

**Senator Chuck Grassley
Questions for the Record**

**Kara Stoll
Nominee, United States Circuit Judge for the Federal Circuit**

1. In an April 1994 article entitled “Means for Functioning in a Vacuum?” which discusses a case decided by the Federal Circuit, you wrote “It is the court’s responsibility to interpret the statutory provisions enacted by Congress [T]he court was simply adhering to the language in the statute enacted by Congress. But, having reversed such a long standing policy, the court should have at least attempted to provide sufficient guidelines for enforcing the new policy. Until the court further defines [the matter, it] will be applied with much confusion and frustration. Preferably, Congress will be persuaded to rewrite the statute”

a. Can you please explain when it is proper for a court to go beyond strictly interpreting statutory language?

Response: I prepared this article more than twenty years ago when I was a patent examiner and a first-year law school student in the evening program at Georgetown University Law Center. My views on the role of a court and statutory interpretation have evolved since that time. A court should look to the plain statutory language and follow binding precedent on the meaning of statutory language.

b. What do you mean by a court issuing “guidelines”?

Response: I no longer believe that a court should issue “guidelines” or provide advisory opinions. The proper role of a court is to resolve only the dispute before it. If confirmed, I will strive to write clear and concise opinions that are narrowly tailored to the dispute before the court.

c. Is this a legitimate exercise of judicial authority?

Response: No.

d. Are there any limitations to what a judge should properly issue in a decision?

Response: Yes. For example, federal courts cannot issue advisory opinions because of the case-or-controversy requirement in the Constitution.

2. Congress has consistently recognized the value of whistleblowers in the government and private sector. As one of the original sponsors of the Whistleblower Protection Act of 1989, I have always pushed for strong whistleblower protections for federal employees. The Court of Appeals for the Federal Circuit has exclusive appellate jurisdiction to hear appeals of federal employee whistleblower cases. Unfortunately, the Federal

Circuit has repeatedly ruled against federal whistleblowers and in my view ignored the express intent of Congress.

- a. In reviewing your questionnaire, it appears you have little, if any, experience with whistleblower law or any federal personnel law. Considering that the Federal Circuit has exclusive jurisdiction over these cases, what, if any, experience do you have with the Whistleblower Protection Act?**

Response: I have no experience with the Whistleblower Protection Act. If confirmed, I will work diligently to familiarize myself with the Whistleblower Protection Act and faithfully apply its provisions to the facts of the cases that come before me.

- b. Does the Federal Circuit have the authority to circumvent the plain language of a statute and the stated Congressional intent of the Whistleblower Protection Act? May the Federal Circuit narrow the broad definitions Congress intended?**

Response: No court has the authority to ignore the plain language of a statute. A court may not narrow definitions provided for in a statute.

- c. If confirmed, will you continue to uphold Federal Circuit precedents that clearly conflict with the statute's plain language?**

Response: An appellate court is bound by its prior panel and en banc decisions, which the court can overrule when sitting en banc. En banc review is warranted when there are conflicting decisions in the court's precedent or the proceeding involves a question of exceptional importance. See Fed. R. App. P. 35(a).

- 3. The Federal Circuit has continued to ignore the express will of Congress and has issued a number of decisions that have substantially limited the types of disclosures that are protected under the Whistleblower Protection Act. Specifically, the 1994 revision to the Act had significant legislative history in both the House and Senate. That legislative history reaffirmed that ANY disclosure of a violation of law, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, would be protected. Despite this clear and express intent, the Federal Circuit has continually limited the types of disclosure that are protected. For instance, in 1995 the court ruled disclosures to co-workers or to the wrongdoer are not protected. In 1998 it held that disclosures made as part of an employee's normal job duties are not protected. And, the court also held that disclosures of information already known, but not acted on, are also not protected.**

- a. Do you agree with the plain language of the statute that any disclosure of violations of law, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety is a protected disclosure under the Whistleblower Protection Act? Why or why not?**

Response: The plain language of 5 U.S.C. § 2302(b)(8) states that prohibited personnel practice includes taking or failing to take, or threatening to take or failing to take, a personnel action with respect to any employee or applicant for employment because of “any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences— (i) any violation of any law, rule, or regulation or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”

b. Do you believe that a disclosure made by a federal employee as part of his or her normal job duties should be protected?

