

**Questions for the Record**  
Senate Judiciary Committee  
Hearing: "Nominations"  
April 10, 2013  
Senator Amy Klobuchar

**Questions for Srikanth Srinivasan, to be United States Circuit Judge for the District of Columbia Circuit**

- 1. If you had to describe it, how would you characterize your judicial philosophy? How do you see the role of the judge in our constitutional system?**

Response: Were I to be confirmed, my judicial philosophy would be characterized by a commitment to an impartial adherence to the applicable law in addressing the cases that come before me, by which I mean an impartial and faithful application of the governing constitutional provisions, statutes, regulations, judicial precedents, or other pertinent legal instruments to the specific context and facts. The role of a judge in our constitutional system should be considered under the provisions of Article III of the Constitution, and includes, in particular, the responsibility to adjudicate only concrete cases and controversies that come before him or her.

- 2. What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their political beliefs or whether they are rich or poor, defendant or plaintiff?**

Response: It is essential that a judge conduct himself or herself with impartiality, objectivity, and open-mindedness in considering the cases to come before the court, and that he or she treat the parties that come before the court with fairness and respect. I assure the Committee that, if I were confirmed, I would adhere to those standards. I hope that the broad array of clients I have represented as a practicing attorney, the wide variety of issues I have confronted during the course of those representations, and the way in which I have comported myself, indicate a capacity for open-mindedness and fairness that would serve me well if I were confirmed to be a judge.

- 3. In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? How does the commitment to stare decisis vary depending on the court?**

Response: The doctrine of stare decisis serves vital interests in promoting stability and predictability in the law. Judges must adhere to that doctrine, under which a court is bound to follow applicable precedent except in highly unusual circumstances. A circuit court panel is bound to adhere to a prior circuit decision unless the decision is contrary to an intervening decision of the Supreme Court or of the en banc court of appeals. While a circuit court, sitting en banc, can overturn prior circuit precedent, a circuit court should

consider en banc review to overturn circuit precedent only in very narrow circumstances, such as if there is a conflict between prior panel decisions within the circuit or if the prior precedent has proved thoroughly unworkable. A circuit court is bound to adhere to any Supreme Court decision that has not been overruled by the Supreme Court itself.

**Senator Chuck Grassley  
Questions for the Record**

**Srikanth Srinivasan  
Nominee, United States Circuit Judge for the D.C. Circuit**

- 1. At your hearing, I asked you about your communications with Mr. Perez regarding the quid pro quo between the Department of Justice and the City of St. Paul. I asked:**

**Mr. Perez, Assistant Attorney General for the Civil Rights Division, reached out to you in the December of 2011 and asked – and I am paraphrasing – as a practical matter how a party would go about withdrawing a case from the Supreme Court. Is that right?**

**You responded, in part:**

**He did put that inquiry to me. If I am recalling the chain of correspondence to which you are referring, I think that inquiry came in the context of a conversation about whether the regulations that were pending and that might be adopted would have an effect on the pendency and that might be adopted would have an effect on the pendency of the case before the Court. And I believe that is reflected in the correspondence, and it is with that backdrop in mind that we had that exchange.**

**The correspondence to which you referred is as follows:**

**On December 9, 2011, at 11:27 PM, you wrote to Mr. Perez:**

**Also, wanted to follow up very quickly on the mtgs today on one item. Although I do think the calculus changes a bit if the pltfs move to dismiss the petn, I still have doubts about whether we'd weigh in in support of dismissal based on the proposed reg. We can discuss, but just wanted to let you know my intuition. Thanks Tom.**

**On December 10, 2011, at 7:36 AM, Mr. Perez responded, writing:**

**Hypothetical question for you: If the petitioners move to dismiss the petition, what is the likelihood of it being granted?**

**On December 10, 2011, at 9:57 AM, you responded, writing:**

**I think quite slim if the basis for dismissal would be the proposed reg. I said yesterday that its happened before where a reg was pending during the Ct's consideration of a case and became final before the opinion, but was remiss in not noting that it in fact happened this Term in the Douglas (California Medicaid) case. The Ct asked for supplemental briefing on the impact of the reg. I will speak with the attys principally responsible for the case, but I don't know of a material difference at this point, and my instinct all along as you know is that the reg here would not afford a basis for dismissal. There are also other considerations to take into account, which we can discuss.**

