

**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.

**Senator Jeff Sessions  
Questions for the Record**

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

- 1. You have written on several occasions that mandatory minimum sentences “can and do result in absurd results and leave sentencing decisions in the hands of the prosecutor making the charging decisions rather than the court.”**

- a. Please take this opportunity to expand on that statement.**

Response: As Public Defender for the State of Rhode Island, my responsibility is to advocate for the individual public defenders as well as the clients served by the office. These statements were made in that capacity. Mandatory minimum sentences are a legitimate expression of legislative intent in the area of appropriate punishment. What I meant by referring to the “hands of the prosecutor making the charging decisions” is that in the first instance the range of sentence, including mandatory minimums, is determined by the charging document. It is not uncommon that a given set of allegations fall within the embrace of several statutes and the prosecutor’s charging decision determines the range within which the court will have sentencing discretion.

- b. Do you believe that there are benefits to mandatory minimum sentences?**

Response: Please see responses to 1(a) above and 1(c) below.

- c. Do you agree that mandatory minimum sentences have been critical to reducing crime levels in the United States?**

Response: I do not know the empirical data with respect to whether mandatory minimum sentences have been critical to reducing crime levels in the United States. It seems reasonable to assume that where there is a deterrent effect of a statutory punishment, mandatory minimums would have an impact in reducing crime.

- 2. In 2013, you stated in a letter to the chairperson of the Rhode Island House Judiciary Committee that “[w]henver legislation infringes upon judicial discretion in the sentencing decision; absurd results are likely to occur.” Please take this opportunity to explain what you meant by that statement.**

Response: Please see my response to Question 1(a) above.

**3. Under the Supreme Court’s decision in *United States v. Booker*, the federal sentencing guidelines are now advisory, rather than mandatory.**

**a. If confirmed, how much deference will you afford the sentencing guidelines?**

Response: If I am confirmed, I will apply precedent from the United States Supreme Court and the United States Court of Appeals for the First Circuit when determining how much deference to give the sentencing guidelines. “Although the Guidelines are no longer mandatory, ‘district courts must still give respectful consideration to the now advisory Guidelines (and their accompanying policy statements).’” *United States v. Velez-Soto*, 804 F.3d 75, 78 (1<sup>st</sup> Cir. 2015) (quoting *United States v. Millan-Isaac*, 749 F.3d 57, 67 (1<sup>st</sup> Cir. 2009) and *Pepper v. United States*, 562 U.S. 476, 501 (2011)). The guidelines are both empirically based and the product of an independent commission and as such should be accorded significant deference.

**b. Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?**

Response: Yes.

**c. Under what circumstances do you believe it appropriate for a district judge to depart downward from the sentencing guidelines?**

Response: Although the sentencing guidelines are now advisory, they still remain the starting point for all sentencing decisions. Judges should select an appropriate sentence by reference to the appropriate guideline sentencing range, the guidance offered by the policy statements contained within the guidelines and the factors set forth in 18 U.S.C. §3553(a). This statute gives guidance to judges as to when it would be appropriate to depart downward (or upward) from an advisory guideline range. If confirmed, I would consider all of those factors in arriving at an appropriate sentence.

**4. In 2013, you wrote to the Rhode Island legislature to express support for legislation “that would legalize marijuana and establish regulations associated with legalization.”**

**a. Do you still adhere to this view?**

Response: I supported the above noted legislation in my capacity as the Rhode Island Public Defender. This has been the position of the Rhode Island Public Defender since well before my appointment to the post. The agency position was not based on a moral or ethical view of marijuana use. Instead, it is consistent with agency advocacy for the inclusion of considerations of public safety and resources when legislating in the area of criminal justice policy. This is particularly so when proposed legislation would impact the clients we serve.

- b. In an August 29, 2013 Justice Department Memorandum, Deputy Attorney General Cole outlines the Department’s policy of non-enforcement towards certain federal laws prohibiting interaction with marijuana. In your view, does this Memorandum outline an appropriate exercise of prosecutorial discretion?”**

Response: As a pending judicial nominee, it would be inappropriate for me to comment on the merits of a law enforcement decision made by the Department of Justice.

- 5. In 2014 and 2015, you wrote to the Rhode Island legislature to recommend the reclassification from misdemeanor to civil violation the crime of first offense shoplifting, referring to it as a “minor and in most cases victimless” crime.**

- a. Do you still adhere to the view that first offense shoplifting should be reclassified from misdemeanor to civil violation?**

Response: This is the position of the Rhode Island Public Defender’s Office and continues to be the position of the agency. There are many instances in which shoplifting is not a victimless crime, and businesses can suffer significant monetary damage as a result of such unlawful acts.

- b. Do you still adhere to the view that first offense shoplifting is “in most cases victimless?”**

Response: Please see my response to Question 5(a) above.

- 6. In 2014, you wrote to the Rhode Island legislature to oppose legislation that would have required individuals convicted of any felony to submit a DNA sample. Recognizing that law enforcement relies on DNA databases to resolve outstanding investigations (including the occasional exoneration of an individual who was wrongly convicted), do you still oppose policies that would require all convicted felons to provide a DNA sample?**

Response: The proposed legislation that my agency opposed would have permitted DNA gathering, testing and inclusion in the database for all felony arrestees not simply for those convicted of any felony. The legislation would have permitted collection, testing and recording of DNA profiles even if no formal charge was ever brought. In part as a result of the advocacy of the Rhode Island Public Defender and others, the legislation as passed permits the gathering of DNA from arrestees but forbids testing and inclusion in the database unless formal charges are lodged.