Response: Yes, so long as that disclosure otherwise meets the requirements of the Whistleblower Protection Act, including the requirements set forth in 5 U.S.C. § 2302(b)(8) as set forth in my answer to part a above. If confirmed, I would be bound by the principle of *stare decisis* to follow binding Federal Circuit precedent.

c. Do you believe that a disclosure made by a federal employee to a co-worker or to the wrong doer is a protected disclosure under the Act?

Response: Yes, so long as that disclosure otherwise meets the requirements of the Whistleblower Protection Act, including the requirements set forth in 5 U.S.C. § 2302(b)(8) as set forth in my answer to part a above. If confirmed, I would be bound by the principle of *stare decisis* to follow binding Federal Circuit precedent.

d. Do you believe verbal disclosures not written down would be protected under the Act?

Response: Yes, so long as that disclosure otherwise meets the requirements of the Whistleblower Protection Act, including the requirements set forth in 5 U.S.C. § 2302(b)(8) as set forth in my answer to part a above. If confirmed, I would be bound by the principle of *stare decisis* to follow binding Federal Circuit precedent.

4. Perhaps the most egregious example of the Federal Circuit placing hurdles in front of federal government whistleblowers is a 1999 decision in *Lachance v. White*. In that case, the Federal Circuit held that a whistleblower had to present “irrefragable proof” that wrongdoing actually occurred in order to prove the claim. Read literally, this “irrefragable proof” standard means a whistleblower must offer indisputable proof that the public official acted in bad faith or violated the law. This standard has been limited to only disclosures that evidence gross mismanagement. But, the standard is clearly contrary to the intent of the Congress.

a. Have you ever heard of the irrefragable proof standard?

Response: I had not heard of the irrefragable proof standard until recently.

b. What is your understanding of this standard?

Response: In *Am-Pro Protective Agency v. United States*, 281 F.3d 1234 (Fed. Cir. 2002), a non-Whistleblower Protection Act case decided subsequent to *Lachance*, the Federal Circuit acknowledged “some confusion” about the term “irrefragable proof” and ruled that the term means “clear and convincing evidence.”

c. What does a whistleblower need to prove in order to meet this standard?

Response: The clear-and-convincing standard of proof would be a more rigorous standard for a whistleblower to meet than the substantial evidence and preponderance of the evidence standards, but it is a less rigorous standard to meet than proving evidence beyond a reasonable doubt.

d. Do you believe this standard or a substantial evidence standard should apply to whistleblower cases?

Response: As set forth in 5 U.S.C. § 2302(b), “any presumption relating to the performance of a duty by an employee whose conduct is the subject of a disclosure . . . may be rebutted by substantial evidence.” If confirmed, I would be bound by the principle of *stare decisis* to follow binding Federal Circuit precedent.

5. 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. Diversity increases public confidence in the judiciary, but it should not impact the outcome of a case. A judge should apply the rule of law to the facts of the case to determine the correct outcome irrespective of his or her personal background.

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

Response: First and foremost, a judge should be unbiased and faithfully apply the rule of law embodied in the Constitution, statutes, and precedent to the facts of a case without regard to the identity of the parties. A judge may not substitute his or her own views for that of Congress or governing precedent. I possess this attribute and, if confirmed, I will be committed to these principles.

7. 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 be respectful and courteous to litigants and fellow judges. A judge should also be hard-working and diligent in learning the record and the parties’ positions. A judge should keep an open mind and understand and consider the parties’ positions before reaching a decision. I believe that I meet these standards.

- 8. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

Response: If the matter involved interpretation of a statute, I would first consider the text of the statute. If the language is clear, I would follow its plain meaning. If the statutory language is ambiguous, I would follow the other canons of statutory interpretation prescribed by the Supreme Court. I would also carefully consider what other courts, in decisions not binding on the Federal Circuit, have said about the issue for their persuasive value, as well as precedents on closely-related issues.

