

**Senator Chuck Grassley
Questions for the Record**

**Responses of Cornelia Pillard
Nominee, United States Circuit Judge for the D.C. Circuit**

- 1. You have extensive appellate experience, particularly before the Supreme Court of the United States. Certainly during that time you have reflected on the professional traits and judicial philosophies of the judges or Justices before whom you have appeared. Please describe for us some traits or judicial philosophy that you would like to emulate as a judge, if confirmed.**

Response: I believe that a federal judge must be a devoted guardian of the United States Constitution and laws. I have not specifically studied the philosophies of individual Justices, but there are qualities of judging that I respect and would strive to emulate in my own work as a judge, if confirmed. The power of Article III judges is confined to the cases and controversies before them. Accordingly, an appellate judge must meticulously read and understand the factual record to know precisely what issues are and are not presented in the appeal. A judge should read briefs with an open mind, and listen to and engage the advocates' arguments without prejudgment. Stability and predictability of judicial decisions is a cornerstone of the rule of law in the United States, and to achieve it I believe that judges must rigorously apply relevant precedent to new cases. Judicial opinions should clearly, logically and concisely set forth their premises, reasoning and conclusions. The effectiveness of our system of courts depends not only on judges being objective and impartial in application of law to fact, but also on the perceptions of the public and the parties appearing before the courts that judges are objective and impartial.

- 2. When is it appropriate for the federal government to preempt state law? If confirmed, what sources and approaches would you utilize to assess whether Congress or the Executive Branch in fact intended to preempt state law and acted within the scope of their authority in doing so?**

Response: By operation of the Constitution's Supremacy Clause, valid federal action can preempt state law explicitly or by implication, such as by occupying the field and thereby displacing state law or by creating an irreconcilable conflict with state law. *See generally Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *Wyeth v. Levine*, 555 U.S. 555 (2009). In deciding whether federal law preempted state law, I would apply the relevant preemption precedents, analyzing any express preemption provision to determine its scope and limits, and considering any potential conflict between state and federal law in light of the appropriate standards and presumptions.

- 3. Do you ascribe to the concept of a living Constitution? Please explain.**

Response: The phrase "living Constitution" can have different meanings for different people. I have not found the phrase, in any of its meanings, to be useful in teaching constitutional law, and have not developed a personal position on it.

4. What is your judicial philosophy or approach in applying the Constitution to modern statutes and regulations?

Response: I would be guided by the knowledge that the Constitution is the supreme law of the land, and that no official action in derogation of it can be valid. If I were confirmed to sit as a judge on the D.C. Circuit, I would apply the relevant constitutional provisions and Supreme Court and D.C. Circuit precedent. I would approach the task of constitutional review of statutes and regulations enacted by the coordinate branches of government with due respect for the constitutional stature and competence of those branches, and thus start from the established presumption of constitutionality. I also would apply established canons of constitutional avoidance to steer clear of any unnecessary resolution of constitutional questions.

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

Response: A judge's opinions and views should have no role in interpreting the Constitution. In *Estelle v. Gamble*, 429 U.S. 97, 102 (1976), the Supreme Court referred to "evolving standards of decency" in determining what conduct is understood as "cruel and unusual" and thus prohibited by the Eighth Amendment, and I would be bound by *Estelle* as by all other precedents of the Supreme Court and the D.C. Circuit. I do not, however, understand *Estelle's* method of constitutional interpretation to be generally applicable to constitutional questions beyond the Eighth Amendment.

6. In *Brown v. Entertainment Merchants Association*, 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: To identify the information pertinent to an appeal, an appellate judge should rely on the parties' briefing and arguments, together with the judge's own review of the opinions below, the factual record and relevant legal sources. In the event that a question arises in a particular case as to the propriety of consulting factual sources outside the record, such as on a matter susceptible of judicial notice, an appellate judge should look for direction to the relevant precedents and appellate rules, including Federal Rules of Appellate Procedure 10 and 16.

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

Response: An appellate judge should be guided by the applicable Federal Rules of Evidence and judicial precedents, such as the Supreme Court's opinions on

expert witness testimony. *See, e.g., Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993).

- 7. 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: The United States Constitution is an American document framed by Americans to govern the United States as a distinct political community. The precedents of the Supreme Court and the D.C. Circuit rely on the relevant United States sources, such as the text and structure of our Constitution, to determine constitutional meaning without regard to any views of the “world community.” D.C. Circuit judges are bound by and must follow those precedents.

If I were confirmed as a judge, I would not rely on foreign courts’ decisions to determine the meaning of the United States Constitution, except in the very limited instances in which the United States Supreme Court or D.C. Circuit precedents explicitly rely on foreign court decisions. For example, in interpreting the Seventh Amendment right to a trial by jury in civil cases, the Supreme Court has examined the common law in England at the time of the Amendment’s adoption. *Chauffeurs, Teamsters, and Helpers Local No. 391 v. Terry*, 494 U.S. 558 (1990).

- 8. In an article you wrote in the Supreme Court Review about plenary power and the *Miller v Albright* decision, you concluded that after *Miller*, the “courts may now step in” “where the political branches abdicate.” You also found that this case means that “the government is no longer entitled to argue for extreme judicial deference” in some cases where Congress generally has plenary authority.**

- a. Under what conditions should courts step in fill in legislative gaps?**

Response: The article did not propose that courts should step in to fill legislative gaps. Rather, we sought to make the point that—despite the executive’s constitutional oath and Take Care Clause obligations, and despite the constitutional oath of members of Congress—sometimes enacted law or regulations contain constitutional defects. In those circumstances, such an unresolved constitutional defect may present a justiciable question for the courts.

- b. What should guide the court when it steps in to fill a legislative gap?**

Response: A court addressing a potential constitutional defect in legislation or regulation should be guided by the Constitution, binding precedents interpreting the Constitution and the law with which it potentially conflicts.

- c. What are your views on the limits courts should impose upon themselves in such situations?**

Response: Courts must in all situations await a properly presented constitutional case or controversy and apply doctrines of constitutional avoidance, presumptions of constitutionality and any other relevant limiting doctrines set forth in binding precedents.

9. What would be your definition of an “activist judge”?

Response: I would identify two somewhat distinct types of activism, both impermissible. The first type of activism occurs when a judge allows personal views or policy preferences to influence his or her application of the law to the facts of a case, and so renders a decision that is not evenhanded and faithful to the facts and/or the law. A second type of activism takes place when a judge exceeds the limitations of Article III by, for example, failing to observe jurisdictional limits on the court’s power; reaching out to strike down as unconstitutional actions that should, under the doctrine of constitutional avoidance or otherwise, be sustained; or creating general federal common law unsupported by legislative authorization.

10. In general, Supreme Court precedents are binding on all lower federal courts. 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.

11. In response to a question asked by Senator Flake, you said that not only are the substance of decisions binding as precedent but the methods of interpretation are binding as well.

- a. Please expand on the different methods of constitutional interpretation that you find to be binding in Constitutional Law and in what contexts those methods are specifically applicable.**

Response: Please see below.

- b. Please explain which method of constitutional interpretation that you would find to be the most persuasive.**

Response: Please see below.

- c. Please explain how original intent should be used when asked to interpret the Constitution.**

Response: The duty of a judge is to follow the interpretive approaches that precedent dictates. The Supreme Court has in some cases employed originalism as a method of interpreting the Constitution, and I would apply such precedents. For example, in *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008), the Court used an originalist methodology—specifically, original meaning—to read the

Second Amendment to protect an individual right to bear arms, and in *United States v. Jones*, 132 S. Ct. 945, 949-950 (2012), the Court relied on original meaning in deciding that physical trespass by public officials triggers the Fourth Amendment, so that police placement of a global positioning device on a car to gather information amounted to a search under the Amendment. The Supreme Court has not, however, adopted original meaning as a blanket methodology to be applied to all constitutional questions. For example, in *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court reaffirmed the requirement that the Miranda warning (based on *Miranda v. Arizona*, 384 U.S. 436 (1966)) be read to criminal suspects. If confirmed, I would be bound by *Dickerson*, even though the decision is not necessarily rooted in originalist methodology. In sum, whether or not the interpretive approaches of the Supreme Court and the D.C. Circuit's precedents can be described as flowing from any unified interpretive rubric, and regardless of whether I personally found any particular method to be persuasive, if confirmed as a judge I would be bound to apply them.

