Nomination of Judge Amul R. Thapar to be
United States Circuit Judge for the Sixth Circuit
Questions for the Record
Submitted May 3, 2017

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?
   a. Would you consider whether the right is expressly enumerated in the Constitution?
   b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?
   c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of another court of appeals?
   d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?
   e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).
   f. What other factors would you consider?

   Response: I would faithfully follow the factors outlined by the binding precedents of the Supreme Court and the Sixth Circuit in determining whether a right is fundamental and protected under the Fourteenth Amendment. What I would decide in a particular case would depend on this precedent, other relevant law, the facts, and the arguments presented.

2. During your confirmation hearing you said that you "don't like labels," but you acknowledged that you belonged to a group that advances an originalist reading of the Constitution.
   a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?
   b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism (last visited May 2, 2017).

Response: I have not had occasion to form an opinion about whether *Brown* is consistent with originalism. I am aware that there is an interesting academic debate on that point, *see, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 955-84 (1995), and about originalism more generally, but my job as a lower court judge is to apply the binding precedents of the Supreme Court and Sixth Circuit. *Brown* removed a great stain from our country's history by overturning *Plessy v. Ferguson*, and *Brown* is indisputably the law of the land. I will faithfully apply it and all other binding precedents.

3. Does your approach to judicial interpretation lead you to conclude that the Fourteenth Amendment's promise of "equal protection" guarantees equality across race and gender, or does it only require racial equality?
   a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?
   b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?
   c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?
   d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

Response: The Supreme Court has consistently held that the Fourteenth Amendment's Equal Protection Clause applies beyond race. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (same-sex couples); *United States v. Virginia*, 518 U.S. 515 (1996) (gender); *Graham v. Richardson*, 403 U.S. 365 (1971) (national origin). The scope of the Fourteenth Amendment's protections is the subject of several live cases before the federal courts. Thus, it would be unethical for me to comment. *See* Code of Conduct of United States Judges Canon 3(A)(6). If an equal-protection case came before me, I would apply the relevant precedent of the Supreme Court and Sixth Circuit.

4. During your hearing you acknowledged that the Supreme Court has held there is a constitutional right to privacy.
   a. Do you agree that the right to privacy protects a woman's right to use contraceptives?
   b. Do you agree that the right to privacy protects a woman's right to obtain an abortion?
   c. Do you agree that the right to privacy protects intimate relations between two consenting adults, regardless of their sexes or genders?
   d. If you do not agree with any of the above, please explain whether these rights are protected or not, and which constitutional rights or provisions encompass them.

Response: The Supreme Court has held that there is a constitutional right to privacy that encompasses the right of married couples to use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965), the right of unmarried people to use contraceptives, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), a woman's right to obtain

an abortion, *Roe v. Wade*, 410 U.S. 113 (1973), and the right of two consenting adults to engage in intimate relations, *Lawrence v. Texas*, 539 U.S. 558 (2003). I will faithfully apply all Supreme Court precedent.

5. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.
   a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?
   b. What is the role of sociology, scientific evidence, and data in the Supreme Court's analysis?

   Response: These are difficult questions that sometimes arise in litigation. If they arose before me, I would need to understand fully the precedent in the area, the specific facts of the case, and the parties' arguments before reaching a position in that case. Above all, I would defer to the Supreme Court and the Sixth Circuit as to when it is appropriate to consider sociology, scientific evidence, and data.

