Senator Chuck Grassley
Questions for the Record

Gregg Jeffrey Costa
Nominee, Circuit Judge
United States Court of Appeals for the Fifth Circuit

1. **Do you believe that a judge's gender, ethnicity, or other demographic factor has any or should have any influence in the outcome of a case? Please explain.**

   Response: No. The outcome of a case should be determined by an objective evaluation of the relevant facts and legal authorities.

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

   Response: The most important attribute of a judge is a commitment to fairly and impartially administering the law. This requires approaching each case with an open mind rather than any preconceived views, giving careful consideration to the arguments of both sides, and reaching the legally correct result regardless of the result's popularity. I believe that I have exhibited this quality during my time serving as a district judge.

3. **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 keep an open mind about the issues in a case; respect the parties, lawyers, and other participants in the judicial process; appreciate that every case is significant to the parties involved regardless of its broader ramifications; and maintain a sense of humility when exercising the significant power our system entrusts to federal judges. I have strived to demonstrate these qualities while serving as a district judge and would continue to try and exhibit these qualities if I am confirmed to serve on the court of appeals.

4. **In general, Supreme Court precedents are binding on all lower federal courts, and Federal Circuit precedents are binding on the Court of International Trade. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?**

   Response: Yes.

5. **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: In interpreting a constitutional provision, statute or regulation, I would first analyze whether the provision's plain language resolved the issue. If ambiguity existed, I would apply commonly accepted canons of construction, take into account the structure and purpose of the term at issue and related provisions, and consider case law interpreting analogous terms.

6. 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 apply the decision even if I believed it was wrongly decided.

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

Response: The principle of constitutional avoidance counsels that a court should avoid declaring a federal statute unconstitutional when an alternative basis exists for ruling in favor of the party making the constitutional challenge. When an alternative basis does not exist, a federal court should declare a federal statute unconstitutional only when the law exceeds the scope of the federal government's enumerated powers, impermissibly infringes on an individual constitutional right, or violates some other constitutional provision.

8. Please describe your understanding of the workload of the Fifth Circuit. If confirmed, how do you intend to manage your caseload?

Response: My understanding is that the Fifth Circuit is one of the busiest federal courts of appeals, second only to the far larger Ninth Circuit in terms of caseload. Managing that caseload in a manner that allows for both careful consideration of each case and prompt dispositions depends primarily on two things. The first is having procedures in place that maximize the efficiency of chambers' staff. On that issue, if I am fortunate enough to be confirmed, I will seek advice from Fifth Circuit judges about their procedures and implement those that seem to be the most efficient. The second factor is a willingness to work hard. If confirmed, I will bring to the Fifth Circuit the same work ethic I have displayed as a teacher, lawyer, and district judge.

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: I do not believe it is appropriate to rely on foreign law or the views of the "world community" when determining the meaning of the Constitution and would not rely on those materials unless required to do so by binding Supreme Court or circuit precedent.

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: First, as a district judge I have based my decisions on precedent, text, and other legal authorities rather than political ideology. Second, I have a strong belief that an independent judiciary committed to the impartial administration of justice is one of the most important features of our constitutional system.

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: Please see above response to Question 10.

12. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?

Response: Overturning circuit precedent is rarely appropriate. A federal court of appeals can only overturn its own precedent when it sits as a full court. Such an en banc hearing is ordinarily warranted only when (1) it is needed to "maintain uniformity of the court's decisions" or (2) the case "involves a question of exceptional importance." *See* FED. R. APP. P. 35.

13. As a district judge, you have experience deciding cases and writing opinions. Please describe how you reach a decision in cases that come before you and to what sources of information you look for guidance.

Response: If the case involves the interpretation of a statute, regulation or procedural rule, the first thing I read is the text of the provision. Next I read the parties' briefs. After reading the briefs, I review Supreme Court and Fifth Circuit precedent that addresses the issues. If the proper decision is not clear at that point, I will consider persuasive authority from other courts and rely on that case law to the extent I think the opinion is well reasoned.

14. Do you think that collegiality is an important element of the work of a Circuit Court? If so, how would you approach your work and interaction with colleagues on the Court?

Response: Yes. One of the biggest differences between the work of trial and appellate judges is that the latter make judicial rulings in consultation with colleagues. Discussing and deciding cases with colleagues is one of the aspects of the court of appeals position that I most look forward to if I am fortunate enough to be confirmed. Collegiality requires keeping an open mind, listening to the views of one's colleagues, and, when disagreement remains after that process, doing so in a respectful manner that avoids personal attacks.