12. 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 a case of first impression, I would start with the text, structure and other indicia of constitutional, statutory or regulatory meaning. In the absence of binding or determinative precedent, I would look to all available sources that might be persuasive or suggestive. Those would include decisions on closely related questions by the Supreme Court and the D.C. Circuit; the reasoning of the lower court opinion as well as of opinions of other federal courts on the same or closely related questions; secondary sources such as learned treatises or other recognized authorities, as well as counsel's arguments in the briefs and at oral argument. Taking all pertinent sources of guidance into account, I would seek to arrive at the resolution most faithful to the meaning of the constitutional provision or other law at issue.

13. 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 be bound to apply a decision of the Supreme Court or the court of appeals on which I sat, even if I believed it to be in error.

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

Response: A federal court must declare a federal statute unconstitutional if the statute exceeds the constitutional power of Congress or encroaches on constitutional rights. A federal court must declare a federal statute unconstitutional only in a properly presented

case or controversy, and only when the statute cannot, under canons of constitutional avoidance, be fairly read so as to avoid the constitutional defect.

15. 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: Stability and predictability of judicial decisions is a cornerstone of the rule of law in the United States, and to achieve it judges must consistently and rigorously apply precedent to new cases. Precedent within the D.C. Circuit is binding on all future panels unless it has been superseded by a decision of the *en banc* court or the United States Supreme Court. *See* Fed. R. App. P. 35. On voting whether to recommend *en banc* consideration, as with all other issues, I would follow the law of the Supreme Court and of the D.C. Circuit as to the circumstances in which such consideration is warranted. The precedents recognize only limited and rare situations in which a court, sitting *en banc*, may overrule its own decisions, such as where there is extraordinary confusion or lack of clarity on an issue, or the precedent has become gravely unworkable. The rationale for judicial reconsideration of precedent, even through *en banc* review, is weaker when the question is statutory or regulatory than when it involves the Constitution, because Congress or an agency may change the law if it believes a court erred. In general, given the bedrock importance of the stability of precedent, mere disagreement with a prior D.C. Circuit panel's decision is not alone sufficient ground for the *en banc* court to overrule it.

16. What weight should a judge give legislative intent in statutory analysis?

Response: The relevance of legislative intent varies depending on the context. The text and structure of legislation are typically the best indicators of legislative intent, and are often determinative. Occasionally, legislative intent behind an otherwise constitutionally unproblematic law may be relevant, however, such as when a party alleges that facially neutral legislation was enacted with invidious intent in violation of equal protection guarantees. *See Arlington Heights v. Metropolitan Housing Dev. Corp.* 429 U.S. 252, 264-68 (1977). (I would note that the party challenging the official action bears the burden of proof that legislators in fact acted with prohibited intent). In determining whether legislative intent is relevant and how to discern it, I would follow applicable Supreme Court and D.C. Circuit precedents.

17. In a recent Supreme Court decision, Justice Kennedy wrote that DOMA “humiliates” “demeans” “disapproves” and “seeks to injure” and that it is a “bare congressional desire to harm”.

a. As a federal judge, what role do you see for making findings of the intent of Congress when they write laws?

Response: If binding precedent required consideration of legislative intent beyond that which could be discerned through consideration of the text and

structure of legislation, I would follow the approach of such precedent in making any required findings.

b. When is legislative intent relevant in determining the outcome of a case?

Response: Please see my response to question 16, above.

c. I expect all federal judges to follow the law and respect every citizen's first amendment religious liberty rights. What is your understanding of a church's right to define marriage how they see fit?

Response: Whether or not a religious community chooses to recognize a marriage is a matter for that community to decide. To the extent that unresolved legal questions regarding the implications of any such recognition might come before me, I would decide them under applicable Supreme Court and D.C. Circuit precedents.

d. Do you support the right of clergy to decline to marry any particular couple?

Response: Whether or not clergy choose to recognize a marriage is a matter for that clergy member and the relevant religious community to decide. To the extent that unresolved legal questions regarding the implications of any such recognition might come before me, I would decide them under applicable Supreme Court and D.C. Circuit precedents.

e. Do you support the right of private individuals (such as photographers or wedding cake makers) to decline to provide services for same-sex weddings?

Response: These are issues that have not been resolved in the Supreme Court or the D.C. Circuit. In addressing any such claim, issues to be considered likely would include (1) An evaluation of the relevant First Amendment doctrines, including both freedom of speech and freedom of religion; (2) whether any neutral law of general applicability, such as federal, state or local antidiscrimination law, extended to the individuals' business activities and so purported to require the service to be provided to same-sex customers; (3) whether federal, state or local law provided an exemption for religious objectors to serving same-sex couples, *see generally* Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*

18. At your hearing, I asked about First Amendment rights and government mandates. Generally speaking, what is your understanding of the current state of the law with regard to the interplay between the establishment clause and free exercise clause of the First Amendment?

Response: The Supreme Court has recognized that the interplay between the religion clauses includes some "play in the joints," such that state non-establishment interests do

not inevitably run afoul of individuals' free exercise rights. See *Locke v. Davey*, 540 U.S. 712, 718-19 (2004); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970). Additionally, the Constitution limits the ability of government, ostensibly seeking to avoid establishing religion, to impose secularism, such as by singling out religion for unfavorable treatment or failing to accommodate religious practices. See, e.g., *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987).

- 19. At your hearing, you were asked about your stance in the case of *Hosanna-Tabor Evangelical Lutheran Church v. EEOC* and you said, “I really called it wrong.” While I appreciate your acknowledgement of “getting it wrong,” I am not concerned with your ability to predict Supreme Court case outcomes. The fact that you advocated so ardently against the ministerial exception to employment decisions is worrisome to me because it reflects your views of the First Amendment free exercise rights. Please explain your understanding of the tension between free exercise rights and general applicability of laws.**

Response: Tensions between free exercise rights and generally applicable state or federal laws implicate the Constitution; Supreme Court precedents, including *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694 (2012), and *Employment Division v. Smith*, 494 U.S. 872 (1990); and statutory law, including any generally applicable laws and, where relevant, the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*, Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc *et seq.*, or similar federal or state enactments. I have not advocated for or against the ministerial exception. In my personal notes for a press briefing, which I supplied to the Committee, I described the issue in the case, identified what was difficult about it, and offered a prediction of how the Court might resolve it. I noted that, although the Supreme Court had never before recognized a “ministerial exception” to generally applicable civil rights laws, the courts of appeals had done so. I stated that “[i]t would be unexceptional for the Court to conclude that the First Amendment prevent[s] courts from second-guessing religious communities’ choice of their leadership, and keeps courts from adjudicating core questions of church doctrine.” Where my prediction erred was in the difficult question of precisely how broadly the Court would define the exception—a problem for which the Court’s own opinion in *Hosanna-Tabor* did not provide any easy formula. *Hosanna-Tabor*, 132 S.Ct. at 707 (declining to adopt a “formula” but concluding that the exception applied to the plaintiff teacher, “given all the circumstances of her employment”). I had predicted that the Court might hold that the neutral, generally applicable law prohibiting discrimination on the basis of disability applied to the firing of the plaintiff teacher because she held a type of position that the Church acknowledged that it had also filled with non-Lutheran laypersons. My prediction was consistent with the unanimous holding of the Sixth Circuit. I was nonetheless clearly wrong, as the unanimous Supreme Court has since held. If I were confirmed, I would have no difficulty applying the Supreme Court’s holding in *Hosanna-Tabor*, or any other Supreme Court precedents.

- 20. In your hearing, you told us that you predicted the *Hosanna Tabor* case incorrectly. We had asked you if you found the ministerial exception unconstitutional. You previously stated that the Lutheran church’s position a “substantial threat to the American rule of law”. Please elaborate why you said this particular statement and describe how the position is a substantial threat to the American rule of law. Please be detailed and specific in your answer.**

Response: The First Amendment protects religious freedom and, because of that important right, religious institutions have the right to be free from governmental interference in how they select or remove their religious leadership. In my notes, prepared before the Supreme Court rendered its *Hosanna-Tabor* decision, I pointed to some public consequences that might arise if the Court issued an especially broad decision against the petitioner, a teacher, in her employment discrimination case against the Lutheran church. Under a broad decision, institutions run by churches, temples or mosques could simply dub all of their employees—from accountants to janitors to cafeteria workers—as “ministers” or their equivalent, and thereby bar them from access to courts in cases of unlawful retaliation or discrimination. The Court’s decision is in fact much more limited and contextually based. The Court noted that it was “reluctant ... to adopt a rigid formula for deciding when an employee qualifies as a minister,” but emphasized that the respondent in this case “held herself out as a minister,” had a “significant degree of religious training,” and that her work involved “conveying the Church’s message and carrying out its mission.” *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694, 707-708 (2012). The Court’s nuanced decision is not a “threat to the American rule of law.”

