

**Senator Chuck Grassley  
Questions for the Record**

**David Jeremiah Barron  
Nominee, U.S. Circuit Judge for the First Circuit**

- 1. During your hearing, I asked you about a leaked OLC memo that you are reported to have authored. I asked why the memo would be leaked to a reporter and not to the general public in a redacted format consistent with national security. I understand that you told me that you had no part in leaking the memo or in authorizing the memo to be shared with anyone, but the question of why was the memo not shared with the general public in a redacted format consistent with national security considerations still remains unanswered. You said the decision stands with the Executive Branch. However, you were part of the Executive Branch when that decision was made. So, please explain why the public was not notified in a limited fashion.**

Response: Transparency is an important means of ensuring public confidence in the legal basis for executive branch action. Decisions regarding the disclosure of confidential executive branch legal advice, however, must weigh the benefits of disclosure in light of classification restrictions as well as applicable privileges, such as the attorney-client privilege. Traditionally, determinations about the disclosure of classified legal advice internal to the executive branch, including memoranda from the Office of Legal Counsel (OLC), are made in accord with those responsible for making determinations about what information should be classified in order to protect national security and in accord with those who hold various legal privileges, such as the attorney-client privilege. Due to classification requirements and applicable privileges, I am not at liberty to discuss confidential advice I may have given while serving in the executive branch, including any advice I may have given regarding the merits of disclosure. Additionally, since I am no longer serving in the executive branch, I am not in a position to assess any ongoing determinations regarding the disclosure of any particular classified executive branch legal advice that may have been given while I was serving in OLC.

- 2. I also asked you about an interview you gave concerning John Yoo's actions and I have some follow-up questions on that. (I realize that you stated that you cannot confirm or deny the existence of the OLC memo. For purposes of these questions, please assume that one exists.)**
  - a. How do you distinguish between authorizing targeted killings and engaging in torture in a legal sense?**

Response: Congress has made torture a federal crime pursuant to 18 U.S.C. §§ 2340-2340A. By contrast, Congress has not similarly made criminal a targeted use of lethal force abroad against a leader of enemy forces in the course of an authorized armed conflict that is carried out in accord with the laws of war.

**b. In a constitutional sense?**

Response: An exercise of presidential power stands on stronger constitutional footing, in general, when undertaken pursuant to a grant of congressional power than when undertaken in conflict with a congressional restriction. *See Dames & Moore v. Regan*, 453 U.S. 645, 668-669 (1981). Congress, pursuant to its Article I powers, is constitutionally empowered to prohibit torture, and it has done so pursuant to 18 U.S.C. §§ 2340-2340A. An exercise of executive authority in contravention of that criminal statute would thus have to be premised on the assertion of a President's constitutional power to act in disregard of such a statutory prohibition. By contrast, pursuant to its Article I powers, Congress is constitutionally empowered to authorize the use of lethal force abroad against enemy forces in the course of an armed conflict, and it has done so in response to the attacks of September 11, 2001. *See Authorization for Use of Military Force (AUMF)*, Pub. L. No. 107-40, 115 Stat. 224 (2001). Accordingly, an exercise of lethal force pursuant to such a grant of congressional power, when carried out in accord with the laws of war, would not rest on a claim that the President possessed a constitutional power to act in contravention of a statutory limitation. Instead, such an assertion of executive power would be premised on a grant of authority from Congress.

**c. What factors should be considered in determining whether one of these practices is acceptable?**

Response: The determination of the lawfulness of an exercise of executive authority of the kind referenced in the question cannot be determined in the abstract. Among the factors that would be relevant are whether, given the particular facts at issue, such an exercise of authority is premised on a grant of valid statutory or constitutional power, and whether it complies with all applicable statutory and constitutional limitations. Interpretations of those legal provisions should take account of the laws of war that may inform them, consistent with applicable judicial precedents construing them.

**d. You wrote a letter in the wake of Abu Ghraib misconduct that Congress should identify all those involved and be held accountable for their actions. Please**

**explain how this is legally different from targeted killing of American citizens without due process.**

Response: Congress, pursuant to its Article I powers, criminalized the abusive treatment of detainees through the Torture Act, 18 U.S.C. §§ 2340-2340A; the Uniform Code of Military Justice, 10 U.S.C. § 893 (2000); *id.* § 928 (2000); and the War Crimes Act, 18 U.S.C. § 2441. Congress has not similarly criminalized the use of lethal force abroad against a leader of enemy forces in the course of an authorized armed conflict when such force is exercised in accord with the laws of war.

- 3. I asked you at your hearing whether or not Mr. Savage, or anyone else from the New York Times, contacted you before publishing his story. You replied “Yes.” Please provide the circumstances of that contact, including dates, location, manner of contact and subject matters discussed. Also describe any documents that might have been made available to Mr. Savage for review.**

Response: To the best of my recollection, Charles Savage contacted me by phone regarding the story you asked about at the hearing. I believe the phone call occurred either the day before, or very near the date of, that story’s publication. I told him that I had no comment. I was living in Cambridge, Massachusetts at that time, after having resumed my professorship at Harvard Law School. I am not aware of any documents that may have been made available to Mr. Savage for his review, and I provided him no such documents.