**On December 10, 2011, at 10:12 AM, Mr. Perez wrote back to you, writing:**

**I was not clear in my question. Do u have a cell and I will clarify**

**On December 10, 2011, at 11:14 PM, you responded, writing:**

**Tom, have been out of town and out of pocket most of the day. Am back tomorrow and will give you a call. My cell is REDACTED. Sri.**

**On December 10, 2011, at 11:16 PM, Mr. Perez responded, writing:**

**I will call u tomorrow. I will be in my office most of the day**

**On December 12, 2011, at 8:58 AM, you responded, writing:**

**Let me know if we should speak before our 1230 mtg. I'll be at the Ct from about 930-1015 but otherwise in the office.**

**This correspondence appears to make clear that, initially, when you emailed Mr. Perez, you were referring to the possibility of the Court dismissing a case based on the fact that an Agency Rule had been proposed, but not yet finalized. When Mr. Perez responded by asking a separate and unrelated hypothetical question, you mistakenly understood him to be referring to the proposed rule. Is that an accurate understanding of the correspondence?**

Response: Yes, it is accurate that I understood Mr. Perez to be referring to the proposed rule.

**2. In 2007 you argued in front of the Supreme Court on behalf of the Respondent in *Zuni Public School District v. U.S. Dept. of Education*.**

**a. Can you please explain what you described in that case, in reference to statutory construction, as a “sliding scale of textual analysis”?**

Response: My comment was made in response to the following question during the oral argument: “What if I’m convinced that your opponent’s reading is really only the fair reading of the statute, but I’m also convinced by you that that’s not what Congress intended. What should I do?” As an advocate for my client’s preferred outcome in the case, I referred to a “sliding scale” as an effort to capture the notion that, the more clearly the Court construed the statutory text to contradict our position, the less room there would be to give effect to any perceived, contrary congressional intent. I further stated that, if the Court believed that the statutory text “unambiguously actually compels that reading”—*i.e.*, a reading contrary to our interpretation—“then I don’t know that we would have a position.”

**b. As a judge, if confirmed, how would you proceed to apply this scale to the Constitution or to federal statutes?**

Response: If I were to be confirmed, I would not base my approach to questions I may confront as a judge on positions and arguments I previously advanced on behalf of my clients when in practice. I would faithfully apply pertinent precedents of the Supreme Court and the D.C. Circuit, including precedents addressing the proper approach when construing constitutional and statutory provisions. With respect to statutory construction, the issue raised by the oral argument in the *Zuni Public School District* case, my understanding of those precedents is that, when the statutory text is unambiguous, there is no need to address additional arguments concerning statutory purposes. *See Boyle v. United States*, 556 U.S. 938, 950 (2009).

**3. In your hearing, I asked if you agreed with the Administration’s position that no reasonable argument could be made in defense of DOMA’s constitutionality. You responded that you were hesitant to give personal views on an issue that you were involved in as an attorney. In this question, I am not asking for your personal views. As**

**an attorney, can you see any reasonable argument that can be made in defense of DOMA’s constitutionality? Please explain.**

Response: I am counsel to a client in a case currently pending in the Supreme Court, *United States v. Windsor*, Sup. Ct. No. 12-307, that raises the question of the constitutionality of Section 3 of DOMA. I am therefore not in a position to address those issues outside the context of my ongoing role as counsel representing my client’s position and interests in that pending matter. The brief for the United States in that case, while arguing that heightened scrutiny should apply, did state that, if the Court applies rational-basis review, the government has previously defended the constitutionality of DOMA Section 3 under rational-basis review and does not challenge the constitutionality of DOMA Section 3 under that highly deferential standard.

- 4. You assisted in the preparation of various briefs in *Padilla v. Rumsfeld* which laid out arguments ultimately adopted by the court as you advocated upholding executive power to detain American citizens on American soil deemed enemy combatants. What is your understanding of current law regarding detention of American citizens on American soil in light of the recent statement by the Attorney General regarding war-time powers?**

Response: Questions concerning the scope of lawful detention authority over American citizens on American soil are currently the subject of pending litigation, and the Department of Justice is counsel for the defendants in that ongoing matter. *Hedges v. Obama*, Nos. 12-3176, 12-3644 (2d Cir.). The Department has explained in that case that a plurality of the Supreme Court, in a case involving an American citizen detained on American soil, determined that “detention of individuals . . . for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use” in the Authorization for Use of Military Force (AUMF). *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality); *accord id.* at 587 (Thomas, J., dissenting); *see also Boumediene v. Bush*, 553 U.S. 723, 733 (2008) (reaffirming holding of *Hamdi*). The Department has additionally observed in that case that Section 1021 of the National Defense Authorization Act of Fiscal Year 2012 (NDAA) specifies that the NDAA affirms, and does not alter, the detention authority conferred by the AUMF, and further specifies that the NDAA does not “affect existing law or authorities relating to the detention of United States citizens . . . or any other persons who are captured or arrested in the United States.”