- 21. In discussing First Amendment rights and government mandates, you said that one would have to take into account religious rights and reproductive rights. How would you balance those rights and what precedent would you look to guide you in finding the balance of these two rights?**

Response: Questions regarding whether religious adherents are exempt from government mandates supporting contraception or other reproductive health benefits are not likely to be decided on constitutional grounds, because federal (and many states’) statutory protection for conscience rights is more robust than that provided by constitutional precedents. See Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb *et seq.*; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Recent court of appeals decisions grappling with conscience rights and government mandates accordingly have relied principally on RFRA or state statutes that protect conscience rights. See *e.g.*, *Conestoga Wood Specialties Corp. v. Sect’y of U.S. Dept. of Health and Human Svcs.*, 2013 WL 3845365 (No. 13-1144) (3d Cir. July 26, 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 2013 WL 3216103 (No. 12-6294) (10th Cir. June 27, 2013) (en banc); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *Korte v. Sebelius*, 2012 WL 6757353 (No. 12-3841) (7th Cir. Dec. 28, 2012); *Morr-Fitz, Inc. v. Quinn*, 2012 Ill. App. 4th 110398; 976 N.E.2d 1160 (2012). Doctrines of constitutional avoidance counsel deciding such issues on available statutory rather than First Amendment grounds.

Apart from the statutory protections for religious freedom and conscience rights, constitutional sources to be considered regarding the relationship between religious rights and state or federal mandates (such as mandates to provide or insure health services) could include the text of the Constitution itself; precedents regarding religious freedom such as *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694 (2012) (recognizing religious entity's exemption from neutral law of general applicability based on free-exercise and non-establishment rights); *Employment Division v. Smith*, 494 U.S. 872 (1990) (sustaining neutral law of general applicability against claim of religiously based exemption); and precedents regarding reproductive rights, such as *Gonzales v. Carhart*, 550 U.S. 124 (2007) (holding federal prohibition of an abortion method not an undue burden); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (reviewing abortion restrictions under due-process "undue burden" analysis); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (recognizing individuals' due process right to use contraception); and *Harris v. McRae*, 448 U.S. 297 (1980) (holding that right to abortion is not violated by government non-funding of abortion).

22. In 2006 you wrote an entry in the Encyclopedia of American Civil Liberties entitled "Reproductive Freedom." In this entry you discuss current law and future directions and appear to criticize conscience rights protections when you write, "Legal restrictions on reproductive choice reach beyond the abortion procedure itself...Laws in several states now grant "conscience rights" to pharmacists and health care providers to refuse to facilitate abortions or even to fill prescriptions for contraceptives if they personally are opposed to such practices." How would you approach a case involving a challenge to these conscience rights?

a. Do you understand the Constitution to protect the conscience rights of health-care providers?

Response: Please see below.

b. Under what scenarios do you understand the law to not protect these conscience rights?

Response: At this time, that precise constitutional issue has not yet been decided by the United States Supreme Court or the D.C. Circuit. Many sources of federal and state law, however, support conscience rights for individuals and religious organizations, as discussed in the response to Question 21, above. Among the issues currently under active consideration in many federal courts is whether and to what extent general business corporations have the same free exercise rights as individuals and religious organizations. See e.g., *Conestoga Wood Specialties Corp. v. Sect'y of U.S. Dept. of Health and Human Svcs.*, 2013 WL 3845365 (No. 13-1144) (3d Cir. July 26, 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 2013 WL 3216103 (No. 12-6294) (10th Cir. June 27, 2013) (en banc); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *Korte v. Sebelius*, 2012 WL 6757353 (No. 12-3841) (7th Cir. Dec. 28, 2012). If confirmed and if presented with such an issue, I

would look to relevant statutory and constitutional provisions, apply any relevant Supreme Court and D.C. Circuit precedent, and otherwise consider decisions from other courts which, though not binding, may be persuasive.

23. You said in your hearing, “women’s rights are facilitated by abortion”. It is not clear to me how this is the case. Please explain the following:

- a. Before abortion was legal, were women’s rights restricted by the fact that they could not get an abortion? If so, how so?**

Response: Please see below.

- b. In what way is abortion necessary to facilitate women’s rights?**

Response: At the hearing I did not assert that “women’s rights are facilitated by abortion.” I quoted the Supreme Court’s observation in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), that “the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” *Id.* at 856.

24. In your hearing, your response to questions from Senator Lee about your amicus brief on *Bray v Alexandria Women’s Health Clinic* was that: “we were arguing that the provisions of the law might be deployed in current-day circumstances, and the contribution of our brief was talking about when and if protesters interfere with law enforcement.” While you addressed the fact that there were “disparaging connotations” associated with using the same statute to address the KKK and current-day problems, you chose to overtly utilize these connotations and directly compare a pro-life group to the KKK in your writings after the *Bray* case was decided. You said the following:

- a. “Just as the Klan used force to subvert official efforts to extend new constitutional rights to the freed slaves, so Operation Rescue uses force to overwhelm official efforts to protect recently recognized rights the Constitution confers on women” (emphasis added).**

This comparison appears to put the actions of Operation Rescue on equal footing with those of the KKK. Is this in any way representative of how you view pro-life advocacy groups that act as Operation Rescue does?

Response: No. If I were confirmed as a judge, I would evenhandedly recognize the rights and responsibilities of all parties to appear before me. The advocate’s role, however, is different from that of a judge, and the quotes referenced in both subparts of this question were written from the perspective of an advocate. Specifically, the quoted comparison in Question 24(b) is from an *amicus* brief filed in *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993); the quoted comparison in Question 24(a) is from an article I wrote as a practicing

lawyer, directed at civil rights advocates, and published in 1993 in a civil rights litigation handbook. An advocate is obligated to use any reasonable argument to advance the client's cause, and the arguments you quote were legally reasonable and professionally responsible.

Congress enacted 42 U.S.C. § 1985(3), which was known as the “Ku Klux Klan Act,” in response to actions of the Klan following the Civil War. Respondents in *Bray* advocated for the application of civil remedies provided in Section 1985(3) to anti-abortion clinic blockades. The case, and my advocacy, made no objection to anti-abortion advocacy or speech. The challenged conduct was the physical blockading of clinics by large groups of people seeking to prevent women from entering the clinics, even with the assistance of law enforcement personnel trying to open the way. The two sentences the question references used analogical reasoning to argue that such blockades were similar in legally relevant respects to some of the conduct that the 42d Congress outlawed when it enacted Section 1985(3). That contention was legally warranted by the detailed analysis we offered of the Court's precedents, the statute's text and its history. Before the Supreme Court decided *Bray*, no court had rejected the argument we made with respect to the applicability of Section 1985(3) to clinic blockades, and the four dissenting justices in *Bray* would have accepted it. Even in rejecting this claim as not properly raised, the Court majority acknowledged that the claim was non-frivolous under *Bell v. Hood*, 327 U.S. 678 (1946). *Bray*, 506 U.S. at 285. Congress, however, soon enacted the 1994 Freedom of Access to Clinic Entrances Act (FACE Act), 18 U.S.C. § 248. That Act provides federal criminal penalties and civil redress for the specific type of conduct challenged in *Bray*, and thus effectively supersedes use of § 1985(3) against such conduct. Although I made the arguments—prior to Congress enacting the FACE Act—that Operation Rescue's hindrance of law enforcement violated § 1985(3), I did not contend and do not believe that Operation Rescue is the moral equivalent of the Ku Klux Klan.

- b. **“Women's reproductive freedom is . . . under broad attack by Operation Rescue, a nationwide conspiracy to undermine the exercise of abortion rights. Defendants in this case, like the conspirators at whom § 1985(3) originally was aimed [referring to the Ku Klux Klan], seek forcibly to revoke constitutional rights that they have been unable to repeal through legal and political processes.”**

You were willing to use a statute to argue your client's cause that was not appropriate to use because you said there was no better statute. I am concerned that as a judge you will stretch statutes to mean more than they should be to suit the outcome you want as a judge. Please explain to the Committee how you came to the conclusion that it was acceptable to use this statute.

Response: Please see my response to Question 24(a), above.

25. At your hearing, you said “I do not believe that the Supreme Court has ever held that the abortion right is protected by equal protection.” But in your article entitled “Our Other Reproductive Choices” you wrote that “equal protection is also at the heart of the matter” when discussing reproductive rights. While you acknowledge that reproductive rights are “traditionally understood to be protected by the privacy aspect of the due process liberty guarantee” this assertion that we should find these rights in another constitutional doctrine is worrisome because it reflects your understanding of constitutional law.

a. Please explain your argument that reproductive rights should be found in equal protection.

