

Senator Vitter
Questions for the Record

Paula Xinis,
Nominee, U.S. District Judge for the District of Maryland

- 1. What are some acceptable indicia of probable cause when conducting a safety pat down of an individual that would elicit a more probing legal search for contraband or weapons?**
 - a. Would a small lump in the suspect’s front pocket when looking for a weapon warrant a more exacting search?**
 - b. Would the crackling sound of a plastic baggy along with feeling a rigid or semi-rigid substance inside the baggy in the suspect’s pants pocket when looking for a weapon warrant a more exacting search?**

Response: In *Terry v. Ohio*, 392 U.S. 1, 24 (1968), the United States Supreme Court held that an officer may conduct a warrantless pat-down search of a suspect lawfully detained for questioning where the officer reasonably believes that the suspect may be carrying a weapon. In *Minnesota v. Dickerson*, 508 U.S. 366, 375-76 (1993), the Supreme Court further held that if an officer conducting a *Terry* authorized pat-down “feels an object whose contour or mass makes its identity immediately apparent” as contraband, the object may be lawfully seized. *Id.* See also *United States v. Swann*, 149 F.3d 271, 274-75 (4th Cir. 1998). If confirmed, I would faithfully apply controlling Supreme Court and Fourth Circuit precedent to the facts of every case in which this issue is presented.

- 2. In your work as a criminal defense attorney, you have given many presentations on sentencing issues, and how to mitigate sentences. In these presentations, you recommended bringing in Bureau of Prison experts to attest to the prison systems “infirmities” and “help craft alternatives to prison.” What are the crimes that you deem worthy of alternatives to prison and what alternative would you suggest for each one?**

Response: For any federal criminal case, the starting point and primary tool to determine the appropriate sentence is the United States Sentencing Guidelines. Certain offenses are also subject to statutory mandatory minimum terms of imprisonment that a sentencing court must apply absent narrowly tailored exceptions set forth in 18 U.S.C. § 3553(e) and (f). This statute at 18 U.S.C. § 3553(a) further states that the court shall consider when imposing sentence the nature and circumstances of the offense, and the need for the sentence imposed to reflect the seriousness of the offense, to afford adequate deterrence to criminal conduct, to protect the public from further crimes and to provide the defendant with needed educational

or vocational training, medical care or other correctional treatment in the most effective manner. If confirmed, I would apply the Sentencing Guidelines, the statutory factors, and all relevant credible evidence when imposing any sentence.

3. What is your philosophy on judicial precedent and would you apply prior binding case law that resulted in a court decision that you personally disagree with?

Response: With regard to applying binding case law, I firmly believe that judges are duty bound to following the binding precedent of the United States Supreme Court and respective Courts of Appeals regardless of any personal views. If confirmed, I will faithfully apply all relevant and binding precedent without regard to any personal views.

4. What is your opinion of the constitutionality of the majority ruling NLRB v. Canning and what would be your allowable time frame between pro forma sessions of the senate before the president can soundly exercise his recess appointment power? Is it 3 days? 4? 5?

Response: In *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2567 (2014), the United States Supreme Court concluded that "the phrase 'the recess' applies to both intra-session and inter-session recesses. If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. And a recess lasting less than 10 days is presumptively too short as well." *Id.* (internal citations and quotations omitted). If confirmed, I would faithfully apply all Supreme Court precedent, including *Canning*, as well as any other binding precedent from the Fourth Circuit.

5. In your opinion, is it an undue burden on a woman seeking an abortion under Planned Parenthood v. Casey if a state requires that doctors performing the procedures have admitting privileges at one of the hospitals in the state to protect women's health and, as a result, all abortion clinics in the state are shut down?

Response: In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the United States Supreme Court reaffirmed the holding of *Roe v. Wade*, but set a new standard for reviewing the constitutional validity of laws restricting abortions. The Court announced, in a plurality opinion, that if a state law imposes an "undue burden" or its "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability," the law does not pass constitutional muster. *Id.* at 878. Because this issue is being litigated in various federal courts throughout the country and may be raised in future cases over which I may preside, I do not believe it prudent for me to address this issue further. If confirmed, I would faithfully follow all binding precedent of the Supreme Court and the United States Court of Appeals for the Fourth Circuit for all matters, including those involving abortion.

6. The Court's ruling on the right to privacy in Griswold v. Connecticut laid the foundation for Roe v. Wade. From your perspective, is Roe v. Wade settled law?

Response: *Roe v. Wade*, 410 U.S. 113 (1973), as affirmed, modified and clarified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and *Gonzales v. Carhart*, 550 U.S. 124 (2007), is binding Supreme Court precedent.

7. How do you reconcile the 2nd Amendment rights under the Constitution to keep and bear arms made applicable to states under the 14th Amendment in McDonald v. City of Chicago with the more recent crop of lower federal court rulings upholding gun control laws, such as laws requiring gun registration, laws making it illegal to carry guns near schools and post offices, and laws banning bottom loading semi-automatic pistols for protection?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that individuals retain the right to keep and bear arms under the Second Amendment. The Court in *Heller* also noted the right to bear arms is not unlimited and that rational basis scrutiny would not be an appropriate level of review. *Id.* at 626, 628, n.27. The Fourth Circuit, applying *Heller*, has announced a two-pronged test to determine the constitutionality of a federal gun-control statute. *See United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010). Under *United States v. Chester*, a court must determine first whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guaranteed right to keep and bear arms. If the "challenged regulation burdens conduct that was in the scope of the Second Amendment," the Court must next determine what level of scrutiny it should apply in reviewing the constitutionality of the statute. *Id.* If confirmed, I will faithfully apply binding precedent in all cases, including those related to the constitutionality of firearms regulations.