15. At a speech in 2005, Justice Scalia said, "I think it is up to the judge to say what the Constitution provided, even if what it provided is not the best answer, even if you think it should be amended. If that's what it says, that's what it says."

a. Do you agree with Justice Scalia?

Response: Yes.

b. Do you believe a judge should consider his or her own values or policy preferences in determining what the law means? If so, under what circumstances?

Response: No.

16. Do you think judges should consider the "current preferences of the society" when ruling on a constitutional challenge? What about when seeking to overrule longstanding Supreme Court or circuit precedent?

Response: No. The premise of the Constitution, including its amendments, is that the American people have decided that principles or rights are so vital that they should be elevated to constitutional status and therefore are immune from future changes in public opinion (absent the supermajoritarian process of a subsequent constitutional amendment). The Constitution thus must be applied regardless whether a particular provision continues to enjoy popular support. Therefore, absent binding Supreme Court or Fifth Circuit precedent directing otherwise, I would not consider the "current preferences of the society" in ruling on a constitutional challenge or deciding whether to overrule circuit precedent (and I would not have the authority to overrule Supreme Court precedent).

17. What is your judicial philosophy on applying the Constitution to modern statutes and regulations?

Response: The Constitution applies to modern statutes and regulations the same way it has applied to older legal enactments.

18. What role do you think a judge's opinions of the evolving norms and traditions of our society have in interpreting the written Constitution?

Response: As discussed in response to Question 16 above, allowing the modern-day popularity of a constitutional provision to affect its interpretation is inconsistent with the very notion of a written Constitution. Therefore, unless Supreme Court or circuit precedent dictated otherwise, I would not consider the evolving norms and traditions of our society when interpreting the Constitution.

19. What is your understanding of the current state of the law with regard to the interplay between the establishment and free exercise clause of the First Amendment?

Response: The Supreme Court has explained that "'there is room for play in the joints between' the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the

Establishment Clause." *Cutter v. Wilkinson*, 544 U.S. 709 (2005). I have not been confronted with an issue involving the interplay of the religion clauses as a district judge. If confronted with such an issue in the future, as with all issues, I would keep an open mind and reach a decision after careful consideration of the parties' arguments, the factual records, and the relevant legal authorities, including *Cutter*.

20. Do you believe that the death penalty is an acceptable form of punishment?

Response: The Supreme Court has held that the death penalty is constitutionally permissible when applied to certain categories of crime and when certain procedures are followed. I would follow binding Supreme Court and Fifth Circuit precedent with respect to the death penalty, as I would for any other area of the law.

21. Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?

Response: One of the greatest achievements of the Constitution is that the system of government it created has endured and continues to thrive in a twenty-first century environment that is far different from the eighteenth-century environment in which it was created. That does not mean however that the meaning of its provisions "is constantly evolving as society interprets it." The principles enshrined in the Constitution at different times in this nation's past do not change or evolve based on current public opinion. A judge's responsibility is to apply those historic principles to modern situations.

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

a. Where is it located?

Response: The word "privacy" does not appear in the Constitution, but the Supreme Court has recognized that the Fourth Amendment protects privacy interests, *see United States v. Jones*, 132 S. Ct. 945, 950 (2012) (explaining that the Supreme Court has often determined when a search occurs by deciding whether "government officers violate a person's 'reasonable expectation of privacy'" (citing *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring))), particularly those associated with the home, *see, e.g.*, *Wilson v. Layne*, 526 U.S. 603, 610 (1999) ("The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home."). The Court has also held that the Due Process Clause protects an interest in "marital privacy." *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

b. From what does it derive?

Response: Please see response to Question 22(a).

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

Response: If a case came before me that invoked the privacy interests described in response to Question 22(a), as with all issues, I would carefully consider the facts of the case and legal authorities related to the precise issue presented.

23. In *Griswold,* Justice Douglas stated that, although the Bill of Rights did not explicitly mention the right to privacy, it could be found in the "penumbras" and "emanations" of the Constitution.

a. Do you agree with Justice Douglas that there are certain rights that are not explicitly stated in our Constitution that can be found by "reading between the lines"?

Response: The Supreme Court's current approach to determining whether the Constitution protects an unenumerated right is to evaluate whether the claimed right is "deeply rooted in this Nation's history and tradition" and "'implicit in the concept of ordered liberty' such that neither 'liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted). *Glucksberg* is the precedent I would follow in this area.

b. Is it appropriate for a judge to go searching for "penumbras" and "emanations" in the Constitution?

Response: That approach is not consistent with current Supreme Court precedent.

