Nomination of Jason K. Pulliam, to be United States District Court Judge
for the Western District of Texas
Questions for the Record
Submitted May 24, 2019

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

   I would apply the framework set forth in the numerous Supreme Court decisions assessing these questions, including but not limited to *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

   a. Would you consider whether the right is expressly enumerated in the Constitution?

      Yes, as directed by Supreme Court precedent.

   b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

      Yes, as directed by Supreme Court precedent. The inquiry would include sources such as the historical practice under the common law, the practice in the American colonies, the history of the state statutes and judicial decisions, and long-established traditions. *See Washington v. Glucksberg*, 521 U.S. 702 (1997).

   c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of a court of appeals?

      Yes. I would be bound by Supreme Court and Fifth Circuit precedent. Absent a decision from those courts on the issue, I could look to decisions from other courts of appeals as persuasive authority.

   d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right had been recognized by Supreme Court or circuit precedent?

      Yes. I would consider whether a similar right has previously been recognized by Supreme Court of Fifth Circuit precedent.

   e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See*

Planned Parenthood v. Casey, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Casey and *Lawrence* are binding Supreme Court precedent. I would follow them faithfully as well as all other binding precedent.

f. What other factors would you consider?

I would consider any other factors that are relevant under Supreme Court and Fifth Circuit precedent.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

The Equal Protection Clause applies to both race-based classifications and gender-based classifications. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

Any academic argument about the intent of the individuals who passed the Fourteenth Amendment does not affect the binding precedent cited above, which I would apply faithfully if I were fortunate enough to be confirmed as a district court judge.

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

I do not know why *United States v. Virginia* was filed or resolved at the time it was.

c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

The Fourteenth Amendment requires that same-sex couples be afforded the right to marry "on the same terms as accorded to couples of the opposite sex." *Obergefell*, 135 S. Ct. at 2607.

d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

Equality under the law is paramount in our legal system. However, it is my understanding that this question is the subject of litigation, therefore Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting.

3. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

   Yes, under the Supreme Court's decisions in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

   a. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

      Yes, under the Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

   b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

      Yes, under the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003).

   c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

      Please see my responses to Questions 3, 3(a), and 3(b).

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

   a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

      If confirmed, I would follow all binding Supreme Court precedent and Fifth Circuit precedent. Where applicable precedent from those courts makes it appropriate to consider such evidence, I would do so in accordance with that precedent.

b. What is the role of sociology, scientific evidence, and data in judicial analysis?

The role of sociology, scientific evidence, and data depends on the nature of the judicial analysis at issue. If confirmed, I would consider binding Supreme Court and Fifth Circuit precedent to determine what role these sources should play in a given case.

5. In the Supreme Court's *Obergefell* opinion, Justice Kennedy explained, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."

a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

Obergefell is binding Supreme Court precedent. If confirmed, I would faithfully follow *Obergefell* and all other binding Supreme Court precedent. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018) ("Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.").

b. When is it appropriate to apply Justice Kennedy's formulation of substantive due process?

If confirmed, I would apply Justice Kennedy's formulation of substantive due process whenever Supreme Court or Fifth Circuit precedent requires me to do so.

6. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

There are many legal scholars who have determined that *Brown* is consistent with originalism, including Michael McConnell and Ilan Wurman. The only relevant consideration for district nominees is that *Brown* is binding precedent. If confirmed, I will faithfully follow *Brown*.

a. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism (last visited May 24, 2018).

I have not studied this white paper. The quoted language seems to reflect the fact that determining the original public meaning of a constitutional provision can be difficult.

b. Should the public's understanding of a constitutional provision's meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

For a district judge, the original public meaning of a constitutional provision is dispositive when the Supreme Court has decided that it is dispositive. If the Supreme Court has decided that some other mode of interpretation is appropriate in interpreting a constitutional provision, that decision is dispositive. If confirmed, I would faithfully apply all binding Supreme Court precedents regardless of their methodology.

c. Does the public's original understanding of the scope of a constitutional provision constrain its application decades later?

Please see my response to Question 6(b) above.

d. What sources would you employ to discern the contours of a constitutional provision?

If confirmed, I would apply all relevant Supreme Court and Fifth Circuit precedent that identifies the appropriate sources to use in discerning the language of a constitutional provision.

7. In your opinion in *In Re Sandoval*, you reasoned that the state legislature had amended the law to allow court orders relating to an individual's sex change to be a sufficient means of providing proof of identity for the purpose of obtaining a marriage license. When an individual has legally changed his or her sex, is it your understanding that this change need not be recognized for any purpose other than acquiring a marriage license?

The issue in the *Sandoval* case was whether the party had state statutory standing to initiate a parentage action. My opinion determined that the party did not satisfy standing under the state statute.