- 9. Please describe your understanding of the workload of the Federal Circuit. If confirmed, how do you intend to manage your caseload?**

Response: I clerked at the Federal Circuit, taught a law school course on practice and procedure at the Federal Circuit, and represented parties in appeals before the Federal Circuit. Based on these experiences, I am familiar with the workload of the Federal Circuit. If confirmed, I would follow the example set by Judge Alvin A. Schall for whom I clerked. Judge Schall ran an efficient and organized chambers, diligently worked with his staff to learn the record and parties' positions prior to oral argument, and diligently worked with his fellow judges and staff to prepare well-written, clear and concise opinions in a timely manner. I would also follow the Federal Circuit's Internal Operating Procedures, which include provisions for managing one's caseload.

- 10. You have spent your entire 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: If confirmed, I will apply the governing Supreme Court and Federal Circuit precedent to the facts of the cases before me without regard to the identity of the parties. With respect to the transition, after I clerked at the Federal Circuit, I represented parties in appeals before the Federal Circuit and, in that role, I would always try to see the case through the eyes of a judge so I could understand the strengths and weaknesses of the case, present the most meritorious positions and arguments, and properly counsel clients. While I have experience with the patent and veterans areas of the Federal Circuit's jurisdiction, I already have begun learning the other important areas of the court's jurisdiction and, if confirmed, I would devote a substantial amount of time to diligently continue those efforts.

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

Response: Collegiality promotes judicial efficiency and allows appellate judges to come together to ideally produce one decision of the Court. If confirmed, I will carefully and

thoughtfully consider my colleagues' views, be respectful toward them and their views even if I disagree, and maintain an open and friendly dialogue.

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

Response: I considered each question, did research where necessary, and drafted answers. I reviewed my draft answers with the Office of Legal Policy of the Department of Justice, made some revisions, and then submitted my answers.

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

Response: Yes.

Senate Committee on the Judiciary
Questions for the Record from Senator Vitter
“Nominations”

Wednesday, March 11, 2015

Kara Stoll, to be a United States Circuit Judge for the Federal Circuit

- 1. What is your opinion of the constitutionality of the majority ruling NLRB v. Canning and what would be your allowable time frame between pro forma sessions of the senate before the president can soundly exercise his recess appointment power? Is it 3 days? 4? 5?**

Response: The Supreme Court in *NLRB v. Canning*, 134 S. Ct. 2550 (2014), held that the Recess Appointments Clause empowers the President to fill any existing vacancy during any recess—intra-session or intersession—of sufficient length. The Supreme Court also addressed the question of how many days is “sufficient length.” Specifically, the Court held that, “in light of historical practice, a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause.” *Id.* at 2567. The Court stated that it added the word “presumptively” in order “to leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break.” *Id.* If confirmed, I would follow Supreme Court precedent in this case and all cases that came before me.

- 2. In your opinion, is it an undue burden on a woman seeking an abortion under Planned Parenthood v. Casey if a state requires that doctors performing the procedures have admitting privileges at one of the hospitals in the state to protect women’s health and, as a result, all abortion clinics in the state are shut down?**

Response: The Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), held that “an undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” *Id.* at 878. The question of whether a state requirement that doctors performing the procedures have admitting privileges at a hospital in the state and, as a result, all abortion clinics in the state are shut down is the subject of current litigation in lower courts. As such, as a judicial nominee, I believe that it would not be appropriate for me to opine on the matter. If confirmed, I would apply governing precedent to this issue and any other issue that came before me.

3. **The Court's ruling on the right to privacy in Griswold v. Connecticut laid the foundation for Roe v. Wade. From your perspective, is Roe v. Wade settled law?**

Response: *Roe v. Wade*, 410 U.S. 113 (1973), is precedent of the Supreme Court and has not been overturned. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court "reject[ed] the rigid trimester framework of *Roe v. Wade*" and adopted the undue burden standard instead, *id.* at 878, but also stated that "[o]ur adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding." *Id.* at 879. *Roe*, as modified by *Casey* and other Supreme Court precedents such as *Gonzales v. Carhart*, 550 U.S. 124 (2007), is settled precedent of the Supreme Court, entitled to deference under principles of *stare decisis*, and lower courts must follow it.

