Senator Grassley
Follow-up Questions for the Record

Robert John Colville
Nominee, U.S. District Judge for the Western District of Pennsylvania

1. **During your hearing, Senator Tillis asked you about an answer you provided on a judicial questionnaire when running for Superior Court judge. The question asked if you possessed a "living document" or "strict constructionist" philosophy with regard to the Constitution. On the survey, you responded "It depends on the context." During your hearing you said, "A judge need not worry whether the Constitution is a living document or whether it is not a living document. Trial judges are bound by precedent… We need not engage in deep and mysterious inquiries into the nature of Constitutional rights."**

   Of course, district court judges do hear cases of first impression as well as cases where an appellate court has not spoken clearly on the issue being litigated. Some of these cases may involve constitutional challenges or issues, and it is important to understand how a nominee to be a district court judge would handle constitutional issues. You have clearly considered the issue and opined that it "depends on the circumstances." Please describe the circumstances where it would be appropriate to adopt a "living document" judicial philosophy and the circumstances where it would be appropriate to adopt a "strict constructionist" judicial philosophy.

   Response: The law must do two things at once. First, and foremost, the law must provide predictability. This is the essential function of the law in a democratic society. Whether any of us, individually, agree with the law or not, when predictable, the law carves out space in which individuals can confidently make plans for the future and make informed judgments about their course of conduct with reliable expectations of the consequences. This is the law's greatest and primary value to an ordered society. Predictability is afforded under the law through strict adherence to precedent.

   But the law must also, at the same time, be just and be perceived to be just. The law must do this in order to maintain the faith and trust of the people. While I do not believe that it is ever the appropriate role of a trial judge to attempt to divine the "life" of the law, or to predict a new path for the law, except to the extent dictated by applicable precedent, I recognize that the Supreme Court has, at times in our Nation's history, found new rights flowing from the Constitution that had not been previously recognized, or that had even been previously rejected. The most notable example that comes to mind is the Supreme Court's decision in *Brown v. Board of Education*. My response to Senator Tillis' question attempted to describe my view that, this role, while perhaps appropriate for an appellate court in a rare, but appropriate circumstance, is not a role I consider appropriately exercised by the trial courts.

As a District Court Judge I would, without qualification or reservation, faithfully abide by the precedent of the Supreme Court and the Third Circuit. If confronted with a genuine constitutional issue of first impression, I would look first to the plain meaning of the Constitution, the relevant statute, rule, or document. If, however, the language at issue was genuinely ambiguous, I would apply the recognized rules of construction to the specific language. I would consider decisions of the Supreme Court and the Third Circuit respecting similar and analogous language. Next, guided by case law, I would look to the express language of the broader relevant authority or document and in the case of a statute any stated goals of the over-arching legislative scheme. I would consider the decisions of courts of other circuits addressing similar and analogous statutory language.

2. **In my written questions, I asked you about your statement that *Roe* is settled law. Instead of answering the question, you indicated that you would follow applicable precedent. But the *Casey* case, which you referenced, will not give guidance on all the abortion cases that could potentially come before you. Please answer this question with specificity:**

In a judicial questionnaire you opined on *Roe,* writing "I accept <u>Roe v. Wade</u> and the case law that follows it as settled law and binding legal precedent." But considerable uncertainty remains in this area of law. For instance, do you believe that under the framework established by *Planned Parenthood v. Casey,* 505 U.S. 833 (1992) a court is constitutionally permitted to disregard the legislature's stated purpose of promoting women's health and instead conduct its own independent analysis of the medical merits of particular abortion-related regulations?

Response: Pursuant to *Planned Parenthood v. Casey* courts are required to determine whether a challenged law regarding abortion "imposes an undue burden on a woman's ability to make this decision". *Planned Parenthood v. Casey*, 505 U.S. at 874. In the *Planned Parenthood v. Casey* case itself, the Court invalidated a spousal notification requirement of the challenged Pennsylvania abortion law, but it upheld other provisions of the law. I would faithfully abide by the precedent of the Supreme Court and the Third Circuit with respect to these issues.

My views regarding the constitutionality of a court's consideration of the legislature's stated purpose of promoting women's health in the context you describe are neither matured nor established. While *Planned Parenthood v. Casey* requires a particular constitutional inquiry, Acts of Congress are presumed constitutional. Only when necessary to resolve a justiciable case or controversy and after careful examination and upon conviction that, consistent with applicable precedential authority, a statute either impermissibly infringes upon a right granted by the Constitution or that a statute exceeds the authority granted Congress under the Constitution, should such a statute be declared unconstitutional.