- 5. You were a panelist in September 2008 on the panel, “Separate but Equal—The Clash Between the President and Congress Over the Power to Wage War”. You did not have any notes or a transcript to provide to the Committee for this talk. What is your**

**understanding of the relationship between the President and the Congress over waging war?**

Response: The presentation to which your question refers consisted of a mock Supreme Court argument in which I was assigned to argue one side in a prepared, hypothetical case. My understanding of the authority of the President and Congress in connection with the waging of war is that, as a general matter, the President possesses constitutional authority in his capacity as Commander in Chief of the armed forces, and Congress possesses constitutional authority in its capacity to declare war and to raise and support armies. An understanding of how those respective spheres of authority apply in a particular context would require a careful examination of the specific facts and of the precise nature of the authority being exercised by the President and/or Congress. If I were confirmed and were to confront a justiciable case or controversy raising questions about the respective authority of the President and Congress over waging war, I would carefully review the competing arguments, and would faithfully apply the pertinent precedents of the Supreme Court and the D.C. Circuit to the specific facts and context. Depending on the specific issues raised and the particular factual context in question, those precedents might include, for instance, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), *Ex parte Quirin*, 317 U.S. 1 (1942), and *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

**6. You were a panelist in September 2007 on the panel, “Federal Preemption of State Law, An Increasing Trend?” When is it appropriate for the federal government to preempt state law?**

Response: The question of whether it is appropriate for the federal government to preempt state law is primarily one to be resolved by Congress, with regard to preemption of state law by a federal statute, or by the Executive Branch, with regard to preemption of state law by federal regulation or administrative action within the scope of statutory authority. In the context of a justiciable case or controversy, the Judicial Branch may be called upon 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.

**7. In your hearing, Senator Lee asked you about an article that you wrote concerning Indiana’s Voter ID laws. You told him that the article was written on behalf of advocating for a client.**

**a. On what other occasions have you written an article advocating on behalf of a client?**

Response: I do not recall another occasion in which I wrote or co-wrote an article advocating on behalf of a client in the context of a pending case, but I have given

interviews in published articles in connection with advocating on behalf of a client in the context of a pending case, Greg Stohr, '*Business Death Penalty*' for *Hiring Illegal Aliens Unites Obama, Companies*, Bloomberg.com (Dec. 8, 2010); Marcia Coyle, *Home Court Showdown*, National Law Journal (Nov. 9, 2009), I have also given an interview to National Public Radio in connection with advocating on behalf of a client in the context of a pending case, *Supreme Court Hears Case on English in Schools*, National Public Radio (Apr. 20, 2009), and I have also participated in a recorded panel briefing (including for members of the media) in connection with advocating on behalf of a client in the context of a pending case, Briefing on *Chamber of Commerce v. Whiting*, American Constitution Society (Nov. 22, 2010).

**b. What was the context behind this article?**

Response: I was one of the lawyers representing a number of amicus parties who joined together on an amicus brief in support of the petitioners in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), which addressed the facial constitutionality of Indiana's voter-ID law. I co-authored an article published on the website, *Slate.com*, that set forth the essence of the arguments we had submitted in our amicus brief in a truncated format suitable for the website's readership. In identifying me as a co-author, the article describes me as counsel for amici in the pending case.

**c. Were you asked to write it by someone or did you decide on your own to write it?**

Response: I do not recall the precise circumstances that gave rise to the article, including who initially suggested writing and submitting it, but I do recall discussing the article with our amicus clients and the website publishers in advance of its submission.

**d. Your Op-Ed appeared to be more of a public policy argument than a legal argument. What was your purpose in publishing this article? Who was your intended audience?**

Response: The article sought to capture the essence of the legal arguments we had made on behalf of our clients in the amicus brief we had submitted in the case, but in a truncated and digestible format appropriate to the broad readership of an online magazine. The intended audience included those who might be interested in the case but lacked the time or legal understanding to review our amicus brief.