4. **Do you agree that the ruling in Baker v. Nelson precludes the federal courts from hearing cases regarding state definitions of marriage? Do you think that US v. Windsor contradicts the Court's previous ruling in Baker?**

Response: In *Baker v. Nelson*, 291 Minn. 310 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972), the Minnesota Supreme Court ruled that a state law limiting marriage to persons of the opposite sex did not violate the Constitution. Baker appealed and the Supreme Court dismissed the case "for want of a substantial federal question." *United States v. Windsor*, 133 S. Ct. 2675 (2013), involved federal law. Specifically, the Supreme Court in *United States v. Windsor* held that it had jurisdiction to consider whether Windsor, as a taxpayer, was entitled to claim the federal estate tax exemption for surviving spouses or was barred from doing so under §3 of the federal Defense of Marriage Act. If confirmed, I would apply governing precedent to this and any other issue that came before me.

5. **What is your philosophy on judicial precedent and would you apply prior binding case law that resulted in a court decision that you personally disagree with?**

Response: A judge should faithfully apply judicial precedent to the facts of a case. A judge may not substitute his or her own views for those of Congress or governing precedent. If confirmed, I would follow judicial precedent regardless of any personal views.

6. **How do you reconcile the 2nd Amendment basic right under the Constitution to keep and bear arms made applicable to states under the 14th Amendment in McDonald v. City of Chicago with the more recent crop of lower federal court rulings upholding gun control laws, such as laws requiring gun registration, laws making it illegal to**

carry guns near schools and post offices, and laws banning bottom loading semi-automatic pistols for protection?

Response: The Supreme Court in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), stated: “In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.” *Id.* at 791. I understand that there have been recent lower federal court rulings upholding gun control laws but, to my knowledge, the Supreme Court has not considered these lower federal court rulings. As a judicial nominee, I believe that it would be inappropriate for me to opine on the lower federal court rulings that might be appealed, even though, to the best of my knowledge, the Federal Circuit has never considered an appeal involving a Second Amendment issue. If confirmed, I would apply governing precedent to this and any other issue that came before me.

7. Do you support suspending capital punishment sentencing pending the Supreme Court’s decision on the use of lethal injection drugs in Oklahoma?

Response: The Supreme Court recently granted certiorari to address this question in *Glossip v. Gross* and set argument for April 29, 2015. The Supreme Court also “ordered that petitioners’ executions using midazolam are stayed pending final disposition of this case.” As a judicial nominee, I believe that it would not be appropriate for me to opine on the correctness of the Supreme Court’s order or its pending decision. If confirmed, I would apply governing precedent to this and any other issue that came before me.

Questions for Judicial Nominees
Senator Ted Cruz

Kara Stoll
Nominee, United States Circuit Judge for the Federal Circuit

Judicial Philosophy

1. Describe how you would characterize your judicial philosophy.

Response: I would characterize my judicial philosophy as respect for the rule of law and the limited role of an appellate court. A judge should be unbiased and faithfully apply the rule of law embodied in the Constitution, statutes, and precedent to the facts of a case without regard to the identity of the parties. A judge should not substitute his or her own views for that of Congress or governing precedent. In addition, an appellate judge must apply the appropriate standard of review when considering a lower court's decision.

2. How does a responsible judge interpret constitutional provisions, such as due process or equal protection, without imparting his own values to these provisions?

Response: The doctrine of *stare decisis* is essential to our judicial system, ensuring predictability, stability, and even-handed application of the law. Circuit judges are bound by Supreme Court decisions on interpretation of constitutional provisions, such as due process or equal protection. By faithfully following precedent, a responsible judge will apply constitutional provisions, statutes, and other governing law to the facts of a case without imparting his own values to these provisions.

3. With the assumption that you will apply all the law announced by the Supreme Court, please name a Warren Court, Burger Court, and Rehnquist Court precedent that you believe was wrongly decided—but would nevertheless faithfully apply as a lower court judge. Why do you believe these precedents were wrongly decided?

Response: If confirmed, I will faithfully follow the precedents of the Supreme Court regardless of whether I believe these precedents were wrongly decided.

