the most important aspects of appropriate judicial temperament include even-temperedness and the ability to be fair to all parties, to remain civil and gracious even in the face of frustrating behavior and to be decisive without being heavy handed. I believe I meet all of these standards.

5. **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: I have never put my personal opinions ahead of the obligations I have under the law. Application of the law and all binding precedent is the most important job for any judge. If confirmed, I would faithfully follow the precedents of higher courts and give them full force and effect without regard to personal opinion.

6. **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 presented with such a case, I would look at the statute or regulation in question to determine if the language was clear and unambiguous. I would then apply the plain language of the statute to the facts of the case before me to determine if the issue could be resolved in that manner. If the language was not clear, I would look to case law from the United States Supreme Court and the Court of Appeals for the First Circuit that was analogous to the case before me. Finally I would look to other Supreme Court and appellate court cases for the most applicable persuasive authority that would apply to the facts before me.

7. **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 would faithfully apply the precedent of the United States Supreme Court and the Court of Appeals for the First Circuit if I were fortunate enough to be confirmed. My personal views would have no place and would play no role in my decision-making.

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

Response: All statutes enacted by Congress are presumed to be constitutional, and a federal court should avoid addressing a statute's constitutionality if the case can be resolved by other means. Where a reasonable interpretation of a statute permits a court to avoid declaring it to be unconstitutional, the court must do so. A statute may only be declared unconstitutional by a court if Congress has clearly exceeded its authority or where it violates a provision of the Constitution.

9. In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community", in determining the meaning of the Constitution? Please explain.

Response: No, it is never proper for judges to rely on foreign law, or the views of the "world community," in determining the meaning of the Constitution.

10. 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: My legal work has always been grounded in precedent and the text of the law and not in any underlying political ideology or motivation. I intend to bring that same respect for the law to the court if I am confirmed.

11. 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: As an assistant public defender for many years, I never allowed my personal views to enter into my representation of clients, no matter how unpopular the client or case. As the public defender, speaking for the agency, I have always put aside any personal views I have held in order to advocate for the agency as a whole. I believe that my reputation in the legal community for integrity and fairness is the best assurance I can give to this Committee that I will be fair to all who appear before me if I am fortunate enough to be confirmed.

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

Response: If confirmed, I would anticipate actively managing my caseload consistent with the procedures already in place in the United States District Court for the District of Rhode Island as well as the federal and local rules of procedure. This would include following the guidelines for timely decision making, utilizing the magistrate judges to permit the efficient resolution of cases, being aware of any uniquely pressing circumstances in a given case, supervising my legal staff efficiently and effectively,

maintaining oversight of courtroom scheduling, and working as hard as I have to in order to handle my cases in a timely manner.

- 13. 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, I believe that judges have an important role in controlling the pace and conduct of litigation. Judges must ensure that cases move through the system efficiently and in a way that is fair to all parties. If confirmed I would strive to issue rulings promptly, require attorneys to adhere to standards of professionalism and civility and utilize the systems outlined in Question 12 to ensure that matters before me are resolved efficiently and fairly.

- 14. If confirmed, you will be charged with deciding cases and writing opinions. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance.**

Response: If confirmed, I would first look at the case before me to determine what issues have been properly raised and placed before the court. That would be the starting point for all decision-making. Second, I would look to controlling precedent and relevant laws or regulations as well as the proper standard of review. Finally, I would apply the law to the facts of the case before me and make a fair and unbiased decision based only on the law and facts of that particular case.

- 15. 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: I am not familiar with that quote or its context. Judges must make all decisions based upon the existing law. Personal views or feelings have no place in judicial decision-making.

- 16. 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 December 17, 2015. I reviewed the questions and prepared answers. Upon completion of my answers, I submitted them to the Office of Legal Policy and discussed them with OLP staff. I then finalized my responses and authorized their transmittal to the Committee.

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

Response: Yes.