- 4. In response to a question from Senator Leahy regarding your view on the legal and constitutional grounds for the targeted killing of an American overseas using a drone you discussed in a general sense the legal principles and legal issues “that one has to consider”. In your response you indicated the source of authority the President is relying on, any Congressional limitations on the scope of that authority, and how the laws of war inform the grants of authority that had been given to the President. You noted there are also constitutional guarantees that citizens enjoy, as well as precedents. Please explain how the criminal statute found at 18 USC 1119 is part of that equation.**

Response: As I emphasized in my response to Senator Leahy at the hearing, the determination of whether a use of lethal force abroad would be lawful must be made in relation to the particular facts of an operation and cannot be resolved in the abstract. That said, certain general considerations would be relevant. In particular, in determining whether such a use of force is lawful, it would be important to assess whether the President would be acting pursuant to an authorization to use force, such as Congress enacted after the attacks of September 11, 2001. *See* Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001). In making that legal determination, it would be important to examine whether Congress had imposed any limits on such an otherwise lawful use of force in other statutes, such as the prohibition against the unlawful killing of a United States citizen that is contained in 18 U.S.C. § 1119. In construing that provision, it would be important to consider, as in construing any statute, not only its text and purpose, but also any judicial

precedents interpreting it, to determine its applicability in light of the facts at issue.

- 5. You have written about progressive and conservative constitutionalism. I asked you to explain those terms and which of those terms best describes your own view. You replied that as you have reviewed your writings it is not entirely clear what content those terms have. I was surprised at your response, given your academic background and reputation as well as how frequently you used these terms in your numerous academic writings. I would like a more complete answer on how you use these terms.**

- a. If, as you say, those labels “are not particularly helpful in articulating anyone who is judge, what their philosophy would be” then for what purpose did you write on this topic?**

Response: The terms “progressive constitutionalism” and “conservative constitutionalism” are often used in academic debates. As I noted at the hearing, they are somewhat crude labels and may be over- or under-inclusive as applied to any particular decision, but I have drawn on those terms as a law professor in the course of entering into academic debates. In particular, I have used those terms in the course of arguing against the academic position that, to promote more “progressive” outcomes, the traditional role of the courts in interpreting the Constitution should be substantially diminished. I have also used those terms in the course of arguing in my academic writings that it is wrong to suggest both that the judicial protection of federalism necessarily supports “conservative” outcomes and that judicially enforceable federalism-based limits on congressional power are unwarranted.

- b. As an academic, do you think judges ever demonstrate a conservative or a progressive tilt?**

Response: Although as an academic commentator I have followed the practice of other commentators in using the terms “progressive” and “conservative” in describing divergences on the Supreme Court in closely divided cases, I do not think it is accurate or useful to ascribe the outcome of a particular decision to a judge’s conservative or progressive “tilt.” A judge is obliged to decide the case at hand, in accord with the facts particular to that case, pursuant to the relevant legal texts and the judicial precedents that interpret them. Judges should not be motivated by personal beliefs, whether “conservative” or “progressive” or something else, in carrying out their judicial functions. In that regard, as I have noted, it is instructive that many Supreme Court decisions do not neatly line up with the “progressive” and “conservative” labels that are often used in commentary on the Supreme Court.

**c. As a judge, if confirmed, how will you ensure that you do not apply any preconceived vision or approach to constitutional interpretation?**

Response: The judicial obligation is to set aside whatever personal views one may have and to decide the particular case at issue. A judge must base the decision in any case solely on the facts and the law, while respectfully considering the arguments of the litigants. I would take that obligation to be an inexorable one, just as I felt obliged to set aside any personal views I may have had in providing legal advice within the executive branch while serving as the Acting Assistant Attorney General for the Office of Legal Counsel and as a career lawyer in that Office. I believe the best way to ensure one honors that obligation is to immerse oneself fully in the particular facts of the case and the law relevant to it and then to apply the law faithfully to those facts.

**6. When I asked you how much you would consider law reviews, literature, and treatises in your judicial decision making you said, “Much less than law professors would wish”. So, how much is this? Will you turn to them to help in your decision making process when the statute or precedent is unclear?**

Response: As I stated at the hearing, law reviews, literature, and treatises do not represent authoritative legal statements. It is not appropriate for judges to rely on such materials as if they are authoritative statements of the law in their own right. Judges may rely on these materials only as supplementary support for faithful interpretations of authoritative legal texts, such as judicial precedents, constitutional provisions, statutes, and regulations.

**7. Do you think that there is a “conservative agenda” at the Supreme Court and how is it manifested?**

Response: The Supreme Court is charged with deciding properly presented cases or controversies. It would misconceive the Court’s role were it to have an “agenda” of any kind. Considering the range of cases the Supreme Court decides, I do not believe it would be accurate to characterize the Supreme Court as manifesting a “conservative agenda,” or an agenda of any kind.

**8. You wrote that “Roberts and Alito have a project... but they don’t have a jurisprudential project in the way Scalia and Thomas did”. Please explain what the “projects” of these Justices are, in your view.**

Response: The statement was made in the course of a 2008 academic panel discussion on the Supreme Court and compared the Justices along certain dimensions. Justices Scalia and Thomas have received prominent attention in academic debates for their support for

originalist and textualist constitutional interpretation, and I believe that was the “jurisprudential project” to which I was referring in making the comparison.

- 9. You once said that “Federalism is what we make of it. Rehnquist and his conservative colleagues have been making the most of it for more than a decade. It’s time for progressives to do the same.”**

- a. How should progressives do this?**

Response: In my academic writings, I have argued that federalism is an important component of our constitutional structure, and I have criticized the suggestion that the judicial protection of federalism necessarily supports outcomes that one might call “conservative.” I have also argued in other academic writing that state and local governments can be sources of policy initiatives that might be classified as “progressive.” I do not believe that judges, when deciding cases concerning federalism, as when deciding any cases, should base their decision on whether an outcome could be classified as “progressive” or “conservative.” Judicial decisions should be based on the text of the constitutional, statutory, or regulatory provision at issue, as considered in light of the applicable facts and judicial precedents. No other considerations are relevant.