4. Which sitting Supreme Court Justice do you most want to emulate?

Response: I respect all of the Supreme Court Justices for their dedication and devotion to public service. As a nominee to the Court of Appeals for the Federal

Circuit, I would emulate Judge Alvin A. Schall of the Federal Circuit, for whom I clerked. Judge Schall exemplifies an unwavering commitment to the rule of law. He is fair and unbiased, diligent in learning the record and the parties' positions, and writes clear and concise opinions narrowly tailored to the issues before the court. He is also respectful toward litigants, his colleagues, and staff.

5. 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, other)?

Response: In interpreting a constitutional provision, its original understanding can be a tool in determining its meaning. For example, in *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008), the Supreme Court considered the public understanding of the words in the Second Amendment at the time it was ratified. If confirmed, I would follow Supreme Court precedent that prescribes the appropriate methodologies to interpret the Constitution.

6. What role, if any, should the constitutional rulings and doctrines of foreign courts and international tribunals play in the interpretation of our Constitution and laws?

Response: None.

7. What are your views about the role of federal courts in administering institutions such as prisons, hospitals, and schools?

Response: Under Article III, Section 2 of the United States Constitution, the role of the federal courts is limited to deciding cases and controversies that come before them.

8. What are your views on the theory of a living Constitution, and is there any conflict between the theory of a living Constitution and the doctrine of judicial restraint?

Response: To the extent that some commentators define the theory of a living Constitution as courts changing the words or the meaning of the Constitution, I do not agree with that theory. Judges should employ judicial restraint by honoring precedent when deciding cases.

9. What is your favorite Supreme Court decision in the past 10 years, and why?

Response: I do not have a favorite Supreme Court decision. If confirmed, I would apply them all as binding precedent.

10. Please name a Supreme Court case decided in the past 10 years that you would characterize as an example of judicial activism.

Response: I cannot identify a case that I would characterize as an example of judicial activism, where a judge relied on his or her personal views to decide a case as opposed to applying the rule of law. If confirmed, I would decide cases based on the rule of law without regard to any personal views.

11. What is your definition of natural law, and do you believe there is any room for using natural law in interpreting the Constitution or statutes?

Response: Commentators have defined natural law as a system of rights or justice held to be common to all humans and derived from nature. Natural law is not precedent, nor is it constitutional or statutory text. If confirmed, I would not rely on natural law to interpret the Constitution or statutes.

Congressional Power

12. 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 Supreme Court’s decision in *Garcia* is binding precedent and has not been overturned. If confirmed, I would apply governing Supreme Court precedent to this and any other issue that came before me.

13. 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, 608 (2000), the Supreme Court identified “three broad categories of activity Congress may regulate under its commerce power.” These categories include: (1) the use of channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities having a substantial relation to interstate commerce. *Id.* at 609. In *Gonzales v. Raich*, 545 U.S. 1, 18 (2005), the Supreme Court held that Congress may regulate the local possession and use of marijuana because “failure to regulate that class of activity would undercut” a larger regulatory regime directed at economic activity. If confirmed, I would apply

governing Supreme Court precedent to this and any other issue that came before me.

14. What limits, if any, does the Constitution place on Congress's ability to condition the receipt and use by states of federal funds?

Response: The Supreme Court has recognized limits on Congress's ability to use its spending power to create incentives for states to act in accordance with federal policies. Supreme Court precedent characterizes Spending Clause legislation as "much in the nature of a contract" and explains that "[t]he legitimacy of Congress's exercise of the spending power 'thus rests on whether the State voluntarily and knowingly accepts the terms of the contract.'" *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (citing *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) and quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). As the Supreme Court has explained, "[r]especting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system." *Id.* If confirmed, I would apply governing Supreme Court precedent to this and any other issue that came before me.

15. Is Chief Justice Roberts' decision in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), on the Commerce Clause and Necessary and Proper Clause binding precedent?

