

**Senator Grassley
Questions for the Record**

**LaShann Moutique DeArcy Hall,
Nominee, U.S. District Judge for the Eastern District of New York**

1. From your questionnaire it appears that you have had limited experience with criminal matters. If confirmed as a federal district court judge, you will be presiding over both civil and criminal matters.

a. What experience do you have with criminal law?

Response: I was part of a legal team that appealed the conviction and death sentence of an Alabama state prisoner. As part of that team, I participated in briefing in Alabama state court. In addition, in another case, I worked on a team appealing a criminal sentence before the Second Circuit Court of Appeals. Through my work on that matter, I had the opportunity to familiarize myself with certain aspects of federal criminal procedure and the United States Sentencing Guidelines.

b. What steps have you taken or will you take to familiarize yourself with the area of criminal law?

Response: Since my nomination, I have begun reviewing materials provided to me by the Federal Judicial Center, including the Manual on Recurring Problems in Criminal Trials. I have also begun reviewing the Federal Criminal Code and Rules. If confirmed, I would continue to utilize the resources available through the Federal Judicial Center to better familiarize myself with criminal law. In addition, I will seek the advice and counsel of experienced district court judges and take advantage of other educational opportunities available to me.

2. During your hearing Senator Tillis asked you about the pro bono work you did in a death penalty appeal. You said your involvement with the case focused on an ineffective assistance of counsel in jury selection. According to the appellate decision in *Ex parte Harris*, you and your team argued the prosecutor purposefully discriminated against potential black jurors during jury selection. Please describe the basis for this claim.

Response: When I made this claim, I was fulfilling my professional and ethical obligations to represent my client. This claim was based on the following allegations of purposeful discrimination: (1) a pattern of strikes of black jurors as for which no race-neutral reason for striking was offered; (2) a history of purposeful discrimination by the prosecutor's office in Montgomery County, as confirmed by a judicial finding in *Sims v. State*, 587 So. 2d. 1271, 1277 (Ala. Crim. App. 1991); and (3) the characteristic most predictive of whether a juror was struck was their race, as no other shared characteristic emerged amongst the struck jurors. In addition, our brief included an argument based on trial counsel's failure to raise these issues.

3. What role, if any, do you believe a federal judge should play in balancing seeking justice for victims and punishment for the offenders with the need to rehabilitate offenders? Please explain.

Response: The Federal Sentencing Guidelines provide a framework for sentencing and should be the principal tool and starting point in all sentencing determinations. 18 U.S.C. Section 3553(a)(2) provides that, among other factors, a sentencing judge should consider “the need for the sentence imposed . . . to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; 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 consider these factors as well as the other factors articulated under the guidelines in making any sentencing determination.

4. How much discretion do you think is appropriate for judges to have during sentencing?

Response: The Sentencing Guidelines promote uniformity and predictability in criminal sentencing. Under 18 U.S.C. Section 3553(a), if warranted, judges are authorized to vary from the ranges set forth in the Sentencing Guidelines. If confirmed, I would give considerable deference to the Sentencing Guidelines and use them as my principal tool and starting point for any sentencing determination, as well as any binding precedent regarding sentencing.

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

Response: The most important attribute of a judge is the ability to fairly and impartially apply the rule of law. I am committed to strict adherence to the rule of law and, if confirmed, I would base my rulings on applicable law without regard to any personal views.

6. 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: A judge should be deliberate, thoughtful, patient, and fair. A judge should serve with integrity and humility. I believe I have demonstrated each of these qualities through my service on the New York State Joint Commission on Public Ethics, the New York City Taxi and Limousine Commission, and in the United States Air Force. If I am confirmed, I will continue to exemplify these qualities.

- 7. 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: If confirmed, it would be my privilege and obligation to faithfully follow binding United States Supreme Court and Second Circuit precedent without regard to any personal views.