- b. You have spoken about liberal/conservative agendas on the Court, and about precedent being able to be used however one sees fit. What will you make of federalism, as a judge?**

Response: I do not believe a judge may use precedent however one sees fit. A judge has an obligation to apply precedent faithfully. With respect to federalism, the Supreme Court has enforced federalism-based limits on federal governmental authority in a number of recent cases. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992). As a judge, I would faithfully apply all relevant Supreme Court and First Circuit precedent to the particular facts that are properly presented in any case or controversy, including in any case or controversy concerning federalism.

- 10. In a panel in 2004 you said that the “living constitution will seem much more respectable in terms of constitutional theory when the issue of same-sex marriage becomes a part of the legal framework of this country”.**

- a. Is the living constitution concept more respectable in terms of constitutional theory in 2013?**

Response: The statement was a comment about how the debate among constitutional theorists might be affected by a decision of the Supreme Court that declared bans on same-sex marriage unconstitutional. The Supreme Court had not issued such a ruling at that time, and it has not issued one in the nine years since. As a result, I am not aware that the terms of that debate about constitutional theory have been altered.

**b. If so, is this a good thing?**

Response: Please see response to 10a.

**11. You have written that the Constitution is not “frozen” and that it is a “dynamic document.” What do you mean by this and how will this affect your judicial decision-making process, if confirmed?**

Response: The Constitution is a written text, and as such, judges are not free to change its words or its meaning. In construing that text, evidence of its meaning at the time of a provision’s ratification can be dispositive. In addition, the Supreme Court and Circuit court precedents are binding on federal appellate court judges. Those precedents may be conclusive of a constitutional question. They may also instruct judges to attend to subsequent technological developments in interpreting the meaning and purposes of certain provisions of the Constitution such as the Fourth Amendment, *see Katz v. United States*, 389 U.S. 347 (1967), or those precedents may instruct judges to attend to the longstanding practices of the political branches in resolving certain separation of powers disputes, *see Dames & Moore v. Regan*, 453 U.S. 645, 686 (1981) (quotations and citation omitted) (“a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘Executive Power’ vested in the President by § 1 of Art. II.”). As a Circuit judge, if confirmed, I would rely on the constitutional text and the precedents interpreting that text in deciding the Constitution’s meaning in light of the relevant facts in connection with particular cases or controversies.

**12. What factors should a judge look to in custody disputes when there are three parents involved in the custody battle? How strong should the biological factor be?**

Response: I have not had occasion during the course of my career as a law professor or as an executive branch lawyer to consider this legal question. In general, the biological factor is an important legal consideration, but in determining precisely how much weight to give it in any particular case, I would be bound as a judge to apply the relevant precedents of the First Circuit and the Supreme Court, in light of the particular factual record presented.

**13. Every nominee who comes before this Committee tells me they are committed to “following precedent”. But you have said that “any good lawyer knows how to distinguish a precedent, if you need to”. This sentiment can work for a judge as well.**

- a. Can you please share your general views on the principle of *stare decisis* and how you will approach following precedent, if you are confirmed?**

Response: The doctrine of *stare decisis* is foundational to the rule of law. It ensures consistency and predictability over time, enables people to plan their affairs so they may comply with legal requirements, and places an important check on judicial discretion. As a Circuit judge, the doctrine of *stare decisis* is especially constraining. A Circuit judge may never vote to overrule a precedent of the Supreme Court, and a Circuit judge could only vote to overrule a decision of the Circuit, absent directly controlling intervening Supreme Court precedent, in limited circumstances when sitting *en banc*. See Fed. R. App. P. 35. The doctrine of *stare decisis* also provides important guidance as to the considerations that should inform a decision whether to overturn prior Circuit precedent in limited circumstances when sitting *en banc*, including whether the prior doctrine has proved to be unworkable and whether it has given rise to reliance interests.

- b. What examples have you seen where a judge has followed one precedent he or she prefers while ignoring one that does not suit the outcome he or she wants?**

Response: No examples come to mind.

**14. I asked you some questions during your hearing that I would like to repeat to get a fuller and better answer to my question. In 2011, the D.C. District Court ordered the Justice Department to release emails regarding then-Solicitor General Kagan’s involvement with ObamaCare litigation. In 2010, then-Solicitor General Kagan wrote you an email when you were Acting Assistant Attorney General for the Office of Legal Counsel. In that particular email she asked whether you had seen former Judge Michael McConnell’s “piece in the wsj.” She was referring to a March 15th op-ed in the Wall Street Journal in which Judge McConnell discussed the constitutionality of a proposal by House Democrats to avoid any additional votes on ObamaCare legislation. The idea was to circumvent a vote on the exact language of the bill as passed by the Senate.**

**In response to that email, you replied: “YES – HE IS GETTING THIS GOING.”**



**What did you mean by that reply – He is getting this going? Who is the “He” and what is he “getting going?”**

Response: I understand that the email was disclosed pursuant to Freedom of Information Act litigation. While I do not recall the specifics of the email exchange, I believe, to the best of my recollection, that the email I sent was referring to Michael McConnell and the debate he was engaging through his op-ed regarding the constitutional concerns he raised with respect to the reported legislative proposal.

**15. How has your time at the Office of Legal Counsel prepared you to be a Circuit Court judge?**

Response: As the Acting Assistant Attorney General for the Office of Legal Counsel and before that a career attorney in that Office, I was entrusted with the responsibility for providing legal advice within the executive branch on a wide range of legal matters. In that role, I was obliged to apply prior precedent in resolving legal disputes within the executive branch concerning the meaning of federal law and to do so without regard to any personal beliefs about the matter at issue. In a number of instances, I also prepared written legal opinions, many of which were published and have been provided to the Committee. Although the role of an executive branch lawyer is distinct from that of a federal appellate judge, I believe my experience heading that Office prepares me for the role of serving as a Circuit judge.