Response: The Supreme Court has held that the abortion right is protected as a due process privacy right, and observed in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), that the right has had practical implications for sex equality: “the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” *Id.* at 856. The reference to equal protection that you quote from my article is not an assertion that the abortion right as such is, or should be, found in equal protection—an issue that I specifically stated in footnote 2 was “beyond the scope of this article.” The article, *Our Other Reproductive Choices*, addressed “other” reproduction-related choices—not the right to abortion—that may affect the frequency of abortion in practice. Specifically, the article discussed potential equality issues—whether at the level of the Constitution, legislation or policy—that may arise when sex education in public schools relies on sex stereotypes to treat boys and girls unequally; when otherwise comprehensive prescription benefit insurance plans do not cover contraception; or when women and men are not afforded equal opportunities to work for pay while also caring for family dependents. The article expressly set aside any constitutional theorizing about the abortion right itself in favor of seeking “common cause between people opposed to legal abortion and those who support the abortion right.” The article concluded that, “[i]f society were willing to recognize the demands of equality in these three areas, there might well be less need for abortion.” Of course, discussing potential equality issues that might arise in these contexts as an academic is very different from analyzing a case that might present such issues were it to come before me. I understand the differences between the role of an academic and the role of a judge.

b. Please explain in what situation you would find it more appropriate to apply equal protection to reproductive rights.

Response: I am not aware of any cases in which the Supreme Court or the D.C. Circuit has applied equal protection analysis to the abortion right. The appropriate analysis would be the analysis supplied by the precedents of the Supreme Court, including *Gonzales v. Carhart*, 550 U.S. 124 (2007), and *Planned*

Parenthood v. Casey, 505 U.S. 833 (1992). If I were a judge, the analysis in court precedents is what I would find appropriate to apply.

c. Please explain where you feel that due process fails to protect reproductive rights.

Response: The above-referenced article argued that the right to abortion, as recognized under the Due Process Clause by the Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), does not provide full practical protection for the reproductive choice to bear a child, because “[p]eople who want children, whether or not they initially intended to get pregnant, often realize they cannot responsibly carry a pregnancy to term” and so may reluctantly opt for abortion. The article proposed that policies seeking to encourage pro-childbirth choices should recognize that “if mothers had more ability to participate in society as equals, women might feel less need for abortion.” As a scholar, I took the view that equal protection and Congress’s power to enforce it, more than the due process-based right to abortion, could provide the general conceptual framework for pro-childbirth policies based on enhanced maternal equality.

d. Please explain why you think that it is necessary that reproductive rights, such as abortion, should be protected by equal protection and due process.

Response: The abortion rights precedents use a due process analysis and do not hold that the abortion right is based on equal protection. If I were confirmed to the D.C. Circuit, I would follow those precedents as I would any other precedents. As a scholar I have not argued that it is necessary that abortion should be protected by equal protection. *See* Response to Question 25(a). To the extent that my academic writing on reproduction-related issues other than abortion presents any new understanding of sex equality, it might inform scholars, policy makers or advocates. If I were confirmed as a judge, however, it would be my responsibility and duty to apply the relevant precedents of the Supreme Court and the D.C. Circuit, not to theorize.

26. According to your understanding of the law, please explain your understanding of when an individual first starts receiving and stops receiving 14th amendment equal protection personhood rights?

a. What equal protection personhood rights do the unborn have? (Please elaborate if it is different during different stages of development.)

Response: Please see below.

b. What equal protection personhood rights do the newly (first few hours of life) born have?

Response: Please see below.

- c. **What equal protection personhood rights do infants in their first week of life have?**

Response: Please see below.

- d. **What equal protection personhood rights do those who are in what are often called vegetative states have?**

Response: The Supreme Court has not specifically addressed when equal protection personhood rights apply to the unborn, newborns, infants or persons in persistent vegetative states. The Court's cases have focused on due process, not equal protection, in recognizing the right to abortion. *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (“Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment”). Additionally, the Supreme Court has noted that “the State may use its regulatory power to bar certain procedures and substitute others all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn,” *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007)—although, again, the Court did not specifically address the State's interest in the life of the unborn in terms of an equal protection personhood right. I also do not believe the Supreme Court has specifically addressed when an individual is no longer considered to have Fourteenth Amendment personhood rights. The Court has held that individuals in persistent vegetative states have a potential liberty interest under the Due Process Clause in refusing unwanted life-sustaining medical treatment, *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), but not in assisted suicide, *Washington v. Glucksberg*, 521 U.S. 702 (1997), and has held that a state does not violate equal protection by banning assisted suicide while allowing terminally ill patients to refuse life-saving treatment, *Vacco v. Quill*, 521 U.S. 793 (1997).

- 27. At your hearing, you said that you supported sex-education curriculum being developed at a local level. However, in a 2006 entry to the Encyclopedia of American Civil Liberties you wrote “Accurate health education can help to make abortion less necessary by teaching teens about reproduction and birth control; such education has, however, been vigorously opposed by the religious right, leaving some states requiring uninformative, “abstinence only” programs.” If a challenge to a locality's decision to offer abstinence only sex education came before you, how would you rule considering your views on sex education?**

Response: If I were confirmed as a judge, any personal views I might have about a particular issue would have no place in my judicial decision making. I would decide any legal challenge to abstinence-only sex education, as I would decide any issue, by looking to the relevant law and precedents.

28. You have written extensively on the reform of the family. I am interested on how you would approach this as a judge, not as an academic.

- a. Under what circumstances should a non-parent be given parental rights either over a fit and able parent or jointly with a fit and able parent?**

Response: Please see below.

- b. Could a loving day-care provider of a child successfully petition for parental rights over the objection of the parent?**

Response: Please see below.

- c. Could a partner of a biological parent who has lived with the child successfully petition for parental rights over the objection of the biological parent?**

Response: Family law is primarily the province of the states, not the federal government or its courts. I am unaware of any precedents of the United States Supreme Court or of the D.C. Circuit that would confer parental rights to (a) a non-parent over, or jointly with, a fit and able parent; (b) a day-care provider over the objection of the parent; or (c) a biological parent's partner over the objection of the biological parent. Parents' rights are fundamental and are specially protected under the Fourteenth Amendment. *Troxel v. Granville*, 530 U.S. 57 (2000); *Santosky v. Kramer*, 455 U.S. 745 (1982). On this, as on any other issue, I would faithfully apply the relevant precedents.

29. Do you believe children have a fundamental right to know and be known by both their parents? When can this right be taken away?

Response: I am not aware of any directly controlling Supreme Court or D.C. Circuit precedent on this issue, which appears to implicate how anonymous adoption laws interact with parents' rights to direct the education and upbringing of their children. As this is an issue that might come before me were I to be confirmed as a judge, it would not be appropriate to speculate.

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 expressly left open the question of the appropriate standard of Second Amendment review of federal and state gun regulations, but has suggested that review should be more demanding than rational basis. *District of Columbia v. Heller*, 554 U.S. 570, 628 n. 27 (2008). The D.C. Circuit calibrates the standard of review to the nature of the regulation and the degree to which it burdens the "core right of self-defense." *Schrader v. Holder*, 704 F.3d 980, 989 (D.C. Cir. 2013) (internal quotations and citation omitted) (applying intermediate scrutiny to a ban on gun

possession by common-law misdemeanants as a class); *see Heller v. District of Columbia*, 670 F.3d 1244, 1257, 1261-62 (D.C. Cir. 2011) (applying intermediate scrutiny to registration requirement and semi-automatic gun ban). On this, as on any other issue, I would faithfully apply the relevant precedents.

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

Response: The Supreme Court has held in a line of cases that the death penalty can be a constitutionally valid form of punishment in some circumstances. *Gregg v. Georgia*, 428 U.S. 153 (1976). If I were confirmed as a judge, I would be bound to apply the Supreme Court's precedents with respect to the death penalty, as on any other issue.