Respectfully, to the extent that your question seeks a specific application of the relevant standards to a matter subject to pending litigation and/or potentially subject to impending litigation, it would be inappropriate for me to express a view as to the issues involved. I would like to reassure the Committee that I would faithfully abide by the precedent of the Supreme Court and the Third Circuit if this issue came before me as a District Court Judge.

3. In responses to judicial questionnaires you submitted from your time campaigning to be a Superior Court Judge, you answered a number of questions about your views on abortion. In a judicial questionnaire you were asked the following, "Does an unborn child have human rights?" You responded, "Probably yes, but only in certain respects and manners of speaking, not all. The real challenge and virtue is responsibly and charitably respecting the range of views on the issue."

a. Please describe, in detail, when an unborn child does not have human rights, as you said to in your response.

Response: I understood the questionnaire to be inquiring of my views, not so much as a judge but rather, as a human being, and not so much as an inquiry into a judicial or legal question but rather, as a moral, theological, or ontological inquiry. In these, and other, regards I am unequipped, then and now, to speak authoritatively. My response attempted to allow for the possibility that if I thoughtfully considered and reflected on the range of perspectives held by many people I might likely discover that there is room for a wide range of reasonable views depending on how the terms were defined and how the question was approached.

b. How would a judge respect "the range of views on the issue" from the bench?

Response: The response I provided to the questionnaire was intended not as a judicial philosophy or legal position, but simply as a very brief human response to a profound and challenging question. I do not believe that a judge should in his or her judicial capacity properly "respect the range of views on th[is] issue." As a District Court Judge I would, without qualification or reservation, faithfully abide by the precedent of the Supreme Court and the Third Circuit with respect to this issue and all issues that come before me.

United States Senator Thom Tillis

Questions for the Record

Senate Judiciary Committee

On

Nominations

Question for Judge Robert John Colville

1. In my written questions to you, I asked the following question: "A number of states, including North Carolina, have passed or introduced laws to protect women's health. You have characterized *Roe v. Wade* and its progeny as settled law. Please address whether you consider the following settled law:

    a. That a state can require a consultation with a physician or qualified professional at least 24 hours prior to an abortion procedure,
    b. That a state can forbid an abortion if a significant factor in the woman's decision is related to the gender of the unborn child,
    c. That a state can require abortion facilities to meet the same standards as ambulatory surgical centers, and
    d. That a state can require an ultrasound be made available to the woman before permitting an abortion."

    In response, you stated:

    > *It is my understanding that each of the scenarios described above is either presently a matter subject to pending litigation and/or potentially subject to impending litigation. As such it would be inappropriate for me to express a view as to the issues involved. I would like to assure the Committee that I would faithfully abide by the precedent of the Supreme Court and the Third Circuit if any of these issues came before me as a District Court Judge.*

    Your answer was non-responsive, and I would like to give you an opportunity to provide a responsive answer. Because you have opined on and characterized *Roe v. Wade* and its progeny as settled law, I would like to

have a more comprehensive understanding of your views in this area of law. If *Roe v. Wade* and its progeny are in fact settled constitutional law, please address and answer individually the question and subparts stated above.

Response: To my knowledge the Supreme Court has not ruled on any of the matters about which you inquire, and each is in some measure the subject of pending litigation or potentially the subject of impending litigation; accordingly, to the extent that litigation is ongoing and not yet resolved by the Supreme Court these matters are, in my view, not settled law. I would also add that I did not intend the phrase "settled law" to carry any specialized legal meaning beyond the simple recognition that *Roe v. Wade,* 410 U.S. 113 (1973) has been long decided and not substantially reversed by the Supreme Court. Of course, *Roe* remains the subject of ongoing legal challenges and is, in that respect, subject to review. However, until or unless reversed, as a trial court judge I would recognize it, and cases that have followed, including those that have, in some respects, narrowed *Roe*'s applicability, such as *Planned Parenthood v. Casey*, 505 U.S. 833 (1997) and *Gonzales v. Carhart,* 550 U.S. 124 (2007) as binding precedent. I would like to assure the Committee that I would faithfully abide by the precedent of the Supreme Court and the Third Circuit if any of these issues came before me as a District Court Judge.