24. In *Brown v. Entertainment Merchants Ass'n,* Justice Breyer supplemented his opinion with appendices comprising scientific articles on the sociological and psychological harm of playing violent video games.

a. When, if ever, do you think it is appropriate for appellate judges to conduct research outside the record of the case?

Response: In terms of the factual record, as a general matter appellate judges should consider only the trial court record. I would rely on outside sources to supplement the factual record only when authorized to do so by court rules.

b. When, if ever, do you think it is appropriate for appellate judges to base their opinions psychological and sociological scientific studies?

Response: This would be appropriate if the trial court record contained such studies. That situation would typically arise if an expert witness relied on such studies in his or her trial testimony.

25. The Fifth Circuit recently reversed your opinion in *Voting for America, Inc. v. Andrade* and disagreed with your holdings that a variety of provisions of Texas election law ran afoul of the First Amendment and the National Voter Registration Act. The Circuit disagreed with your holding that various activities comprising voter

registration drives constituted expressive conduct within the meaning of the First Amendment.

a. What is your view of the scope of non-speech conduct that qualifies as expressive activity protected by the First Amendment?

Response: The Supreme Court has found that non-speech conduct qualifies as expressive activity in a number of situations in which the expressive activity conveyed a political message. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (finding that wearing arm bands to protest the Vietnam War was entitled to First Amendment protection); *United States v. O'Brien*, 391 U.S. 367 (1968) (indicating that burning a draft card was entitled to First Amendment protection, though holding that the government was justified in prohibiting the practice); *Brown v. Louisiana*, 383 U.S. 131 (1966) (finding that sit-ins to protest segregation were entitled to First Amendment protection). Most commonly, though not exclusively (*see Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991)), such expressive activity will convey a political message, as such messages lie at the core of the First Amendment.

b. Do you believe that the Circuit correctly held that the activities in question in *Andrade* are not entitled to First Amendment protection?

Response: The Fifth Circuit held that "there is nothing 'inherently expressive' about receiving a person's completed [voter registration] application and being charged with getting that application to the proper place." *Voting for America v. Steen*, 732 F.3d, 382, 392 (5th Cir. 2013). The Fifth Circuit did find that regulating the compensation of persons involved in voter registration activity implicated First Amendment concerns, *see id.* at 398 ("Because the provision applies to all persons—not just [volunteer deputy registrars]—and covers any activity that facilitates voter registration, it encompasses activities that involve expression, including voter drives where canvassers seek to persuade eligible voters to register."), but adopted a narrowing construction of those statutes that avoided the constitutional concern, *see id.* at 397-98. As with all binding precedent, this is the law that I would follow on this issue.

c. Do you believe that the Circuit's decision is consistent with the Supreme Court's decisions in *Meyer v. Grant* and *Buckley v. American Constitutional Law Foundation*?

Response: When I issued my decision, there was no Fifth Circuit precedent addressing whether those cases, which addressed First Amendment protections applicable to circulators of ballot-initiative petitions, also applied to voter registration campaigns. My approach was similar to the other federal district courts that had addressed the issue, all of which had found that *Meyer* and *Buckley* did extend to voter registration activity. A majority of the Fifth Circuit panel disagreed with

respect to the Texas laws aimed solely at volunteer deputy registrars and distinguished *Meyer* and *Buckley*, and as a judge I am bound to follow that precedent.

d. Please explain the legal reasoning that led you to criticize the Texas Secretary of State for not producing evidence of "rampant fraud" committed by out-of-state VDRs.

Response: During the course of this litigation, I held a two-day hearing on the plaintiffs' motion for a preliminary injunction. Among the criteria judges have to weigh when deciding whether to grant a preliminary injunction is the balance of harms—in this case, whether plaintiffs could demonstrate that the harms they would suffer if an injunction was not entered outweighed any harm the state would suffer if an injunction was entered. The Texas Secretary of State, as a defendant, elected not to call any witnesses or introduce any exhibits. I was not criticizing this litigation decision, but pointing out its impact on the balance of harms I was required to conduct. As a consequence of the evidence that was submitted during the hearing, the plaintiffs could point to a substantial evidentiary record in support of the claimed harm to their registration activities whereas the Secretary of State did not have any evidence in the record demonstrating how the injunction would undermine her efforts to combat voter fraud (which is a recognized state interest under the Supreme Court's decision in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008)).

e. Do you believe that a State must demonstrate voter fraud before enacting provisions that require voters to present identification prior to voting?

Response: In *Crawford*, the Supreme Court recognized a state interest in preventing voter fraud even when the "record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." 553 U.S. at 194.

f. If so, what quantum of voter fraud do you believe is necessary?