32. You indicated in your questionnaire that have unable to find notes, transcripts, or recordings for several of your speeches. Could you provide the committee with a more detailed description of the points covered in your lecture than is provided in your original questionnaire for the following talks?

a. April 18, 2006: Speaker, "Briefing on Contraceptive Equity: *Cummins v. Illinois*"

Response: I spoke about my amicus participation in a then-pending appeal to the Seventh Circuit in *Cummins v. Illinois*. *See* 2006 WL 951818 (7th Cir. 2006) (appellate brief). The case raised the question whether a state employer that offers otherwise-comprehensive prescription health benefits as part of its health plan but excludes coverage for prescription contraceptives, when the only FDA-approved prescription contraceptives are for women, violates Title VII's bar against sex discrimination. The *amicus* brief in which I participated was limited to a narrow question regarding whether, under Section 5 of the Fourteenth Amendment, Congress had validly abrogated Illinois' sovereign immunity through Title VII, including the Pregnancy Discrimination Act. The *amicus* brief argued that, in light of the Supreme Court's decision in *Nevada v. Hibbs*, 538 U.S. 721 (2003), the interpretation of Title VII that the appellant proposed was appropriate under Section 5 of the Fourteenth Amendment, such that, if accepted by the Seventh Circuit, it would bind state as well as private employers. My comments focused on the issue argued in the brief.

b. February 28, 2006: Roundtable Discussant, Yale Women Faculty Forum "Working for Care: Families and the Workplace"

Response: I spoke about the implications for work-family balance of the Supreme Court's decision in *Nevada v. Hibbs*, 538 U.S. 721 (2003), a case in which I was lead Supreme Court counsel. The Court in *Hibbs* sustained the Family and Medical Leave Act's family-care provisions as appropriate legislation under Section 5 of the Fourteenth Amendment to remedy a widespread pattern of state sex discrimination against men in family leave policies and practices. I argued that family-friendly policies and practices should be sex-neutral and encourage

men to participate, to help to respond to the problem the Court in *Hibbs* identified of “mutually reinforcing stereotypes that only women are responsible for family caregiving and that men lack domestic responsibilities.” *Id.* at 722.

c. September 17, 2004: Participant, Roundtable at Duke University School of Law, Conference on Interrogation, Detention and the Powers of the Executive.

Response: I spoke about the importance of internal executive-branch processes to obtaining the best legal advice on crucial matters of executive powers in the War on Terror. I discussed the benefits that might be gained from exposing proposed executive legal positions to robust internal debate, including diverse executive-branch expertise and perspectives, and to prompt public scrutiny where feasible and appropriate.

33. In a comment you made about the *Stolt-Nielsen* case, you criticized “this court’s hostility to class actions” as evidence of “conservative activism.” I’m not familiar with the phrase, as conservatives on the bench are generally the opposite of activist. Could you define what characteristics comprise a conservative activist court?

Response: An activist court or judge, whether conservative or not, is one that (1) allows personal views or policy preferences to influence application of the law to the facts of a case, and so renders a decision that is not evenhanded and faithful to the facts and/or the law, or (2) exceeds the limitations of Article III by, for example, failing to observe jurisdictional limits on the court’s power; reaching out to strike down as unconstitutional actions that should, under the doctrine of constitutional avoidance or otherwise, be sustained; or creating general federal common law unsupported by legislative authorization. Both forms of activism are impermissible.

34. You indicated that you were a member of the American Constitution Society from 2004 until 2008. Please describe to the Committee your work with the ACS. Specify what projects you worked on, what responsibilities you had, and what policies you advocated for during your time there.

Response: I helped to identify issues and speakers of current interest for panels and programs to be sponsored by the American Constitution Society. I participated on occasion in conference calls to discuss and plan for such panels and programs. I participated as a speaker or moderator at ACS-sponsored programs, as reflected in my responses to this Committee’s questionnaire. I had no role in policy development or advocacy for policies within the ACS.

35. Your questionnaire indicates you were a member of the American Constitution Society for Law and Policy. There is nothing wrong with membership in such groups, but I do have a question about how the goals of that organization might affect your judgments, if confirmed. Peter Edelman, as chair of the board of directors for American Constitution Society for Law and Policy, stated he would

help to engage a younger audience about how the law can improve the lives of everyday citizens. “What we want to do is promote a conversation — the idea of what a progressive perspective of the constitution is and what it means for the country.” He also indicated that a goal of the organization is “countering right-wing distortions of our Constitution.”

- a. **What is your view of the role of the courts on improving the lives of everyday citizens.**

Response: Courts fulfill their role in improving the lives of everyday citizens through consistent, rigorous and transparent application of law to fact in disputes that come before them.

- b. **Can you please explain, in your view, the idea of what is a progressive perspective of the Constitution?**

Response: This was neither my statement nor my terminology, and I am not familiar with the full context nor what Professor Edelman meant by it.

- c. **What does the idea of a progressive perspective of the Constitution mean for the country, in your view?**

Response: Without a more specific definition of what is meant by a progressive perspective of the Constitution, I cannot comment on what it might mean for the country. I do, however, recognize that critical analysis of and robust public debate among lawyers, academics, students and laypersons over constitutional law from a range of perspectives helps the profession and the public better to understand the nature of our constitutional democracy and to play informed and constructive roles within it.

- d. **Can you please identify what “right-wing distortions of the Constitution” you are concerned about or feel need to be countered?**

Response: I have not asserted that there are “right-wing distortions of the Constitution” that need to be countered.

- e. **If you are confirmed as a federal judge how would you seek to promote a “progressive perspective of the Constitution; or counter “right-wing distortions of the Constitution?”**

Response: If I were confirmed as a judge, I would not seek to promote any perspective on the Constitution other than that which the document itself and relevant precedent embodies. In my view, judges must understand and apply the Constitution free of distortions from any quarter.

36. In sentencing, what consideration should a judge give to factors such as a defendant's race, age, marital status, or family status (whether or not the defendant has children)? Should two defendants who committed the same crime receive different sentences based on these factors?

Response: Defendants who commit the same crime should be treated the same, except to the extent that the law provides that specific circumstances of individual defendants be taken into account. Federal law recognizes the importance of uniformity of sentences of similarly situated persons who commit the same offenses. *See* 18 U.S.C. 3553(a)(6) (referring to “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”). The Sentencing Guidelines, even though they are advisory, provide considered and useful guidance to achieve appropriate uniformity in sentencing. If I were confirmed as a judge and a case reviewing a criminal sentence came before me, I would be guided by applicable law on relevant sentencing considerations, as well as precedents requiring deference to the sentencing decisions of the district courts.

37. You have spent your legal career as an advocate for your clients. As a judge, you will have a very different role. 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. What do you expect to be most difficult part of this transition for you?

Response: In my career I have worked as an advocate in and out of government, a legal advisor, a scholar, and a teacher. I understand that the role of a judge is distinct in important ways from each of the prior roles I have held. A judge must be a devoted guardian of the established American legal tradition, and must remain impartial, objective, and circumspect. My approach to reaching decisions would be to learn the record of each case thoroughly and accurately, and rigorously and impartially apply the law to the facts. Sources of information to which I would look for guidance would include the parties' briefs and arguments, opinions below, the constitutional, statutory, regulatory or other authoritative text at issue, and relevant precedents. My understanding also likely would be assisted by discussion with the other judges and with my law clerks.

I appreciate the gravity of the work of the D.C. Circuit and fully anticipate that, especially at first, it would pose challenges for me, as for any new judge. I cannot predict which aspects of this change would be the most difficult, but I trust that hard work, dedication, patience and the guidance of established judicial colleagues would ease the transition.

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

Response: In my view, the most important attribute of a judge is rigorous and impartial application of the law to the facts. I believe that, were I to be confirmed as a judge, I would embody that attribute.

39. Do you think that collegiality is an important element of the work of a Circuit Court? If so, how would you approach your work on the court, if confirmed?

Response: Yes, I think that collegiality is very important in federal appellate courts, as appellate judges must work together in relative isolation from the rest of the legal community, and they typically remain colleagues for the balance of their working lives. Openness to the views of colleagues helps any judge to test her or his own judgments, and the joint character of appellate decision making helps to ensure that court opinions are sound and widely accepted. I have striven throughout my professional life to establish and maintain cordial and respectful relations with all colleagues of whatever stature or role, and, were I to be confirmed, I would be committed to collegiality within the court.

40. 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 must be even-tempered, open-minded, treat all persons with dignity, and, above all, remain faithful to the law. That means that the judge should strive to understand and appreciate the interests and positions of the parties appearing before her and the views of judicial colleagues, even while she remains ultimately reliant on her own analysis, reason and judgment about what the law requires. In the face of the disagreements or strong feeling that important legal disputes may evoke, a judge should remain civil and dispassionate, inspiring confidence in and respect for the neutrality of the appellate process. I believe that I meet those standards.

41. Previously, you have made comments about allowing cameras in the courtroom, stating, “When I think about it objectively and take my personal interests out of the picture, I think cameras should be there.” Would you support legislation that allows for cameras in federal courtrooms, including the Supreme Court, and if allowed, what actions would you undertake to ensure cameras were operated in your courtroom? Please explain.