- 8. In your hearing, Senator Cruz asked if you ascribed to the concept of a living Constitution. You replied, “that term probably has a lot of freight associated with it”. What did you mean by that statement?**

Response: I intended to convey that, while the Constitution functions as a “living” document in the sense that its provisions continue to govern today and that it contains its own mechanism for modification through the amendment process set forth in Article V, the term “living Constitution” seems to have come to be understood to refer to a method of constitutional interpretation according to which the provisions of the Constitution are themselves considered to adapt and change over time other than through the amendment process.

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

Response: I would faithfully apply the pertinent precedents of the Supreme Court and the D.C. Circuit in applying the Constitution to modern statutes and regulations. I would carefully examine the text of the relevant constitutional provisions and the pertinent constitutional structure, and would also carefully review and apply any precedents construing the relevant provisions. In addition, and consistent with applicable precedent, I would assess the discernible, intended meaning of the relevant provisions by reference to pertinent sources at the time of the provisions’ establishment.

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

Response: The applicable precedents of the Supreme Court do not support a judge’s generally applying his or her own opinions of the evolving norms and traditions of our society when interpreting the written Constitution, and I would adhere to those precedents were I to be confirmed. The Court has examined “evolving standards of decency” when applying the Eighth Amendment’s prohibition against cruel and unusual punishment, *see Estelle v. Gamble*, 429 U.S. 97, 102 (1976), and I would apply that precedent in the particular contexts in which it is pertinent, but I do not understand the Court to support reliance on “evolving standards of decency” outside that context.

- 11. You argued in a Texas redistricting case challenging the State’s redistricting plan following the 2020 census. The Supreme Court rejected your argument in a 9-0 decision. Please explain how the arguments you advanced regarding pre-clearance and deference owed by the District Court to the State plan were appropriate and within the mainstream of legal thought.**

Response: In *Perry v. Perez*, 132 S. Ct. 934 (2012), the Supreme Court reviewed the district court's process of fashioning interim districting maps to govern an election that was scheduled to take place before the State had obtained preclearance of its redistricting maps as it was required to do by Section 5 of the Voting Rights Act. The Supreme Court held in a per curiam opinion that the district court, in fashioning interim maps, should take "guidance" from the State's unprecleared maps "unless they reflect aspects of the state plan that stand a reasonable probability of failing to gain § 5 preclearance," by which the Court explained it meant that "the § 5 challenge is not insubstantial." *Id.* at 942. The Court then remanded for an application of the standards it had set forth in its opinion, explaining that it was "unclear" whether the district court had "followed the appropriate standards in drawing interim maps." *Id.* at 944. I was counsel for the United States in connection with its amicus submission, and that submission argued in part that, contrary to the State's argument, the Supreme Court should not require the use of the State's unprecleared maps on an interim basis. The Court, consistent with our position in that respect, did not require use of the States unprecleared maps on an interim basis. The United States's brief further argued that the Court should vacate the district court's decision and remand for further analysis with regard to two of the three redistricting maps in issue (for Congress and the State House). Although the Supreme Court did not fully accept the position we advanced, the Court did vacate the district court's decision and remand for further analysis. I believe we had a fully reasonable, good-faith basis for the arguments we advanced on our client's behalf, including precedents of the Supreme Court establishing that a State that is a covered jurisdiction for purposes of Section 5 of the Voting Rights Act may not give legal effect to changes affecting voting unless and until preclearance has been obtained. *See Lopez v. Monterey County*, 519 U.S. 9, 20 (1996); *Clark v. Roemer*, 500 U.S. 646, 652-653 (1991).

**12. 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: My understanding is that, although the Supreme Court has observed that the prohibitions of the Free Exercise Clause and Establishment Clause may be "frequently in tension," there is nonetheless "room for play in the joints between them," such that, for instance, "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke v. Davey*, 540 U.S. 712, 718-719 (2004) (citations and internal quotation marks omitted).

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

Response: The Supreme Court has established that the death penalty is an acceptable form of punishment under the Constitution, and I would faithfully apply the Supreme Court's decisions concerning the death penalty if I were to be confirmed.

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

Response: The Constitution does not itself refer to a “right to privacy,” but the Supreme Court has understood various constitutional provisions to encompass privacy rights and interests. For instance, the Court has referred to the Fourth Amendment’s protections as conferring a “right of privacy.” *E.g.*, *Johnson v. United States*, 333 U.S. 10, 14 (1948); *see Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011) (referring to “privacy rights that the [Fourth] Amendment protects”). The Court has also found that the First Amendment affords certain protections to “privacy of association and belief.” *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (citing cases). In addition, the Court has observed that the liberty protected by the Due Process Clause of the Fourteenth Amendment includes a right “to marital privacy.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

**a. Where is it located?**

Response: Supreme Court precedent recognizes the existence of privacy rights under certain provisions of the Constitution as described above.