Response: According to *Crawford*, no quantum is necessary to recognize that the state has an interest in preventing voter fraud.

26. In a 1999 law review article, you applied what you described as a "textual-contextual framework" in analysis of certain historical texts. Do you believe the "textual-contextual framework" is a tool of statutory interpretation appropriate for judges to apply?

Response: I discussed that framework, which is used by some historians, in the context of a note I wrote during law school. The note provided a historical account of Chief Justice John Marshall's views on free speech issues that he confronted prior to his appointment to the Supreme Court, focusing primary on the controversy over the Sedition Act. That framework, which is used for historical scholarship, is not an approach that I would use for statutory interpretation. For questions of statutory interpretation, different considerations of text and context are commonly accepted as appropriate. *See, e.g., Lawson v. FMR LLC*,

No. 12-3 (U.S. Mar. 4, 2013) (Scalia, J., concurring) (holding that the majority's resolution of a question of statutory interpretation "logically flows from [the statute's] text and broader context" but noting his disagreement with "the Court's occasional excursions beyond the interpretative terra firma of text and context").

27. In a 2012 interview you expressed your view that white-collar criminals are "more blameworthy" than socially disadvantaged offenders. Please explain this statement.

Response: I was asked the following during an interview: "As a prosecutor, what motivated your focus on white-collar crimes?" My full answer was as follows: "There are a lot of crimes in our society born of desperation. That doesn't excuse them, but it's worth considering that these are people who see themselves as having no other options. Other crimes are born of greed or arrogance. To me, that's more blameworthy in a sense. Often the 18-year-old who has never had any real opportunities is getting a stiffer sentence than the businessman who has had every opportunity, and that's no way to build trust in the justice system." I was trying to capture the idea that in order for society to have confidence in our criminal justice system, they need to see rich and poor individuals alike held accountable when they violate the law. Of course, personal motivations for prior career decisions, like any other personal views I have, do not influence my rulings as a judge.

28. As a judge, does a criminal defendant's social, economic, or class status inform your judgment as to what is the appropriate sentence to render?

Response: No, unless the Sentencing Guidelines provide for enhanced punishment based on a defendant's employment status when the crime was committed as is this case for those who abuse a position of public trust or use a special skill, *see* U.S.S.G. § 3B1.3, or, for violations of the securities laws, if the defendant was an officer or director of a publicly traded company, a registered broker or dealer, or an investment advisor, *see* U.S.S.G. § 2B1.1(18). Apart from these and other situations in which the Sentencing Guidelines provide status enhancements, social, economic, or class status should not inform the sentencing decision. Congress has directed that among the many factors a judge must consider when sentencing a defendant is the "nature and circumstances of the offense," 18 U.S.C. § 3553(a)(1), which might include consideration of the motive for the criminal activity.

29. Do you believe that socially disadvantaged defendants are entitled to less severe punishment than other defendants who commit the same offense conduct?

Response: No. Uniformity in sentencing when the offense conduct and other relevant factors are similar is an important principle. It was a concern about sentencing disparities that motivated the comments I made in the 2012 interview. I was expressing a concern that defendants who lack significant financial resources often receive "stiffer sentence[s]" than white-collar criminals who typically have greater financial resources. That is a common perception of the criminal justice system—and a perception that is borne out by what I observed during my years as a federal prosecutor and my knowledge of federal sentencing

statistics. In terms of sentencing data I have seen, white-collar defendants receive below-Guidelines sentences and sentences of probation at higher rates than other offenders.

30. What standard of scrutiny do you believe is appropriate in a Second Amendment challenge against a Federal or State gun law?

Response: The Supreme Court has held that a more exacting level of scrutiny than rational basis applies to Second Amendment challenges. *See District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008). However, the Supreme Court has not announced the precise level of scrutiny lower courts should apply in such cases. In reaching a decision on this issue, I would of course be bound by Fifth Circuit case law. *See, e.g.*, *NRA v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 195 (5th Cir. 2012) (explaining, in case involving challenge to federal laws that prohibit federally licensed firearms dealers from selling handguns to persons under the age of 21, that a "regulation that threatens a right at the core of the Second Amendment—for example, the right of a law-abiding, responsible adult to possess and use a handgun to defend his or her home and family—triggers strict scrutiny" . . . but intermediate scrutiny applies as to "less severe regulation [] that does not encroach on the core of the Second Amendment").

31. What would be your definition of an "activist judge"?

Response: An activist judge is one who follows his or her own policy preferences rather than the law.