Response: The quoted comment is not correctly attributed to me. I have never formally studied the question and do not have the benefit of the specifics of the legislation the question hypothesizes, and so I hesitate to express an opinion on it. I note that I have on one occasion publicly responded to a panel question by expressing concern about allowing cameras in the courtroom. (The panel took place on February 28, 2010 at the Peter Jennings Project on Journalism and the Constitution). My concern was that video broadcasting might create incentives for counsel to be showy and present arguments designed to arouse popular sentiments, rather than being strictly directed at the legal questions at hand. I do, however, note that the Supreme Court makes same-day transcripts and audio recordings available to the public, and the D.C. Circuit has decided to do so as well. I believe that those media have helped the public to better understand the work of the Supreme Court, and have not harmed the quality of argument before the Court. I welcome the parallel development in the D.C. Circuit.

- 42. Miguel Estrada has a professional background similar to yours. Much of the objection to his nomination was focused on the request that internal Solicitor General memoranda be provided to the Committee. Do you think that was an appropriate request, and would it be appropriate for you to provide similar materials to the Committee in support of your nomination? Please explain.**

Response: Miguel Estrada and I were colleagues in the Office of the Solicitor General, and we were law school contemporaries at Harvard and fellow editors on the Harvard Law Review. Based on what I know of Mr. Estrada, I do not believe there was any need to review any internal Solicitor General memoranda to conclude that he was well qualified to serve on the D.C. Circuit and should have been confirmed.

Although I have not studied the question, I appreciate that there are strong reasons to protect the confidentiality of the decision making processes in the Solicitor General's Office. As many former Solicitors General have attested, candid advice on difficult and often controversial legal questions is facilitated by the assurance that the advice will be kept confidential. Any decision about disclosure of internal memoranda of the Office of the Solicitor General, were they sought, would properly rest with the executive branch. The executive branch position presumably would be informed by an assessment of the desirability and lawfulness of maintaining the long-standing policy of confidentiality of such memoranda.

- 43. According to the website of American Association for Justice (AAJ), it has established a Judicial Task Force, with the stated goals including the following: "To increase the number of pro-civil justice federal judges, increase the level of professional diversity of federal judicial nominees, identify nominees that may have an anti-civil justice bias, increase the number of trial lawyers serving on individual Senator's judicial selection committees".**

- a. Have you had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding your nomination? If yes, please detail what individuals you had contact with, the dates of the contacts, and the nature of the communications.**

Response: I have had no contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding my nomination.

- b. Are you aware of any endorsements or promised endorsements by AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ made to the White House or the Department of Justice regarding your nomination? If yes, please detail what individuals or groups made the endorsements, when the endorsements were made, and to whom the endorsements were made.**

Response: I am not aware of any endorsements or promised endorsements by AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ made to the White House or the Department of Justice regarding my nomination.

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

Response: I received the questions from the Office of Legal Policy in the Department of Justice on Wednesday, July 31, 2013. I reviewed the questions, referred to my papers and notes and to applicable legal research materials, and drafted answers to the questions. I submitted those answers for review by an attorney in the Office of Legal Policy, made revisions, and finalized my answers for submission to the Committee.

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

Response: Yes.

**Senator Jeff Sessions
Questions for the Record**

**Responses of Cornelia Pillard
Nominee, United States Circuit Judge for the D.C. Circuit**

1. At your hearing, in response to a question by Senator Flake, you testified that you believe judges should look to the original meaning of the words and phrases of the Constitution when applying them to current cases. You also testified that in your role as a judge you “would be bound by the precedents and the precedents that direct [judges] to look at the original meaning.”

a. Do you believe that judges are bound to follow the “original public meaning” of the text of the Constitution where it can be ascertained?

Response: The duty of a judge is to follow the interpretive approaches that precedent dictates. The Supreme Court has in some cases employed originalism as a method of interpreting the Constitution, and I would apply such precedents. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court used an originalist methodology—specifically, original meaning—to interpret the Second Amendment to protect an individual right to bear arms, and in *United States v. Jones*, 132 S. Ct. 945, 949-50 (2012), the Court relied on original meaning in deciding that physical trespass by public officials triggers the Fourth Amendment, so that police placement of a global positioning device on a car to gather information amounted to a search under the Amendment. However, the Supreme Court has not adopted “original public meaning” as a blanket methodology to be applied to all constitutional questions. If confirmed, and if presented with a case involving a particular constitutional question, I would carefully examine Supreme Court and D.C. Circuit precedents relevant to the question and apply those precedents’ interpretive approach.

b. Before your hearing, had you ever stated that “original public meaning,” “original meaning,” or “original intent” methodology was the best way to interpret the Constitution? If so, when and to whom?

Response: I do not believe that I have ever stated that any single methodology was the best way to interpret the Constitution.

c. In your testimony, by “original meaning,” were you referring to the originalist methodology that aims to discern the meaning of a constitutional provision at the time that it was ratified; as distinct from original intent meaning what the Framers intended the meaning to be? If not, how do you define the phrase “original meaning”?

Response: As I stated in response to Senator Flake at my hearing, I believe that “precedents on method . . . are equally binding on judges as the substance of the opinions themselves.” The Supreme Court has looked to the original meaning of constitutional text (as you define it in your question), on two recent occasions, as I mentioned above—*Heller* and *Jones*. If confirmed, I would be bound by those as by any other precedents—their method and their substance. To the extent that another binding Supreme Court was based on another methodology, such as original intent rather than original meaning, I would equally be bound by that precedent.

- d. Where the “original meaning” is not sufficiently clear to settle whether a democratic enactment violates a provision of the Constitution, is it proper for a judge to resort to other resources to decide the meaning of the provision? If so, please explain your view on the best way for a judge to do so, including what other resources you view as relevant and important. If not, does the lack of clarity require that the judge defer to the democratic enactment?**

Response: Judges are bound in interpreting the Constitution to follow judicial precedent of their own court and higher courts. The Supreme Court’s precedents make clear that, in addition to considering the text of a constitutional provision, judges may legitimately refer to constitutional structure and historical sources such as THE FEDERALIST PAPERS, and may be guided by canons of interpretation and prudential rules. If consulting those sources does not yield a clear result, deference to democratic enactments may be appropriate.

- e. Based on your current understanding of the original meaning of the Fourteenth Amendment, do you believe, or have you previously stated, that the original meaning (however you define that phrase) of the Fourteenth Amendment supports recognition of a constitutional right to abortion?**

Response: I have not developed or stated a view on original constitutional meaning and abortion rights. The Supreme Court has held in a line of cases that the Fourteenth Amendment’s Due Process Clause supports a constitutional right to abortion in certain circumstances. See *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). If I were confirmed as a judge, I would be bound to apply the Court’s precedents with respect to abortion, as on any other issue.

- f. Based on your current understanding of the original meaning of the Fourteenth Amendment, do you believe, or have you previously stated, that the original meaning (however you define that phrase) of the Fourteenth Amendment supports recognition of a constitutional right to same-sex marriage or of a constitutional obligation on the part of any government not to define marriage as the union of a man and a woman?**

Response: I have not developed or stated a view on original constitutional meaning and the definition of marriage. The Supreme Court has not ruled on the existence or not of a constitutional right to same-sex marriage, nor on the constitutionality under the Fourteenth Amendment of state law defining marriage as the union of a man and a woman. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Court held that the federal Defense of Marriage Act was unconstitutional, relying primarily on the Fifth Amendment, but with reference to the Fourteenth Amendment: “The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.” *Id.* at 2695 (internal citation omitted). If I were confirmed as a judge, I would be bound to apply the Court’s precedents with respect to marriage, as on any other issue.

2. **At your hearing you were asked whether you still hold the views that you made in a statement at a press briefing on the *Hosanna-Tabor* case, where you said that the position that the church has a First Amendment right to choose who it hires was a “substantial threat to the American rule of law.” You testified that you “called that case wrong,” which appears to be an explanation of another part of your statement predicting how the court would rule. Below is the full statement:**

“The Lutheran Church-Missouri Synod defends its very broad version of the ministerial exception by arguing that teachers play a pivotal role in disseminating the faith and in being powerful, Christian role models for students. It is certainly plausible that religious organizations are more effective in their missions when everyone associated with them exemplifies in every possible respect the Church’s teachings, and when the Church can command that its own dispute resolution processes oust any external legal system. But the Lutheran Church’s position here is a substantial threat to the American rule of law – it would effectively empower any religion to create its own autonomous Vatican City-style regime for employment-law purposes, a sovereign unto itself over which the federal courts lack civil rights jurisdiction. It is hard to see the Supreme Court deciding that that is what the First Amendment law requires.”