**16. How has your time as a law professor prepared you to be a Circuit Court judge?**

Response: As a law professor, I have become familiar through my teaching, research, and writing about areas of the law that are regularly the subject of cases arising in the Circuit courts, particularly federal administrative law. In addition, I have learned the importance of fairly considering all sides of a legal issue and spotting the strengths and weaknesses of legal arguments. Finally, my career as a law professor has placed a premium on being able to clearly explain legal concepts and materials. I believe that these skills and experiences have all provided me with valuable preparation for what I know is the very different role of being a Circuit judge.

**17. Please elaborate for the Committee any experience you have with appellate courts.**

Response: During my service at the Office of Legal Counsel, both as the Acting Assistant Attorney General, and, before that, as an attorney-advisor, I was called upon to advise on a wide range of litigation in federal courts of appeals and at the Supreme Court. While a law professor, I served as a counsel for amici in two Supreme Court cases. I have also been an

amicus in litigation before the Supreme Court of the United States, the United States Court of Appeals for the Third Circuit, and the Court of Appeals of New Mexico. In addition, I served on a steering committee of the “Executive Session for: State Court Leaders in the 21st Century,” a multi-year project conducted in conjunction with the Harvard Kennedy School and the National Center for State Courts, that brought together chief justices of state supreme courts from across the country. Finally, I have taught appellate court precedents, and written about them, as a law professor for more than a decade.

**18. Senate Democrats ignored your counsel, first given back in 2003 and which you subsequently reaffirmed before this committee at your nomination hearing, by invoking the nuclear option, breaking Senate rules governing changes to the rules, and silencing the right of the minority to exercise a check on the majority and the executive. What is your view on this action taken by the Senate in terms of protecting minority rights and in terms of the balance between the executive branch and Congress?**

Response: The letter I signed stated that the filibuster was a constitutionally permissible exercise of the Senate’s authority to establish rules for its operation. In supporting the conclusion that the filibuster was constitutional, the letter referenced the historical practice regarding its use, and stated that it “reflects the Senate’s longstanding respect for minority views and underscores the unique role of the Senate as a part of American democracy. It has the salutary effect of giving an incentive to all sides to seek compromise on issues where points of view are sharply divided. With regard to nominations to an independent branch of government such as the judiciary, the filibuster encourages the President to find common ground with the Senate by nominating individuals who can garner consensus.” I continue to adhere to the views expressed in that letter.

**19. Please define “originalism” and discuss the merits of and problems with judges using this philosophy in deciding constitutional issues.**

Response: As an academic theory, originalism has a number of variants. Some originalist scholars have advocated giving weight to the intentions of those involved in drafting constitutional provisions, while others have emphasized the importance of determining the public meaning the constitutional text had at the time of its ratification. Judicial decisions across a broad range of constitutional doctrine make clear that the intentions of those involved in drafting constitutional provisions, as well as the public meaning of those provisions at the time of their ratification, supply important, and potentially dispositive, evidence regarding the Constitution’s proper interpretation. Those precedents also identify cases in which those provisions must be considered in light of unforeseen technological developments or when it is unclear what the original intentions or public meaning was of a particular provision in application. In determining how to use such originalist evidence in a particular case if I were confirmed as a judge, I would apply the applicable Supreme Court and First Circuit precedents interpreting the particular constitutional provision at issue.

**20. I am interested in your views on NSA wiretapping.**

- a. What is your understanding of the current state of law regarding the legality of the NSA wire-tapping?**

Response: I am aware in a general way of the public debate concerning the lawfulness of activities reportedly undertaken by the National Security Agency under Section 215 of the Patriot Act and Section 702 of the Foreign Intelligence Surveillance Act. To determine the legal basis for a particular national security program, it would be necessary to know with specificity which program was at issue and the facts relating to its operation.

- b. Where is the authority for this program found?**

Response: Please see my response to 20a.

- c. You once said that this issue will be resolved by the courts and that the previous Administration was afraid they would lose in the courts. Please compare and contrast the handling of NSA wiretapping issues by previous and current administration.**

Response: I was referring in the referenced statement to reports that, for a certain period of time, the previous Administration based certain surveillance activities on the legal claim that the President was constitutionally empowered as Commander in Chief to take action in contravention of the Foreign Intelligence Surveillance Act (FISA). I am not aware that, given existing statutory grants of authority, any surveillance activities are currently being undertaken pursuant to a similar claim regarding the executive's constitutional authority to act in contravention of FISA.

**21. You wrote a letter that argued that Congress has the authority to use the prohibition of slavery under the Thirteenth Amendment to make federal offenses those crimes motivated by gender, sexual orientation, gender identity or disability. Please elaborate to the Committee how sexual orientation should receive the same legal protections as race or gender.**

Response: The Supreme Court has held that laws that discriminate on the basis of race or gender should be subject to heightened scrutiny. In the case of gender discrimination, the Court has held that "intermediate" scrutiny applies. *See, e.g., Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730-31 (2003). In the case of race discrimination, the Court has held that "strict" scrutiny applies. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The Court has not held that similarly heightened scrutiny applies to laws that

discriminate on the basis of sexual orientation. The letter referenced in the question did not argue that the Thirteenth Amendment would be a source of authority for Congress to make federal offenses crimes motivated by the gender, sexual orientation, gender identity, or disability of the victim. The letter discussed two separate provisions of H.R. 1592, The Local Law Enforcement Hate Crimes Prevention Act of 2007. The letter explained that one of these provisions, the proposed addition of § 249(b) to Title 18 of the United States Code, would have prohibited violent crimes motivated by religion, national origin, gender, sexual orientation, gender identity or disability, but only if the crime were committed with some connection to interstate commerce, such as during interstate travel or in a way that affects interstate commerce. The letter defended the constitutionality of that provision solely on the basis of Congress's commerce power and without reference to the Thirteenth Amendment. The letter addressed the Thirteenth Amendment as a possible source of congressional authority only in connection with the other provision, the proposed addition of Section 249(a) to Title 18 of the United States Code, which would have prohibited violent crimes motivated by the race, color, religion, or national origin of the victim. The letter concluded that the Thirteenth Amendment provided a source of congressional power for that proposed provision on the basis of the Supreme Court's decisions in *Runyon v. McCrary*, 427 U.S. 160 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971); and *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), as well as on the basis of the Second Circuit's decision in *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002).