**b. From what does it derive?**

Response: Please see above.

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

Response: The Supreme Court has understood certain provisions of the Constitution to encompass privacy rights, and the contours of those rights would depend on the particular constitutional provision in issue and the precise facts and circumstances presented by a case in which the privacy-related protections of those provisions were asserted by a party.

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

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

Response: I do not understand the applicable, current Supreme Court precedents to support any process of “reading between the lines” of the Constitution to identify constitutional rights that are not explicitly stated in the Constitution. In *Washington v. Glucksberg*, 521 U.S. 702,

720 (1997), the Court described its opinion in *Griswold*, referenced above in question 15, as recognizing a right of “marital privacy,” and further described that right, not as one that is found by “reading between the lines” of the Constitution, but instead as one that is part of the “liberty” expressly protected by the Fourteenth Amendment’s Due Process Clause. If I were confirmed, I would be bound by, and would faithfully apply, the Supreme Court’s applicable precedents, including the Court’s decision in *Washington v. Glucksberg*.

**17. Is it appropriate for a judge to search for “penumbras” and “emanations” in the Constitution?**

Response: I do not understand the applicable Supreme Court precedents to call for a judge to search for “penumbras” and “emanations” in the Constitution, and I would faithfully adhere to those precedents were I to be confirmed.

**18. 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’s decisions in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), or *District of Columbia v. Heller*, 554 U.S. 570 (2008), did not establish a specific standard of scrutiny for assessing a Second Amendment challenge to a Federal or State gun law, although the Court in *Heller* did determine that rational-basis review would not be an appropriate standard, *id.* at 628 n.27. In *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (citations and internal quotation marks omitted), the D.C. Circuit determined that “the level of scrutiny applicable under the Second Amendment surely depends on the nature of the conduct being regulated and the degree to which the challenged conduct burdens the right,” such that “a regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify.” Applying that framework, the court then held that a standard of intermediate scrutiny should apply to gun registration laws and to the prohibitions on certain semi-automatic rifles at issue in the case. *Id.* at 1257, 1261-1262. That decision is binding precedent in the D.C. Circuit, and if I were confirmed, I would faithfully apply it and any other pertinent precedent when identifying the applicable standard of scrutiny in a Second Amendment challenge against a Federal or State gun law.

**19. 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: I fully understand and appreciate that the role of a lawyer acting as an advocate for his or her clients is to zealously advocate on the client's behalf, whereas the role of a judge, by contrast, is one of impartiality in the sense of an objective adherence to the applicable law. If confirmed, I would abide by a commitment to an impartial adherence to the applicable law in addressing the cases that come before me, by which I mean an impartial and faithful application of the governing constitutional provisions, statutes, regulations, judicial precedents, or other pertinent legal instruments to the specific context and facts. I would be guided by applicable precedents of the Supreme Court and D.C. Circuit in undertaking and implementing that approach. While I fully expect that aspects of the judicial role will prove challenging, particularly at the outset of the transition as one confronts issues for the first time, it is difficult to predict in advance which aspect of the transition will prove to be the most challenging. The process of setting up a well-functioning and efficient chambers, for instance, will present a new challenge for me. I take some comfort, however, in knowing that others have made a similar transition, and I would expect to draw on the counsel and guidance of my colleagues on the court in making the transition.

**20. It appears from your letters of support to this Committee for Caitlin Halligan, Donald Verrilli, and now Justice Elena Kagan, as well as your pro bono work for Al Gore in the aftermath of the 2000 presidential election, that you have political leanings. There is nothing wrong with that, and such participation does not disqualify any nominee. However, what assurances can you give this Committee that you will not allow political persuasions to play a role in your judicial making philosophy?**

Response: I can assure the Committee that I have a deep respect for the need for strict objectivity and impartiality in the task of judging. Were I to be confirmed, I would abide by a commitment to an impartial adherence to the applicable law in addressing the cases that would come before me, and any personal or political views would play no role in my performance of my responsibilities as a judge. While I have joined the group letters listed above, I also authored and submitted my own, individual letter of support for Raymond M. Kethledge in connection with his nomination to the United States Court of Appeals for the Sixth Circuit. Additionally, while I was part of the legal team that worked for Vice President Gore in the aftermath of the 2000 presidential election, I also was privileged to be hired relatively soon thereafter by Solicitor General Ted Olson, who was the lead lawyer for President Bush in the aftermath of the 2000 presidential election.