Response: In *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), five justices of the Supreme Court agreed that Congress could require certain individuals to pay a financial penalty for not obtaining health insurance pursuant to Congress's power under the Taxing Clause. In his decision, Chief Justice Roberts also stated that the Commerce Clause does not give Congress the power to require an individual to maintain health insurance. *Id.* at 2591. Circuit Courts have recognized the existence of "considerable debate about whether the statements about the Commerce Clause are dicta or binding precedent." *United States v. Henry*, 688 F.3d 637, 641-42 n.5 (9th Cir. 2013). While some Circuit Courts have treated this part of the decision as binding precedent, see *United States v. Rose*, 714 F.3d 362, 371 (6th Cir. 2012), others have declined to express an opinion on the issue, see *United States v. Roszkowski*, 700 F.3d 50, 58 n.3 (1st Cir. 2012). If confirmed, I would apply governing Supreme Court precedent to this and any other issue that came before me.

Presidential Power

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

Response: The Supreme Court has addressed the President’s power to issue executive orders and take executive actions on numerous occasions. *See, e.g., Medellin v. Texas*, 552 U.S. 491 (2008); *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S. Ct. 863 (1952). The President’s power to issue executive orders “must stem either from an act of Congress or from the Constitution itself.” *Youngstown*, 72 S. Ct. at 866. In *Medellin*, the Supreme Court stated that Justice Jackson’s “tripartite scheme” as set forth in his concurring opinion in *Youngstown*, 72 S. Ct. at 863, “provides the accepted framework for evaluating executive action.” *Medellin*, 552 U.S. at 524. “First, ‘[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.’” *Id.* (quoting *Youngstown*, 72 S. Ct. at 863.) “Second, ‘[w]hen the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.’” *Id.* “Finally, ‘when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb’ and the Court can sustain his actions ‘only by disabling the Congress from acting upon the subject.’” *Id.* If confirmed, I would apply governing Supreme Court precedent to this and any other issue that came before me.

17. Does the President possess any unenumerated powers under the Constitution, and why or why not?

Response: In *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S. Ct. 863, 866 (1952), the Supreme Court held that the President’s power to issue an order “must stem either from an act of Congress or from the Constitution itself.” If confirmed, I would apply governing Supreme Court precedent to this and any other issue that came before me.

Individual Rights

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the Supreme Court held that the Due Process Clause protects “those fundamental rights which are, objectively, ‘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.’” If confirmed, I would apply governing Supreme Court precedent to this and any other issue that came before me.

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

Response: In *City of Cleburn v. Cleburn Living Center*, 473 U.S. 432, 440-41 (1985), the Supreme Court held that classifications based on race, alienage, national origin, gender, and illegitimacy, as well as classifications which burden a fundamental right, are subject to heightened scrutiny under the Equal Protection Clause. If confirmed, I would apply governing Supreme Court precedent to this and any other issue that came before me.

20. 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: I do not have a personal view as to whether the use of racial preferences in higher education will be necessary in fifteen years. If confirmed, my personal views, if any, will not factor into my decision-making process.

21. To what extent does the Equal Protection Clause tolerate public policies that apportion benefits or assistance on the basis of race?

Response: In *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), the Supreme Court held that “all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’” (Internal citations omitted). “This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.” *Id.* The Supreme Court later explained that “[s]trict scrutiny is a searching examination, and it is the government that bears the burden to prove ‘that the reasons for any racial classification are clearly identified and unquestionably legitimate.’” *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013) (internal citations omitted). If confirmed, I would apply governing Supreme Court precedent to this and any other issue that came before me.

22. Does the Second Amendment guarantee an individual right to keep and bear arms for self-defense, both in the home and in public?

Response: The Supreme Court addressed the Second Amendment and an individual’s right to keep and bear arms for self-defense in the home in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *District of Columbia v. Heller*, 554 U.S. 570 (2008). In *Heller*, the Supreme Court held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense and struck down a District of Columbia law that banned the possession of handguns in the home. In *McDonald*, the Supreme Court held that the Second Amendment right is

fully applicable to the states under the Fourteenth Amendment and struck down a Chicago law that banned handguns in the home. The Supreme Court has not addressed the right to bear arms for self-defense in public. If confirmed, I would apply governing Supreme Court precedent to this and any other issue that came before me.