- 8. 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 confirmed, I would faithfully apply binding United States Supreme Court and Second Circuit precedent. In cases of first impression where a statute or regulation is at issue, I would first look to the plain language of the relevant statute or regulation. If the language is clear and unambiguous, I would apply the plain meaning of the text. If the language is ambiguous, I would employ the methods of construction articulated by the United States Supreme Court and the Second Circuit. I would also look to analogous cases from the United States Supreme Court and the Second Circuit for guidance. If I could not find guidance in the United States Supreme Court or the Second Circuit, I would look to analogous cases in other jurisdictions.

- 9. 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: If confirmed, I would faithfully apply binding decisions from the United States Supreme Court and Second Circuit without regard to any personal views.

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

Response: Statutes enacted by Congress are presumptively constitutional. Constitutional challenges to federal statutes should be considered only when necessary. To the extent a district court must address a constitutional challenge to a federal statute, it should construe the constitutional issues narrowly. A federal statute should not be declared unconstitutional unless it violates the Constitution or exceeds congressional authority.

- 11. 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. United States judges should determine the meaning of the United States Constitution by applying binding precedent. It is not proper for United States judges to rely

on foreign law or the views of the “world community” when interpreting the United States Constitution.

12. 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: I served as a commissioner on the New York State Joint Commission on Public Ethics, which has oversight over the Executive and Legislative Branches and investigates potential violations of New York State ethics laws. In this quasi-judicial role, I was required to apply New York law and make determinations by referring to the applicable statutes. I did so fairly, impartially, and without regard to any political ideology or motivation. If confirmed to be a district court judge, I would continue this practice, and would decide the cases before me by faithfully following binding United States Supreme Court and Second Circuit precedent.

13. 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: Throughout my career in the private sector, as well as my public service as a commissioner for the New York State Joint Commission on Public Ethics, a commissioner for the New York City Taxi and Limousine Commission, and as a member of the United States Air Force, I developed a general reputation for being fair. Because of my role on the Joint Commission on Public Ethics, I have a demonstrated record of applying the law to the facts fairly and without regard to my personal views. The greatest assurance I can give the Committee that future litigants before me would be treated fairly is my pledge that, if confirmed, I would continue to adhere to the rule of law and apply precedent in all matters before me.

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

Response: If confirmed, I would commit myself to efficiently managing my docket by making appropriate use of magistrate judges; establishing reasonable but firm discovery deadlines; narrowing the scope of or resolving cases through the use of dispositive motions; promptly deciding motions by the parties; and encouraging settlement, where possible.

15. 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. If confirmed, I would take the steps described above in order to control my docket.

16. Do you believe there is a right to privacy in the U.S. Constitution?

Response: If confirmed as a district court judge, I would be bound by precedent. The United States Supreme Court has addressed the right to privacy under various provisions of the

Constitution in a number of cases. For example, in *NAACP v. Alabama*, the Court addressed the rights to freedom of speech and assembly guaranteed under the Fourteenth Amendment's due process clause. 357 U.S. 449 (1958). The United States Supreme Court held that "immunity from state scrutiny of membership lists . . . [was] so related to the right of the members to pursue their lawful private interests privately and to associate freely with others . . . as to come within the protection of the Fourteenth Amendment." *Id.* at 466. In *United States v. Jones*, 132 S. Ct. 945 (2012), the Court stated that, with regard to the protections of the Fourth Amendment, "[a]t bottom, [the Court] must assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Id.* at 950 (internal citation and quotation marks omitted). If confirmed and presented with a case on these issues, I would faithfully follow this binding precedent, as well as any other applicable precedent from the United States Supreme Court and the Second Circuit.

a. Where is it located?

Response: Please see Response to Question 16 above.

b. From what does it derive?

Response: Please see Response to Question 16 above.

c. What is your understanding, in general terms, of the contours of that right?

Response: Please see Response to Question 16 above.

17. 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 the context of this statement. However, a judge's personal beliefs should not play a role in how he or she decides cases. A judge must be guided solely by adherence to the rule of law, which dictates that he or she apply binding precedent to the facts presented.