**21. I don't know if you had any views on the nomination of Miguel Estrada. He had a background very 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: Decisions concerning what requests to make of a nominee are for the Committee to make, and I do not think it would be appropriate for me to comment on the propriety or impropriety of any decision made by the Committee in that regard. My understanding is that the Committee did not request internal Solicitor General memoranda in connection with more recent nominations of individuals who had served in the Solicitor General's Office before being nominated to serve as a judge or a Justice, including Chief Justice Roberts and Justices Kagan and Alito. With respect to whether it would be appropriate for me to provide internal Solicitor General memoranda in connection with my nomination, I agree with the concerns expressed by all then-living Solicitors General in a letter to the Committee dated June 24, 2002. That letter expressed concerns about any request to disclose internal Solicitor General memoranda because the Office's "decisionmaking process required the unbridled, open exchange of ideas—an exchange that simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure. . . . High-level decisionmaking requires candor, and candor in turn requires confidentiality." Ultimately, any decisions concerning the propriety of providing internal memoranda would be made by the Department of Justice and Executive Branch, presumably taking into account institutional considerations including the concerns about disclosing confidential communications expressed in the June 24, 2002, letter.

**22. 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: Appellate courts rely on the parties to a case to bring to the court's attention—and where appropriate, to include in the record of the case—the relevant sources and authorities on which the court may need to rely in reaching a decision. If confirmed, I would fully expect to rely on the parties to do so. If I confronted any questions concerning the propriety of researching and relying upon materials outside of the appellate record, I would look to precedents of the Supreme Court and the D.C. Circuit to examine the propriety of doing so, if ever, in the particular context in which any such issue might arise.

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

Response: I would examine pertinent precedent of the Supreme Court and the D.C. Circuit in assessing the propriety of relying on particular types of materials. If a party relied on psychological and sociological scientific studies in presenting its position to an appellate court, an appellate judge would need to carefully examine the relevance of such studies to the specific legal issues raised by the case and in the specific context in which those issues arise before determining whether such studies may appropriately be relied upon. In addition, depending on the circumstances, an appellate judge may also wish to ascertain whether such studies were brought to the attention of the district court, and if so, the manner in which the district court relied (or did not rely) on the studies.

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

Response: I understand an “activist judge” to be a judge who bases his or her decisions on his or her personal policy preferences rather than on an impartial application of the law to the facts.

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

Response: I believe an essential attribute of a judge is an ability to maintain objectivity, open-mindedness, and impartiality in addressing the cases that come before him or her, and I believe I possess that ability.

**25. 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 do believe that collegiality is very important to the effective functioning of a Circuit Court. If confirmed, I would endeavor to treat my colleagues on the court with great civility and respect, regardless of whether they may agree or disagree with my views in a particular case. I would also likewise endeavor to treat the personnel who support the court’s operations, as well as the parties who appear before the court, with great civility and respect.

**26. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?**

Response: A judge should approach cases with open-mindedness and impartiality, and should treat his or her colleagues, as well as the parties who present competing sides of a

case, with respect and civility. I believe I would meet those standards if I were to be confirmed.

**27. 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.

**28. 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: I would be guided by precedent of the Supreme Court and the D.C. Circuit in identifying the sources to which I would turn when confronted with a case of first impression. In a case raising an issue of statutory interpretation, for instance, I would, insofar as is consistent with precedent setting forth the proper means of statutory interpretation, carefully examine the pertinent statutory text and structure, look to statutory findings or other relevant and applicable indicia of the statute's purpose as warranted, and consider judicial precedents (or nonbinding decisions from other circuit courts or district courts) that shed light on the provision or that interpret or apply related provisions as warranted.

**29. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?**

Response: I would apply any pertinent precedent of the Supreme Court or D.C. Circuit regardless of whether I considered the precedent to be seriously in error.

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

Response: The Supreme Court has explained that "judging the constitutionality of an Act of Congress is the gravest and most delicate duty that [it] is called upon to perform," *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (citation and internal quotation marks omitted), and that a court should "invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds," *United States v. Morrison*, 529 U.S. 598, 607 (2000). In addition, a court should generally avoid invalidating



a statute enacted by Congress if there exists a non-constitutional ground for resolving the case. *See Northwest Austin*, 557 U.S. at 205. When those standards are satisfied in the context of a concrete case or controversy, it is appropriate for a court to declare a statute enacted by Congress unconstitutional.