6. During your nomination hearing, we had an exchange about your dissent in *United States v. Carr*, 355 F. App'x 943 (6th Cir. 2009). In that opinion, you wrote that "once a court determines a Fourth Amendment violation has occurred, it must go to the next step and determine whether suppressing the evidence that resulted would have a deterrent effect," and "only when the Court determines that benefits of deterrence outweigh the costs should a court suppress" the contested evidence. *Id.* at 950.
   a. When should a court admit evidence obtained through a search conducted in violation of the Fourth Amendment?
   b. Does the suppression of evidence obtained from an illegal search depend on there being some deterrent effect that might prevent a future illegal search?
   c. Your dissent states that after a court determines a search has been illegal, it should balance the benefits of deterrence against the costs of suppression. The Supreme Court has explained that a cost of suppression is the risk that "guilty and possibly dangerous defendants" might not be convicted. *Herring v. United States*, 555 U.S. 135, 141 (2009). The cost of suppression of evidence in a particular case varies significantly, from minimally affecting the chance of conviction (such as when there is ample other evidence) to significantly decreasing the likelihood of conviction (such as when there is a critical piece of evidence that might be suppressed). Should a court consider how suppression will impact the likelihood of conviction before deciding whether to suppress?
   d. If so, does the balancing test discussed in *Herring* mean that critical evidence might always be admitted because the cost of letting a "possibly dangerous" defendant go free

will always be greater than the deterrent effect?

e. What is the scope of the good faith exception?

Response: The Supreme Court has explained that "the exclusionary rule is not an individual right and applies only where it results in appreciable deterrence." *Herring v. United States*, 555 U.S. 135, 141 (2009). It has further stated that "[r]eal deterrent value is a 'necessary condition for exclusion,' but it is not 'a sufficient' one," counseling courts that "[t]he analysis must also account for the 'substantial social costs' generated by the rule." *Davis v. United States*, 564 U.S. 229, 237 (2011). The Supreme Court has therefore recognized exceptions to the exclusionary rule. *See Herring*, 555 U.S. at 141 (collecting cases). For example, the Supreme Court has held that there is no societal benefit to suppressing evidence when an officer has acted with "objective good faith." *United States v. Leon*, 468 U.S. 897, 920-21 (1984). This exception, however, does not mean that courts refrain from applying the rule simply because suppression will make a conviction less likely. For instance, I have ordered suppression in cases where the illegally obtained evidence was central to the government's case. *See United States v. Lee*, 862 F. Supp. 2d 560 (E.D. Ky. 2012) (suppressing a confession and other illegally obtained evidence because extending the good-faith exception to that case would give law enforcement "little incentive to err on the side of constitutional behavior" (internal quotation marks and citation omitted)); *United States v. Rice*, 704 F. Supp. 2d 667 (E.D. Ky. 2010) (suppressing evidence found at the defendant's home because the good faith exception did not apply). The government dismissed both cases.

7. During your nomination hearing, we discussed your concurrence in *Lawrence v. 48th District Court*, in which you said there is a "need to rein in the definition of 'in custody.'" 560 F.3d 475, 485 (6th Cir. 2009). Following up on our exchange, please answer the following questions:
   a. Why did you express support for the Supreme Court or Congress that would restrict precedent and limit the availability of habeas relief?
   b. In the hearing, you emphasized that you have found ineffective assistance of counsel claims to be meritorious. But for some defendants, their ability to bring an ineffective assistance of counsel claim or a post-conviction claim based on actual innocence hinges on their ability to seek habeas relief in federal court. How will you ensure that federal habeas statutes serve their intended purpose by providing access to federal courts and protecting against improper restrictions on liberty?
   c. Please explain what other avenues to federal court will be available for post-conviction relief for those sentenced to probation if courts limit federal habeas statutes to those in detention facilities.

Response: I concurred in full in the *Lawrence* majority opinion. I wrote separately only to reiterate what Justice Blackmun and others had already observed: That we (as courts) might have over-read the term "in custody" and thus strayed beyond the limits Congress put in the habeas statute. As I noted, however, Congress itself could extend the writ to any restraint on liberty—including even a summons. And we would enforce it, as we enforce other post-conviction remedies. Indeed, in *United States v. Arny*, I found that the defendant had received ineffective assistance of counsel and thus provided him post-conviction relief without needing a writ of habeas corpus to do so; the rules provided another vehicle. *See* 137 F. Supp. 3d 981 (E.D. Ky. 2015), *aff'd*, 831 F.3d 725 (2016).