**22. In 2006, you co-authored an article posted to the Georgetown Law Faculty Blog concerning President Bush's use of signing statements. In that article, you refer to an OLC opinion written during the Clinton Administration that stress that "the President is to act in ways that respect the important roles of Congress and the courts in the process of constitutional interpretation and the resolution of constitutional controversy."**

**a. Do you believe that this statement is still true today?**

Response: Yes.

**b. You also criticized President Bush and his administration for relying on non-enforcement as "a strategy of first-resort." Do you believe that a strategy of non-enforcement as a first-resort is inappropriate no matter who is President?**

Response: I made that statement in the context of a discussion of the President's assertion of a right to issue signing statements announcing an intention to decline to enforce a statute on the ground that the statute was unconstitutional. The legal authority to exercise such a power, like the legal authority of the President to exercise any power, is not dependent on, or related to, the particular President who claims

such authority. Such authority must instead rest on a valid grant of power conferred by a statutory or constitutional provision.

**23. Your questionnaire indicates you were a board member of the official law journal of the American Constitution Society for Law and Policy. There is nothing wrong with associating with such groups, but I do have a question about how the goals of that organization might affect your judgments, if confirmed. Peter Edelman, as chair of the board of directors for American Constitution Society for Law and Policy, stated he would help to engage a younger audience about how the law can improve the lives of everyday citizens. “What we want to do is promote a conversation — the idea of what a progressive perspective of the constitution is and what it means for the country.” He also indicated that a goal of the organization is “countering right-wing distortions of our Constitution.” Also, some of the stated goals and missions of the organization are “countering right-wing distortions of our Constitution” and “debunking conservative buzzwords such as ‘originalism’ and ‘strict construction’ that use neutral-sounding language but all too often lead to conservative policy outcomes.”**

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

Response: I am not familiar with the comments by Peter Edelman to which the question refers, or the context in which those comments were made. With respect to my own views regarding the judicial role in improving the lives of everyday citizens, it is simple. The role of the judge is to decide individual cases impartially and on the basis of the facts and the law. By honoring that traditional judicial role as faithfully as possible, a judge promotes the rule of law and thereby benefits all citizens.

**b. Can you please identify what “right-wing distortions of the Constitution” you are concerned about or feel need to be countered or why concepts such as originalism and strict construction need to be “debunked?”**

Response: I am not familiar with the article by Peter Edelman that contains the phrases quoted in the question and so cannot comment on it.

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

Response: I am not familiar with the quotation from Peter Edelman or how he meant to use that term. In my academic writings, as noted in response to question 5, I have used the term “progressive constitutionalism” in the course of participating in certain

academic debates. In those debates, the term has been used, albeit in a crude way, to describe the divergence on the Supreme Court in certain closely divided cases.

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

Response: I am not familiar with the quotation from Peter Edelman or how he meant to use that term, and so I cannot comment on it.

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

Response: While I am not familiar with the context for the quotation referenced in the question, judges should faithfully apply the Constitution and not promote an ideological agenda. My role as a judge would be to decide particular cases or controversies on the basis of the facts at issue, the relevant legal texts, and the precedents construing them.

**24. During the Bush Presidency, you co-authored an article critical of the administration’s use of signing statements. One of the four concerns you raised was that the increased use of signing statements permitted the administration to conduct “non-enforcement” as a “strategy of first-resort.” You argued that this strategy ignored the proper constitutional roles of the legislative and judicial branches. In my opinion, the current administration has made non-enforcement a strategy of first-resort. This is clearly evident in a number of legal challenges over the past several years. Most recently, just last week we saw the President use non-enforcement as a strategy of first-resort when he decided to suspend enforcement of his own ObamaCare provision that required insurance companies to drop coverage to their customers despite the President’s repeated assurances that “if you like your plan, you can keep it.” I think it is a fair assumption that this administration will continue to use non-enforcement as a strategy of first-resort which leads me to this next series of questions:**

- a. As an appellate judge, how do you plan to approach a case that calls into question the President’s declination to enforce a specific law?**

Response: The President has no general dispensing power, *see Kendall v. United States ex Rel. Stokes*, 37 U.S. 524 (1838), and he is obliged to ensure that “the laws be faithfully executed.” *See* U.S. Const., Article II, cl. 1. In any properly presented case or controversy challenging a President’s assertion of a right to decline to enforce a

statute, I would consider the relevant facts and asserted sources of executive authority, as well as the precedents construing them. I would then base my judgment solely on the facts and the law, as I would do in all cases.