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

Response: When conducting statutory interpretation, a court should attempt to ascertain the legislature's intent as manifested in the relevant statutory text and structure. If the relevant statutory text is unambiguous, there should be no need to consider other indicia of legislative intent. *See Boyle v. United States*, 556 U.S. 938, 950 (2009).

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

Response: No. A judge should base his or her decision on an impartial application of the law to the facts, without regard to his or her gender, ethnicity, or other demographic factors.

**33. In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community", in determining the meaning of the Constitution? Please explain.**

Response: I would be guided by precedent of the Supreme Court and the D.C. Circuit in undertaking the task of constitutional interpretation, and I understand those precedents to call for an examination of the relevant text and structure when determining the meaning of the Constitution, without regard to foreign law or the views of the "world community." The Supreme Court has, however, at times relied on pertinent English common law in discerning the meaning of certain constitutional provisions. *See United States v. Jones*, 132 S. Ct. 945, 949 (2011). In addition, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court referenced certain international law and foreign law sources as "confirmation" of the Court's interpretation of the Eighth Amendment's prohibition against cruel and unusual punishment to bar imposition of the death sentence against juvenile offenders. *Id.* at 575, 578. The Court explained that those sources were "not controlling," but provided "significant confirmation for [the Court's] own conclusions." *Id.* at 578. I would be bound by those Supreme Court precedents as I would be bound by all other Supreme Court precedents.

**34. In your hearing you said, "I think sometimes we see international law in opinions of the Supreme Court as having kind of a confirming qualify for a conclusion that has been reached based on analysis of the text and the structure of the Constitution." Will you please provide the Committee an example of this? Is this an approach you would follow, if confirmed? Please explain.**

Response: As explained in the response to question 33, the Supreme Court, in *Roper v. Simmons*, 543 U.S. 551, 575, 578 (2005), referenced certain international law sources as "confirmation" of the Court's interpretation of the Eighth Amendment's prohibition against

cruel and unusual punishment. The Court's decision in *Roper* is binding on lower courts in the particular contexts in which it governs, and I therefore would abide by that precedent in those contexts if I were confirmed.

**35. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?**

Response: It is essential that judges set aside any personal views when resolving the cases that come before them, and that they instead reach decisions based on a commitment to an impartial application of the law to the facts. I will abide by that standard if I am confirmed, and will treat the parties who appear before me with fairness and respect. I hope that the broad variety of experiences, clients, and issues I have dealt with in my career as a practicing attorney, in addition to the way in which I have comported myself, indicates that I would conduct my responsibilities with impartiality and fairness if I were to be confirmed.

**36. 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: A circuit court panel is bound to adhere to a prior circuit decision unless the decision is contrary to an intervening decision of the Supreme Court or of the en banc court of appeals. While a circuit court, sitting en banc, can overturn prior circuit precedent, a circuit court should consider en banc review to overturn circuit precedent only in very narrow circumstances, such as if there is a conflict between prior panel decisions within the circuit or if the prior precedent has proved thoroughly unworkable.

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

Response: I received the questions on April 17, 2013. I reviewed the questions, conducted pertinent research, and prepared responses, and I then shared my draft responses with the Office of Legal Policy in the Department of Justice. On May 3, 2013, I spoke with representatives of the Office of Legal Policy, after which I revised my responses and then authorized the submission of my responses to the Committee.

**38. Do these answers reflect your true and personal views?**

Response: Yes.

**Questions for Mr. Srinivasan  
Senator Ted Cruz**

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

Response: Were I to be confirmed, my judicial philosophy would be characterized by a commitment to an impartial adherence to the applicable law in addressing the cases that come before me, by which I mean an impartial and faithful application of the governing constitutional provisions, statutes, regulations, judicial precedents, or other pertinent legal instruments to the specific context and facts. I do not have sufficient familiarity with the body of decisions of any particular Justice of the Warren, Burger, or Rehnquist Courts to identify the single Justice whose judicial philosophy might be described as most analogous with mine. When a law student, however, I worked as a research assistant on Professor Gerald Gunther's biography of Judge Learned Hand, *Learned Hand: The Man and the Judge*, and in that capacity became sufficiently familiar with Judge Hand's general approach to the craft of judging to conclude that his general approach seemed a highly admirable one, without regard to his opinions in particular cases or his views on particular issues.