Your testimony addressed only your prediction on how the court would rule, not your statement that if the Court were to adopt the Lutheran Church’s position, it would pose a “substantial threat to the American rule of law.” Please take this opportunity to answer whether you still hold the view that “the Lutheran Church’s position here is a substantial threat to the American rule of law.”

Response: The First Amendment protects religious freedom and, because of that important right, religious observers and institutions are entitled to be free from

governmental interference in how they select or remove their religious leadership. In my notes, prepared before the Supreme Court rendered its *Hosanna-Tabor* decision, I explained that, although the Supreme Court had never before recognized a “ministerial exception” to generally applicable civil rights laws, the courts of appeals had done so. I stated that “[i]t would be unexceptional for the Court to conclude that the First Amendment prevent[s] courts from second-guessing religious communities’ choice of their leadership, and keeps courts from adjudicating core questions of church doctrine.” Where my prediction erred was in the difficult question of precisely how broadly the Court would define the exception. I pointed to some public consequences that might arise if the Court issued an especially broad decision against the petitioner, a teacher, in her employment discrimination case against the Lutheran church. Under a broad decision, institutions run by churches, temples or mosques could simply dub all of their employees—from accountants to janitors to cafeteria workers—as “ministers” or their equivalent, and thereby bar them from access to courts in cases of unlawful retaliation or discrimination. The Court’s decision is in fact much more limited and contextually based. The Court noted that it was “reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister,” but emphasized that the respondent in this case “held herself out as a minister,” had a “significant degree of religious training,” and that her work involved “conveying the Church’s message and carrying out its mission.” *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694, 707-08 (2012). The Court’s nuanced decision is not a “threat to the American rule of law.”

3. You are the founding Academic Co-Director of and Professor at the Center for Transnational Studies. You have described that organization’s mission as “based on recognition that now we need to make some shifts from nation- or region-centric to a more broadly transnational, even global, orientation.” At your hearing, you were asked whether international human rights could be a potential source of social rights in the U.S., to which you answered: “Not unless Congress would so legislate.”

a. Before your hearing, had you ever stated that it is not appropriate to rely on foreign law in deciding the meaning of the U.S. Constitution? If so, when and to whom?

I have not stated a view on that issue. I have referred to the Supreme Court citation to foreign sources in a set of notes for remarks at a judges’ retreat that I provided to this Committee. (Discussion of the Supreme Court Term at the Eastern District of Pennsylvania Judges’ Retreat on October 16, 2003.) My notes stated that the majority opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), “adverted to foreign legal sources” which “this Court has rarely done,” and opined that the references to foreign sources were “confirmatory . . . rather than persuasive.”

If I were confirmed as a judge, I would not rely on foreign courts’ decisions to determine the meaning of the United States Constitution, except in the very limited instances in which the United States Supreme Court or D.C. Circuit precedents explicitly rely on foreign court decisions. For example, in interpreting

the Seventh Amendment right to a trial by jury in civil cases, the Supreme Court has looked to the common law in England at the time of the Amendment's adoption. *Chauffeurs, Teamsters, and Helpers Local No. 391 v. Terry*, 494 U.S. 558 (1990).

- b. **Justice Breyer has offered this reason in defense of the practice of invoking foreign court decisions in deciding the meaning of the Constitution:**

“[I]n some of these countries there are institutions, courts that are trying to make their way in societies that didn't used to be democratic, and they are trying to protect human rights, they are trying to protect democracy. They're having a document called a constitution, and they want to be independent judges. And for years people all over the world have cited the Supreme Court, why don't we cite them occasionally? They will then go to some of their legislators and others and say, 'See, the Supreme Court of the United States cites us.' That might give them a leg up, even if we just say it's an interesting example.”

Do you agree with this reason or find it persuasive? If so, why?

I do not read Justice Breyer's remarks as advocating that foreign court decisions should play any determinative role in deciding the meaning of the United States Constitution. In any event, as noted above, if I were confirmed as a judge I would not rely on foreign court decisions to determine the meaning of the United States Constitution except in the very limited instances in which the United States Supreme Court or D.C. Circuit precedents explicitly rely on foreign court decisions.

- c. **Justice Breyer has also offered this reason why the decision of a foreign court may be relevant in deciding the meaning of the Constitution:**

“Well, it's relevant in the sense that you have a person who's a judge, who has similar training, who's trying to, let's say, apply a similar document, something like cruel and unusual or—there are different words, but they come to roughly the same thing—who has a society that's somewhat structured like ours. And really, it isn't true that England is the moon, nor is India. I mean, there are human beings there just as there are here and there are differences and similarities.... And the fact that this has gone on all over the world and people have come to roughly similar conclusions, in my opinion, was the reason for thinking it at least is the kind of issue that maybe we ought to hear in our court, because I thought our people in this country are not that much different than people other places.”

Do you agree with this reason or find it persuasive? If so, why?

Response: I do not read Justice Breyer's remarks as advocating that foreign court decisions should play any determinative role in deciding the meaning of the United States Constitution. Again, if I were confirmed as a judge I would not rely on foreign court decisions to determine the meaning of the United States Constitution except in the very limited instances in which the United States Supreme Court or D.C. Circuit precedents explicitly rely on foreign court decisions.

4. Have you ever expressed an opinion on whether the death penalty is unconstitutional? If so, what was that opinion? If not, do you have such an opinion?

Response: I have not stated a view on that issue, and any personal beliefs on that or other questions that might come before me if I were confirmed as a judge would not be relevant to how I would decide the issues. The Supreme Court has held in a line of cases that the death penalty is a constitutionally valid form of punishment in certain circumstances. *See Gregg v. Georgia*, 428 U.S. 153 (1976). If I were confirmed as a judge, I would be bound to apply the Court's precedents with respect to the death penalty, as on any other issue.

5. In your article *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, you wrote “[i]n the context of one-party dominance of the three branches, however, the rights-protecting effect of separation of powers is reduced.” You further stated, “[f]ollowing 9/11, with Republicans dominating all three branches and war ongoing, risks of governmental myopia ran high.” Is it your view that the judicial branch was “dominated” by “Republicans” following 9/11? If so, does such domination continue? If not, when did it end?

Response: The point made in the text, and the supporting citations to THE FEDERALIST NO. 51 (James Madison) and to Daryl J. Levinson, *Empire-Building Government In Constitutional Law*, 118 HARV. L. REV. 915, 952 (2005), was principally about the political branches, and issues arising in the war on terror that I identified as involving “partially unreviewable power in the political branches.” To the extent that the point referred to the Court, it was an observation that seven of the nine Justices of the Supreme Court at that time had been appointed by Republican presidents. In retrospect, the point might have been clearer if I had consistently limited my observations to the political branches. In any event, I would not want my comments to be read to imply that a judge's decisions are dictated by the party of the President who appointed him or her. To the contrary, in my view, such an implication is inaccurate and inconsistent with judicial independence and the legal, as distinct from political, nature of Article III courts. *See THE FEDERALIST NO. 78* (Alexander Hamilton). Judges are bound to decide cases by impartial application of the law to the facts before them. Neither a judge's own personal politics, nor the politics of the appointing President, should play any role.

6. In your article *United States v. Virginia: the Virginia Military Institute, Where the Men are Men and So are the Women*, you wrote that “the length and magnitude of the VMI litigation attests to the inadequacies of the ‘intermediate scrutiny’ standard of constitutional review of sex-based policies and laws, such as VMI’s male-only admissions policy.” In addition, you appeared to express disappointment that the case of *Nguyen v. INS* used “a watered-down heightened scrutiny” and that the “the [Nguyen] decision adds weight to arguments that equal protection doctrine is, at least in some fact settings, substantially less skeptical than the Court’s recent *Virginia* decision had seemed to establish.”

a. What level of scrutiny do you believe current Supreme Court doctrine requires in reviewing sex-based policies?

Response: The Supreme Court has made clear that sex-based distinctions in the law are subject to review under “intermediate” constitutional scrutiny. *See Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 730-31 (2003). If confirmed as a judge, I would apply the Court’s precedents with respect to the level of constitutional scrutiny applicable to sex-based classifications, as with any other issue.

b. Do you believe, or have you ever written, that sex-based policies should be reviewed under strict scrutiny, the same level of scrutiny required for race-based policies?