**b. What are the applicable standards of law in reviewing such a case?**

Response: Cases challenging a President's decision to decline to enforce a statute may arise in a range of contexts. A President may assert such a power on the ground that the statute at issue is itself unconstitutional and may not be enforced for that reason. Alternatively, a President may decline to enforce a statute in certain instances on the basis of what he claims is enforcement discretion that has been conferred on him either by statute or the Constitution. With respect to decisions to decline to enforce a statute on the ground that it is unconstitutional, the most recent Supreme Court decision to address that issue is *United States v. Windsor*, 570 U.S. \_\_ (2013). The Supreme Court has addressed the executive's authority to decline to enforce a statute as a matter of enforcement discretion in, among other cases, *Heckler v. Chaney*, 470 U.S. 821 (1985).

**c. What assurances can you offer this committee that you would approach such a case without regard to your political affiliation or personal legal philosophies?**

Response: If confirmed, I would decide such a case as I would decide any case that came before me as a judge: impartially, on the basis of the facts and the law, and without regard to any personal views. As the Acting Assistant Attorney General for the Office of Legal Counsel and as a career lawyer in that Office, I was charged with providing honest, straight, legal advice about the extent of executive branch authorities, and I believe that I did so. In the very different role of a Circuit judge, I would also decide any such cases solely on the basis of the facts and the law.

**25. In a 2008 NPR interview, you said that impeachment articles against former President Bush were justified by charges that the President had misled the American people into the Iraq War. What, in your view, would have been the principle justification for bringing impeachment proceedings against the former president?**

Response: I did not argue in that interview that impeachment proceedings against President Bush were justified. I did say that, as a general matter, an allegation that a President had taken steps to create a false predicate for a war was a very serious one, and that it could potentially form the basis for an impeachment charge. With respect to President Bush, however, I expressed doubts that impeachment proceedings were appropriate.

**26. According to your questionnaire, you have never tried a case and have only participated in three briefs to appellate level courts. Please discuss any other experience that has prepared you to serve as a Federal Circuit Court judge.**

Response: In addition to my experience in preparing appellate briefs in the Supreme Court, and serving as an amicus in other litigation, the most directly relevant experience would be my service as the Acting Assistant Attorney General for the Office of Legal Counsel (OLC) and before that, as an attorney-advisor in OLC. In those capacities, I advised on a wide-range of federal appellate litigation, as is commonly the case for persons in such positions. In addition, my work in that Office involved advising the executive branch on a broad range of legal questions concerning federal law, such as those that federal courts of appeals are regularly called upon to decide. My responsibilities as the acting head of OLC also included issuing signed opinions resolving questions of federal constitutional, statutory, and regulatory law, many of which were published and have been provided to the Committee. I also believe my career in teaching law has helped prepare me for federal judicial service. Over more than a decade of teaching, I have become very familiar with areas of the law that regularly come before federal courts. In addition, my close work with academic colleagues provides me with experience for engaging in the collegial relations that are central to the effective functioning of a Circuit court.

**27. In your questionnaire, you listed three Supreme Court cases in which you have submitted amicus briefs. All of these involved highly political issues. Why did you choose these three cases?**

Response: I do not recall the precise circumstances that led to my participation in *Wisconsin Right to Life v. Federal Election Commission* or *Randall v. Sorrell*. I believe I was asked to assist as a counsel in those cases through former colleagues of mine from the Department of Justice who were handling them at the time, and I agreed to do so. With respect to my participation along with other faculty members and my dean as amici in *Rumsfeld v. FAIR*, I believed it was important as a faculty member at Harvard Law School to help in the effort to ensure that gay and lesbian students at my institution continued to have equal opportunities to seek legal employment.

**28. Please describe any substantive legal pro bono work that you have contributed to during your legal career.**

Response: I participated without compensation as a counsel for amici in *Wisconsin Right to Life v. Federal Election Commission* and *Randall v. Sorrell* in briefs submitted to the Supreme Court. I also was an amicus in briefs submitted to the Third Circuit and the Supreme Court in *Rumsfeld v. FAIR* and in a brief submitted to the Court of Appeals of New



Mexico in *New Mexicans for Free Enterprise v. City of Santa Fe*. I have also been a faculty supervisor for student clinical work for the disadvantaged both in conjunction with my course on Local Government Law, including clinical placements concerning community economic development, and as part of independent clinical projects. I have further described my other pro bono service in response to question 25 of my Senate Judiciary Committee questionnaire, including my uncompensated service as a member of the Massachusetts Board of Higher Education, a member of the Board of the Massachusetts State College Building Authority, and a member of the advisory board of the Rappaport Center for Law and Public Service at Suffolk University Law School.

**29. In *Rumsfeld v. FAIR* you argued that the Solomon Amendment's equal access requirement is satisfied when an institution applies to military recruiters the same policy it applies to all other recruiters. Chief Justice Roberts disagreed with this argument stating that "a school excluding military recruiters would comply with the Solomon Amendment so long as it also excluded any other employer that violates its nondiscrimination policy."**

**a. When interviewed about this decision you said that you think "the court's decision is incorrect and that our brief had it right."**

**b. Do you still believe that you had it right and the court was wrong?**

Response: No. As a participant in a litigated dispute, I was persuaded by the statutory argument that I, along with fellow professors and my dean, had advanced in the amicus brief submitted on our behalf. It is clear that the statutory argument does not reflect the settled meaning of that statute, as authoritatively determined by the Supreme Court.

**c. Can you name some other cases where you think the "court's decision is incorrect?"**

Response: If I were confirmed as a judge, my view of the correctness of a Supreme Court decision would be of no moment. My only obligation would be to apply the Court's precedent faithfully.

**30. I have some questions about your work on the *Wisconsin Right to Life v. Federal Election Commission* case:**

- a. **Do you see a non-profit's expenditure on electioneering communications in the same manner as a corporation expending money from its corporate treasury in order to influence an election?**

Response: In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court did not distinguish between non-profit and for-profit corporations in evaluating the constitutionality of the prohibition Congress had imposed on a corporation making expenditures from its corporate treasury. I would faithfully apply the Court's decision in *Citizens United*, as well as any related Supreme Court and First Circuit precedents, to any case that were to come before me presenting issues concerning election-related expenditures by corporations, non-profit or otherwise.