**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 quoted statement is from a Supreme Court decision that remains binding precedent on all lower courts, including the D.C. Circuit. The Supreme Court made that observation about "judicially created limitations on federal power" in the particular context of the issues before it in *Garcia*, and the Court has invoked state sovereign interests in applying judicially enforceable limitations on federal power in other cases such as *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992). I would faithfully apply the pertinent decisions of the Supreme Court addressing issues concerning state sovereign interests if I were to be confirmed and cases presenting those issues were to come before me.

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

Response: In *United States v. Morrison*, 529 U.S. 598, 610-611, 613 (2000), and *United States v. Lopez*, 514 U.S. 549, 560-561, 566-567 (1995), the Supreme Court emphasized the non-economic nature of the regulated conduct in invalidating an Act of Congress on the ground that it exceeded Congress's power under the Commerce Clause. The Court, however, did not hold that non-economic activity can never fall within the scope of Congress's power under the Commerce Clause. In *Gonzalez v. Raich*, 545 U.S. 1 (2005), Justice Scalia, after reviewing the Supreme Court's Commerce Clause jurisprudence, subsequently stated in a concurring opinion that "Congress may regulate even non-

economic activity if that regulation is a necessary part of a more general regulation of interstate commerce.” *Id.* at 37 (Scalia, J., concurring). Were I to be confirmed, if confronted with any issues concerning the scope of Congress’s authority to regulate non-economic conduct pursuant to its Commerce Clause power, I would carefully review the competing arguments and faithfully apply pertinent precedents of the Supreme Court and D.C. Circuit.

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

Response: The ability of the President to apply and enforce executive actions, including executive orders, would be subject to the applicable constitutional constraints on the exercise of federal power, including constraints established in the Bill of Rights. Those constraints would be judicially enforceable in the context of a justiciable case or controversy. With regard to whether the President has acted within the scope of constitutional or statutory authority in issuing executive actions including executive orders, Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-638 (1952), set forth a framework for addressing the President’s actions, and the Supreme Court has subsequently applied that framework, *see, e.g., Medellin v. Texas*, 552 U.S. 491, 524-525 (2008); *Dames & Moore v. Regan*, 453 U.S. 654, 669-670 (1981). The Supreme Court has held, for instance, that the President, absent congressional action, could not take unilateral action to render the provisions of a non-self-executing Treaty binding in domestic courts. *Medellin*, 552 U.S. at 523-529. In any justiciable case or controversy concerning the validity of the President’s actions, including with respect to issuance or enforcement of executive orders, I would faithfully apply any pertinent precedent of the Supreme Court and D.C. Circuit.

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

Response: The Supreme Court has explained that its “established method of substantive-due-process analysis has two primary features.” *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997). The first is that the “Due Process Clause specially protects those fundamental rights and liberties which are, objectively speaking, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Id.* at 720-721 (citations and internal quotation marks omitted). The second is that the Court has “required in substantive-due-process cases a careful description of the asserted fundamental liberty interest.” *Id.* (citations and internal quotation marks omitted). I would faithfully and carefully apply those principles and pertinent precedent of the Supreme Court and D.C. Circuit if I were confirmed and a case before me presented questions concerning whether an asserted right is fundamental for purposes of substantive due process.

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

Response: I am counsel to a client in a case currently pending in the Supreme Court, *United States v. Windsor*, Sup. Ct. No. 12-307, that raises questions concerning the standards for determining when a classification is subject to heightened judicial scrutiny

under the Equal Protection Clause and the application of those standards. I am therefore not in a position to address those issues outside the context of my ongoing role as counsel representing my client's position and interests in that pending matter. We have stated in that case that the Supreme Court's decisions have "established a set of factors that guide the determination of whether to apply heightened scrutiny to a classification," including "whether the class in question has suffered a history of discrimination," "whether the characteristic prompting the discrimination frequently bears no relation to ability to perform or contribute to society," "whether the discrimination against members of the class is based on obvious, immutable, or distinguishing characteristics that define them as a discrete group," and "whether the class is a minority or politically powerless." U.S. Br., *Windsor*, at 20 (citations and internal quotation marks omitted).

**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 quoted statement is from a Supreme Court decision that is binding precedent on all lower courts, including the D.C. Circuit. If I were to be confirmed, I would faithfully and carefully apply that precedent, as well as any pertinent additional precedent that may be issued by the Supreme Court or the D.C. Circuit—including any decision in *Fisher v. University of Texas*, Sup. Ct. No. 11-345, currently pending before the Supreme Court—to any case to come before me that may raise questions concerning the consideration of an applicant's race in the context of a public university's admissions decisions.