Response: In a brief that I drafted in my role as Assistant to the Solicitor General, the United States argued that classifications that deny opportunities to individuals based on their sex should be subjected to strict judicial scrutiny. *See* Brief for the Petitioner at 33-36, *United States v. Virginia*, 518 U.S. 515 (1996). As stated in response to part a. of this question, the Court has since made clear that intermediate scrutiny is the applicable standard, and that is the standard that I would apply as a judge if I were confirmed.

7. In your article *Plenary Power Underground in Nguyen v. INS*, you wrote “[o]ne reading of *Nguyen* is that equal protection doctrine may not (yet) be everything *Nguyen* and his father might have wished for, but at least the Court accorded them the same individual constitutional rights as United States citizens, and that is a particularly important advance for aliens generally. Viewed from that perspective, the individual’s loss is a footnote to a larger victory: assuring aliens the full benefit of constitutional principles applicable to citizens.”

a. Do you believe that illegal aliens should have the same individual constitutional rights as U.S. citizens?

Response: The Supreme Court has not held that illegal aliens have individual constitutional rights identical to those of United States citizens. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 792 & n. 4 (1977). In the decision my article examined,

Nguyen v. INS, 533 U.S. 53 (2001), the Court held that, because the challenged sex-based classification survived the intermediate scrutiny applicable to United States citizens, the Court had no need to “decide whether some lesser degree of scrutiny pertains because the statute implicates Congress’ immigration and naturalization power.” *Id.* at 61. If confirmed as a judge, I would apply the Court’s precedents with respect to illegal aliens, as with any other issue.

b. What is included in the “full benefit of constitutional principles applicable to citizens”? Does this include a right to healthcare?

Response: I am not aware of any Supreme Court or D.C. Circuit precedent creating a constitutional right to health care, whether applicable to United States citizens or illegal aliens.

**Questions for the Record for all nominees
Senator Ted Cruz
“Judicial Nominations” Hearing – 7/24/13**

**Responses of Cornelia Pillard
Nominee, United States Circuit Judge for the D.C. Circuit**

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: I believe that a federal judge must be a devoted guardian of the United States Constitution and laws. I have not specifically studied the philosophies of individual Justices, but I believe there are basic rules that apply to every federal judge. The power of Article III judges is confined to the cases and controversies before them. Accordingly, an appellate judge must meticulously read and understand the factual record to know precisely what issues are and are not presented in the appeal. A judge must read briefs with an open mind, and listen to and engage the advocates’ arguments without prejudgment. Stability and predictability of judicial decisions is a cornerstone of the rule of law in the United States, and to achieve it I believe that judges must rigorously apply relevant precedent to new cases. Judicial opinions should clearly, logically and concisely set forth their premises, reasoning and conclusions. The effectiveness of our system of courts depends not only on judges being objective and impartial in the application of law to fact, but also on the perceptions of the public and the parties appearing before the courts that judges are objective and impartial.

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: The duty of a judge is to follow the interpretive approaches that precedent dictates. The Supreme Court has in some cases employed originalism as a method of interpreting the Constitution, and I would apply such precedents. For example, in *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008), the Court used an originalist methodology—specifically, original meaning—to read the Second Amendment to protect an individual right to bear arms, and in *United States v. Jones*, 132 S. Ct. 945, 949-950 (2012), the Court relied on original meaning in deciding that physical trespass by public officials triggers the Fourth Amendment, so that police placement of a global positioning device on a car to gather information amounted to a search under the Amendment. The Supreme Court has not, however, adopted original meaning as a blanket methodology to be applied to all constitutional questions. If confirmed, and if presented with a case involving a particular constitutional question, I would carefully examine Supreme Court and D.C. Circuit precedents relevant to the question and apply those precedents’ interpretive approach.

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: I believe that stability and predictability of judicial decisions is a cornerstone of the rule of law in the United States, and that to achieve it judges must consistently and rigorously apply precedent to new cases. Precedent within the D.C. Circuit is binding on all future panels unless it has been superseded by a decision of the *en banc* court or the United States Supreme Court. *See* Fed. R. App. P. 35. On voting whether to recommend *en banc* consideration, as with all other issues, I would follow the law of the Supreme Court and of the D.C. Circuit as to the circumstances in which such consideration is warranted. The precedents recognize only limited and rare situations in which a court, sitting *en banc*, may overrule its own decisions, such as where there is extraordinary confusion or lack of clarity on an issue, or the precedent has become gravely unworkable. The rationale for judicial reconsideration of precedent, even through *en banc* review, is weaker when the question is statutory or regulatory than when it involves the Constitution, because Congress or an agency may change the law if it believes a court erred. In general, given the bedrock importance of the stability of precedent, mere disagreement with a prior D.C. Circuit panel's decision is not alone sufficient ground for the *en banc* court to overrule it.

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: The structure of the federal system provides important safeguards to state sovereignty, but the Supreme Court has made clear that the quoted statement from *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985), does not render the protection of state sovereign interests non-justiciable. Instead, “[f]ederalism has more than one dynamic,” *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). When a question arises whether the federal government has encroached on state sovereignty, individuals and states may in appropriate circumstances seek judicial relief. *See* *Bond*, 131 S. Ct. at 2365; *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). If I were confirmed as a judge, I would be bound to apply the Court's precedents with respect to the constitutional allocation of powers between the federal and state governments, as on any other issue.

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 stated that Congress, under the Commerce Clause and Necessary and Proper Clause, may regulate (1) “the use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce,” and (3) “those activities having a substantial relation to” or that “substantially affect” interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-559 (1995). The Supreme Court has emphasized the non-economic nature of regulated activity in invalidating certain legislation as exceeding Congress's commerce power, *see, e.g., United States v. Morrison*, 529 U.S. 598 (2000), *Lopez*, 514 U.S. at 567. The Court has also, however, concluded that Congress may regulate non-economic activity where such regulation is “an essential part of a larger regulation of economic activity,” *Lopez*, 514 U.S. at 561; *Gonzales v. Raich*, 545 U.S. 1, 24-5 (2005); *id.* at 34 (Scalia, J., concurring).

What are the judicially enforceable limits on the President’s ability to issue executive orders or executive actions?

Response: In enforcing limits on presidential actions, the Supreme Court has inquired into whether the President has acted pursuant to constitutional and statutory authority, whether his action has encroached on the authority of another branch, and whether his conduct violates the Constitution’s limitations on federal power, such as in the Bill of Rights. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), set forth a framework for considering the constitutionality of presidential action. The Court has used that framework to review executive action in various cases, including *Medellin v. Texas*, 552 U.S. 491, 523-29 (2008), *Hamdi v. Rumsfeld*, 542 U.S. 507, 531, 536 (2004), and *Dames & Moore v. Regan*, 453 U.S. 654, 668-69, 674, 678 (1981). In order to be judicially enforceable, a limitation on a presidential order or other action must arise in the context of a justiciable case or controversy.

When do you believe a right is “fundamental” for purposes of the substantive due process doctrine?

Response: The Supreme Court has identified various fundamental rights subject to substantive protection under the due process clause. The Court has stated that, “in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion,” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted), and the right to travel, *Chicago v. Morales*, 527 U.S. 41, 53-54 (1999). The Court also has “assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.” *Glucksberg*, 521 U.S. at 720 (citing *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 278-79 (1990)). The Court’s substantive due process analysis guards against too-ready recognition of liberty rights as fundamental, lest the mere “policy preferences” of the justice be thereby constitutionalized and largely placed “outside the arena of public debate and legislative action.” *Glucksberg*, 521 U.S. at 720.

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

Response: Under the Supreme Court’s precedents, “unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The Court has subjected “suspect” classifications—for example, those based on race or ancestry—to strict constitutional scrutiny. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The Supreme Court has also treated sex- and illegitimacy-based classifications as “quasi-suspect,” warranting an “intermediate” level of constitutional scrutiny. *United States v. Virginia*, 518 U.S. 515 (1995); *Clark v. Jeter*, 486 U.S. 456 (1988); see *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985). The Court also uses a higher degree of constitutional scrutiny to review classifications that impinge on the exercise of fundamental

rights, such as distinctions based on religion, protected speech or association, voting, or the exercise of fundamental liberty interests protected by the Due Process Clause. *Nordlinger*, 505 U.S. at 10.

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: The Court’s precedents make clear that race-based affirmative action, if any, should terminate when the objectives for which it was adopted have been achieved. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). The Court’s strict-scrutiny precedents have imposed limitations on the consideration of race in higher education that are designed to prevent its unnecessary use. *See Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2417-21 (2013). I cannot predict, however, when the Supreme Court might determine that reliance on race in decision making in public higher education is no longer necessary. If confirmed as a judge, I would be bound to apply the Court’s precedents with respect to race-based precedent, as on any other issue.