- b. **Do "corporations" have a right to political expression or any other speech rights?**

Response: The Supreme Court affirmed the First Amendment speech rights of corporations in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

**31. With regard to another case, *Randall v. Sorrell*.**

- a. **Do you believe that expenditure limits can be constitutional?**

Response: The Supreme Court has distinguished between contribution limits and expenditure limits in evaluating campaign finance regulations in *Buckley v. Valeo*, 424 U.S. 1 (1976), and it has continued to invoke that distinction in subsequent cases. In doing so, it has invalidated expenditure limits, most recently in its decision invalidating a campaign finance prohibition against corporations using corporate treasuries to fund expenditures. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). If I were confirmed as a judge, I would apply those precedents, as well as any related Supreme Court and First Circuit precedent, to the particular facts at issue if a case came before me regarding the constitutionality of any expenditure limitation.

- b. **Do you think that expenditure limits impede one's First Amendment rights?**

Response: The Supreme Court has held in a number of cases that expenditure limitations are unconstitutional because they impermissibly impede First Amendment rights. See, e.g., *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *Buckley v. Valeo*, 424 U.S. 1 (1976).

- c. Taking into consideration the Supreme Court's decision in this case, what is your view of what the Court did in *Buckley v. Valeo* in terms of expenditure limits?**

Response: In *Buckley v. Valeo*, the Supreme Court held that expenditure limitations in a federal campaign finance law were unconstitutional because they impermissibly impeded First Amendment rights. The Court has, in subsequent cases, invalidated other expenditure limitations in campaign finance laws, such as in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). If I were confirmed as a judge, I would apply these, and any other applicable precedents, including those of the First Circuit, in deciding any cases concerning the constitutionality of an expenditure limitation. I would do so in such cases, as in all cases, without regard to any personal views I might have.

- 32. There was a recent decision by the New Mexico Supreme Court<sup>1</sup> where the Court held that a photographer improperly discriminated against a gay couple when she refused to take photos for their commitment ceremony for religious reasons and, as the Court stated in its opinion, the Respondents are, “now are compelled by law to compromise the very religious beliefs that inspire their lives.”<sup>2</sup>**

- a. How would you respond if a party in a similar case claimed this was a Freedom of Speech violation? Particularly with respect to a creative and expressive art form such as photography?**

Response: I am not familiar with the New Mexico Supreme Court case referenced above. In a particular case or controversy raising such a claim, I would carefully consider the briefing of the parties and the factual record in applying the applicable law, and in doing so I would faithfully apply the applicable precedents of the Supreme Court and the First Circuit, including those concerning the First Amendment.

- b. Do you think the New Mexico state legislature, by requiring companies that advertise publicly to act in this way, compels the company to speak the government's message?**

Response: The Supreme Court has addressed issues concerning compelled speech in a number of cases, and I would apply those precedents, as well as any other applicable precedents of the Supreme Court and the First Circuit, in deciding any

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<sup>1</sup> *Elane Photography, LLC v. Willock*, 2013 WL 4478229 (N.M. Aug. 22, 2013).

<sup>2</sup> *Id.*, Para. 90.

case raising such an issue that might come before me if I were confirmed as a Circuit judge.

**c. How would you respond if an individual or company in this circumstance raised a Free Exercise claim?**

Response: If I were confirmed as a judge, I would decide any case presenting such a claim consistent with the Free Exercise Clause and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq., and all applicable Supreme Court and First Circuit precedent.

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

Response: No. The parties to a dispute are entitled to an impartial resolution of the case by the judge before them, on the basis of the facts and the law and independent of any personal characteristics of the judge.

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

Response: I think the most important attribute of a judge is impartiality and open-mindedness – a willingness to consider the arguments of the parties with care and respect so that they may be considered thoroughly in light of the facts and the law and so that litigants to a dispute know that their arguments have been heard without any preconceived views regarding the strength of their positions. I believe I would be an impartial and open-minded judge.

**35. 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: Judges must be even-tempered and respectful of the litigants in a case and the judges with whom they serve. Consistent with that temperament, judges must be open-minded and impartial and capable of setting aside any personal views that they may have in order to focus on the facts and the law. I believe I have the temperament to meet that standard.

**36. 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. As a Circuit judge, a decision of the Supreme Court is controlling and must be given full force and effect.

**37. 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 examine the text of the relevant provision. The precedents of the Supreme Court and of the Circuit would provide persuasive authority in interpreting that text in cases in which there was no controlling precedent directly on point. I would apply those precedents to interpret the text of the constitutional, statutory, or regulatory provision at issue, relying on them as well for guidance as to the sources that may properly be relied upon in determining the meaning of those texts.

**38. 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: With respect to any precedent of the Supreme Court, I would, if confirmed as a Circuit judge, apply it faithfully regardless of whether I believed the Supreme Court had seriously erred in issuing it. I would be similarly bound by First Circuit precedent while serving on a panel, and I would consider voting to overrule a Circuit precedent, absent directly controlling intervening Supreme Court precedent, only in appropriately limited circumstances when sitting *en banc*, see Fed. R. App. P. 35, and in accord with the doctrine of *stare decisis* and the considerations that it instructs judges to rely upon in deciding whether to overturn a precedent.