18. Please describe with particularity the process by which these questions were answered.

Response: I received these Questions for the Record from the Office of Legal Policy at the Department of Justice on May 13, 2015. After reviewing the questions, I drafted responses and discussed the same with an attorney at the Office of Legal Policy at the Department of Justice. I then finalized my responses and asked the Department of Justice to submit them on my behalf.

19. Do these answers reflect your true and personal views?

Response: Yes.

Senator Vitter
Questions for the Record

LaShann Moutique DeArcy Hall,
Nominee, U.S. District Judge for the Eastern District of New York

- 1. 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*, 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.” 134 S. Ct. 2550, 2567 (2014) (internal citations and quotation marks omitted). If confirmed as a district court judge, I would faithfully apply this and any other binding precedent from the United States Supreme Court and the Second Circuit.

- 2. 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*, the United States Supreme Court held that the standard to determine the validity of laws restricting abortions asks whether the law has the purpose or effect of imposing an “undue burden.” 505 U.S. 833, 877 (1992). Undue burden is defined as “a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” *Id.* The question of whether requiring doctors who perform abortions to have admitting privileges imposes an undue burden under *Casey* is currently being litigated. If confirmed and presented with a case on this issue, I would apply any binding precedent and the legal standard articulated in *Casey* to the facts in the case.

- 3. 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), has not been overturned. Since *Roe*, the United States Supreme Court stated, in *Planned Parenthood v. Casey*, that “[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.” 505 U.S. 833, 879 (1992). In *Gonzales v. Carhart*, the court held that the respondents had not demonstrated that the Partial Birth Abortion Act of 2003 was “void for vagueness, or that it imposes an undue burden on a woman’s right to abortion based on its overbreadth or lack of a health exception.” 550 U.S. 124, 168 (2007). If confirmed, I would faithfully follow these binding precedents as well as any other applicable precedent from the United States Supreme Court and the Second Circuit.

4. Do you agree that the ruling in Baker v. Nelson precludes the federal courts from hearing cases regarding state definitions of marriage? Do you think that US v. Windsor contradicts the Court's previous ruling in Baker?

Response: In *Baker v. Nelson*, the Minnesota Supreme Court held that a state law limiting marriage to persons of the opposite sex “does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution.” 291 Minn. 310, 315, 191 N.W.2d 185, 187 (1971). The United States Supreme Court dismissed Baker’s appeal “for want of a substantial federal question.” *Baker v. Nelson*, 409 U.S. 810, 810 (1972). In *United States v. Windsor*, the United States Supreme Court held that the federal Defense of Marriage Act “is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution,” 133 S. Ct. 2675, 2695 (2013), but recognized that, “subject to [constitutional] guarantees, regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States.” *Id.* at 2691 (internal citations and quotation marks omitted). The United States Supreme Court recently granted certiorari in *Obergefell v. Hodges*, which addresses whether: (1) the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and (2) the Fourteenth Amendment requires a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. The United States Supreme Court’s decision in that case will be binding precedent for lower courts. If confirmed, I would faithfully follow the binding precedent of the United States Supreme Court and the Second Circuit.

5. 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: I believe that judges must strictly adhere to the rule of law by applying precedent fairly and impartially. If confirmed, I would faithfully follow binding United States Supreme Court and Second Circuit precedent without regard to any personal views.

6. How do you reconcile the 2nd Amendment basic right 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*, the United States Supreme Court held that “the [District of Columbia’s] ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.” 554 U.S. 570, 635 (2008). In *McDonald v. City of Chicago*, the United States Supreme Court held that, “the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.” 561 U.S. 742, 791 (2010). If confirmed and presented with a case on this issue, I would apply the law as articulated in *Heller* and *McDonald* and any other applicable binding precedent to the facts in the case before me.

7. Do you support suspending capital punishment sentencing pending the Supreme Court's decision on the use of lethal injection drugs in Oklahoma?

Response: This issue has not yet been decided by the United States Supreme Court. If confirmed as a district court judge, I would be bound by the United States Supreme Court and Second Circuit precedent existing at the time of my determinations.