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

Response: After reading the questions, I conducted research and drafted answers. I then shared my draft answers with the Office of Legal Policy at the Department of Justice. After discussing my answers with an attorney in the Office of Legal Policy, I made revisions and finalized the answers for submission to the Committee.

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

Response: Yes.

Questions for the Record
Senator Ted Cruz

Gregg Jeffrey Costa
Nominee, Circuit Judge
United States Court of Appeals for the Fifth Circuit

1. **Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice's judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.**

   Response: Etched into the facade of the law school I attended are the words "That they may truly and impartially administer justice." Though intended as a command for all the future lawyers entering the law school, it is a particularly apt description of a judge's duty. "Truly," meaning a judge should faithfully apply precedent and other governing legal authorities to the facts of the case. "Impartially," meaning a judge should follow the law without regard to the wealth or status of the litigants or public reaction to the decision. In terms of Supreme Court Justices, given the variety of issues that they decide, I am unable to select one whose philosophy would most closely mirror mine. I did have the great honor of serving as law clerk to Chief Justice William Rehnquist, from whom I learned a number of important lessons. Perhaps most relevant to the court of appeals position to which I have been nominated, Chief Justice Rehnquist always maintained very good relationships with his colleagues, an accomplishment attributable in large part to his sense of humor and humility.

2. **Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?**

   Response: A court should consider originalist sources when interpreting a constitutional provision on which precedent has not provided an answer. Evidence concerning original public meaning is typically the most persuasive originalist evidence. *See District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

3. **If a decision is precedent today while you're going through the confirmation process, under what circumstance would you overrule that precedent as a judge?**

   Response: If confirmed as a court of appeals judge, I would not have the authority to overrule Supreme Court precedent. A court of appeals only has authority to overrule one of its own precedents when sitting as a full court. One of the limited circumstances in which it would be appropriate for an *en banc* court to overrule circuit precedent is when such a ruling is "necessary to secure or maintain uniformity of the court's decisions." *See* FED. R. APP. 35. Another situation would be when an intervening Supreme Court decision has cast doubt on the circuit precedent.

4. **Explain whether you agree that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).**

   Response: If confronted with the issue presented in *Garcia*, I would be bound to follow its holding, as with all Supreme Court precedent. In other cases involving federalism issues, however, the Supreme Court has found limitations on federal power to be judicially enforceable and rejected arguments that political safeguards alone are sufficient. *Compare United States v. Morrison*, 529 U.S. 590, 616 n.7 (rejecting the dissent's argument that *Garcia* means that the scope of federal power would be "defined solely by the political branches"), *with id*. at 649 (Souter, J., dissenting) (arguing that the "*Garcia* Court's rejection of 'judicially created limitations' in favor of the intended reliance on national politics was all the more powerful . . ."); *see also Printz v. United States*, 521 U.S. 898 (1997) (finding that provisions of the Brady Bill violated state sovereign rights over a dissent which cited *Garcia* for the argument that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself"). If a case presenting these issues came before me, I would carefully examine and take into account all relevant Supreme Court decisions.

5. **Do you believe that Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?**

   Response: The Supreme Court has emphasized the non-economic nature of the activity being regulated in decisions holding that federal laws exceeded the scope of the Commerce Clause. *See United States v. Morrison*, 529 U.S. 598, 610-11, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 560-61, 566-67 (1995). The Supreme Court has not held, however, that an exercise of the Commerce Clause power could never reach non-economic activity. In his synthesis of the caselaw in this area, Justice Scalia concluded that "Congress may regulate even non-economic activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring).

6. **What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?**

   Response: A President's ability to issue executive orders or actions "must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). The Supreme Court has adopted the "tripartite scheme" set forth in Justice Jackson's concurrence in the Steel Seizure Case as the legal framework governing this issue. *See Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).

7. **When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?**

Response: The Supreme Court has held that a right is "fundamental" for purposes of the substantive due process doctrine when it is "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotations and citations omitted).

8. When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: The Supreme Court has held that classifications that are "so seldom relevant to the achievement of any legitimate state interest," such as those based on race, are subject to strict scrutiny. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Classifications that "frequently bear[] no relation to ability to perform or contribute to society," such as sex, are subject to intermediate scrutiny. *Id*. at 440-41.

9. Do you "expect that [15] years from now, the use of racial preferences will no longer be necessary" in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: Regardless of any personal expectations I may or may not have, I would follow *Grutter* (and other precedent in this area such as *Fisher v. University of Texas*, 570 U.S. __ (2013)) when confronted with an issue concerning the use of racial preferences in public higher education.