**Senator Jeff Flake**  
**Questions for the Record**

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

- 1. What is your approach to statutory interpretation? Under what circumstances, if any, should a judge look to legislative history in construing a statute?**

Response: If I was fortunate enough to be confirmed, I would follow the controlling precedent from the Supreme Court and the Court of Appeals for the First Circuit when addressing issues of statutory interpretation. If no precedent existed I would apply the basic rules of statutory construction. The basic principle of statutory interpretation is that “if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written.” *Textron Inc. v. Comm’r*, 336 F.3d 26, 31 (1<sup>st</sup> Cir. 2003). If the words of a statute were ambiguous, I would invoke several standard canons of construction that are set forth in case law, including: looking to the entire statutory scheme to determine its meaning; looking to the intent of the legislature, for which legislative history is sometimes relevant; and reading the statute to have a common sense meaning.

- 2. What is the proper scope of the 10th Amendment to the Constitution? In what circumstances should a judge apply it?**

Response: The 10<sup>th</sup> Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” This Amendment enunciated the intent of the framers to grant limited power to the federal government and the intent to reserve any power not so granted to the States and its people. If I were presented with a case involving the 10<sup>th</sup> Amendment, I would apply the precedent of the United States Supreme Court and the First Circuit to the case before me.

- 3. Does current standing doctrine foster or impede the ability of litigants to obtain relief in our legal system?**

Response: I have no opinion about whether the standing doctrine fosters or impedes the ability of litigants to obtain relief in our legal system. The standing doctrine is contained in Article III of the United States Constitution (requiring a case or controversy) and as such is binding on the courts. As a conceptual matter, the requirement of standing is designed predominantly to avoid advisory opinions. If I were confirmed as a United States District Judge, I would follow the doctrine as written and interpreted by the United States Supreme Court and the Court of Appeals for the First Circuit when determining standing in any case brought before me.



**Senator Thom Tillis**  
**Questions for the Record**

**Mary McElroy**

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

**Questions for All Nominees**

- 1. One challenge you will face as a federal judge is managing a busy caseload. If confirmed, how will you balance competing priorities of judicial efficiency and due process to all litigants involved in the case?**

Response: As an assistant public defender, I managed a busy caseload throughout my career. In my current position as Rhode Island Public Defender, I oversee the work of the entire office and its ninety-three full time employees. While judicial efficiency is a critical component of the delivery of justice, it must be balanced by the due process guarantee. If confirmed, I would consult with the other judges in the District of Rhode Island as to the best practices for maintaining the balance between judicial efficiency and due process.

- a. Will you give certain cases priority over others?**

Response: If I was fortunate enough to be confirmed, I would not unilaterally determine priority of cases. I would be guided by congressional demonstration of priority (for example the speedy trial act), guidelines from the Administrative Office of the United States Courts, and district-wide needs as determined by the chief judge and the Court of Appeals for the First Circuit.

- 2. What is a fundamental right?**

Response: A fundamental right is one that is guaranteed by the United States Constitution and which has been recognized by the United States Supreme Court as requiring vigorous protection from government encroachment.

- a. From where are these rights derived?**

Response: These rights are derived from the Constitution typically from the Bill of Rights and are incorporated to the States through the Fourteenth Amendment.

**3. What role, if any, should societal pressure or popular opinion play in interpreting legislation or the United States Constitution?**

Response: Neither societal pressure nor popular opinion should play any role in judicial interpretation of legislation or the Constitution.

**Questions for Ms. Mary Susan McElroy**

**1. During your time as a Federal Public Defender, you wrote letters supporting and opposing proposed legislation by the Rhode Island General Assembly. Several letters opposed legislation that would have increased sentences for certain crimes. If confirmed, how will you facilitate the will of Congress when applying sentences that you personally believe do not fit the crime? In addition, what aggravating factors do you believe need to be present in a case before imposing a severe criminal sentence?**

Response: I wrote letters to the Rhode Island General Assembly during my years as the Public Defender for the State of Rhode Island and never as a Federal Public Defender. In my current position as Rhode Island Public Defender, it is my responsibility to advocate for legislation that supports the policies of my agency. The role of advocate is very different from that of a judge. If confirmed I would faithfully follow all laws as passed by Congress and all binding precedent of the United States Supreme Court and the United States Court of Appeals for the First Circuit. In imposing sentences I would be bound to apply the law regardless of any opinion I may hold or position I may have taken when in the role of an advocate. Congress has established the factors that a court must consider in imposing sentences and I would faithfully apply the law. For example, 18 U.S.C. §3553 mandates consideration of several factors including the need for deterrence, the protection of the public and the seriousness of the offense.

**2. If confirmed, how do you transition from a role of being a zealous advocate to a neutral arbiter?**

Response: Most judges need to make the transition from the role of advocate to that of a neutral and detached arbiter of the law; I would be no different. Judges who have litigated on behalf of the government, corporations, organizations or criminal defendants all need to leave behind the role of advocate in order to faithfully fulfill their obligations once confirmed as judges. I greatly respect and appreciate the different roles in the legal system played by advocates and judges. I will be very mindful of the different roles and am committed to giving every litigant a fair hearing and approaching every case with an open mind.