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

Response: Congressional statutes carry with them a presumption of constitutionality, but in a properly presented case or controversy, judges act consistent with their assigned role in declaring a statute unconstitutional where the relevant provision, considered in light of applicable precedent, compels the conclusion that Congress exceeded its constitutional authority or violated a constitutional limitation. In making constitutional rulings, it is important for courts to decide no more than is necessary and to follow doctrines counseling against the unnecessary resolution of constitutional questions.

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

Response: I understand that the work of a Circuit judge is substantial, and that it is the obligation of a Circuit judge to manage that caseload so that decisions are made in a timely manner. If confirmed, I would be diligent in fulfilling my responsibilities and in organizing my chambers to ensure the efficient and timely resolution of my assigned caseload. I would consult with my fellow judges on the Circuit in determining how best to ensure that processes were in place to make such timely resolution possible.

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

Response: The Constitution is a domestic legal text, and it must be interpreted as such. As a result, neither “foreign law” nor the “views of the world community” can be determinative of its meaning. Where relevant precedents of the Supreme Court or the Circuit instruct judges to consult other than domestic sources, however, whether such sources are English common law or the laws of war, I would be bound to do so.

**42. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?**

Response: I can assure this Committee that my decisions as a judge, were I confirmed, would not be based on any underlying ideology or motivation. In support of that pledge, I would point to the reliance on text and precedent in the opinions I signed while serving as the Acting Assistant Attorney General of the Office of Legal Counsel. I would also point to the support I have received for my nomination from those with whom I have worked throughout my legal career, including career lawyers who served in the Office during my tenure, including many who had served in that same capacity in the prior administration; distinguished lawyers who served in Administrations other than the ones in which I served; and the former Chief Justices of the California and Texas Supreme Courts.

**43. 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: If confirmed, I would put aside any personal views and decide all cases only on the basis of the facts and the law. In support of that assurance, I would point to the same evidence that I referenced in my response to question 42.

**44. 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: An appellate court may overturn precedent within the Circuit, absent a directly controlling intervening decision by the Supreme Court, by sitting *en banc* and then only in limited circumstances. *See* Fed. R. App. P. 35. Any decision to overrule a precedent must also be made in accord with the doctrine of *stare decisis*, which identifies the considerations that should be made before overturning precedent, including, among others, an assessment of whether the prior precedent has proved to be unworkable and whether it has given rise to reliance interests.

**45. You have spent your legal career as an advocate for your clients, or as an academic commenting on the law. 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 would base my decisions in properly presented cases on the precedents of the Supreme Court and the First Circuit and apply them to the text of the legal provision at issue in light of the particular facts presented. In doing so, I would rely solely on those legal materials, and would not base my decision on any personal views that I may have. The responsibility of serving on a Circuit court is a great one. It is also a very different one from that of an academic, as I am fully aware. I do believe that my prior work as the Acting Assistant Attorney General for the Office of Legal Counsel and as a career lawyer in that Office, which, by tradition, seeks to provide unvarnished legal advice and not to advocate on behalf of a client, provides me with valuable preparation for the unique role of service on a federal court of appeals. A challenge will be organizing chambers to ensure their effective and smooth functioning, although there is no one aspect of serving as a Circuit judge that stands out for me in thinking about the challenge presented by such a transition in my career. I would consult with my colleagues about how best to manage the special demands presented by serving as a Circuit judge.

**46. 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, if confirmed?**

Response: I believe collegiality is a critical trait in a judge on a Circuit Court. The smooth functioning of, and effective decision making by the Circuit, depend on the ability of its members to treat each other civilly and respectfully. I have placed a high value on

collegiality in all my work experiences, and I would work to ensure that I lived up to the strong tradition of collegiality that has long defined the First Circuit.

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

**a. Do you agree with Justice Scalia?**

Response: I am not familiar with the quotation or the context for it, but I agree that a judge should interpret the Constitution and apply binding precedent regardless of the judge's personal views, if any.

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

Response: No.

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

Response: If confirmed as a Circuit judge, I would have no authority to overrule Supreme Court precedent, longstanding or otherwise. With respect to overturning a Circuit precedent, I would do so, absent directly controlling intervening Supreme Court precedent, only in appropriately limited circumstances when sitting *en banc*. See Fed. R. App. P. 35. In making such a decision, I would be bound to apply the doctrine of *stare decisis*, which sets forth the considerations that should go into such a judgment, including whether reliance interests have developed in the prior precedent. With respect to whether the “current preferences of the society” should be considered in the course of a constitutional challenge, the Constitution was designed to place limitations on governmental action, regardless of whether such action enjoys contemporary popular support or accords with the current preferences of the society.

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

Response: The Constitution applies equally as a source of authority for, and limitation on, all statutes and regulations, no matter their vintage. Thus, just as a new statute or regulation is



not constitutionally suspect for that reason, neither is it entitled to special deference on account of its recent passage or enactment.

**50. What weight or consideration should a judge give to evolving norms and traditions of our society in interpreting the written Constitution?**

Response: The text and the meaning of the Constitution are not subject to change by judges on the basis of their view of evolving norms and traditions of our society. The Supreme Court has in discrete areas looked to the practices of the political branches in connection with certain separation of powers disputes. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 645, 686 (1981). It has also looked to “evolving standards of decency” in connection with certain questions arising under the Eighth Amendment. *See, e.g., Estelle v. Gamble*, 429 U.S. 97 (1976). If confirmed as a Circuit judge, I would be bound to apply those precedents, as well as any other applicable Supreme Court and First Circuit precedent, to the facts at issue in any properly presented case or controversy.

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

Response: My understanding is that, as the Supreme Court stated in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), “‘there is room for play in the joints between’ the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause,” *id.* at 713-714 (citation omitted). If confirmed, I would apply the Court’s precedent in *Cutter*, as well as any applicable Supreme Court and First Circuit precedent in analyzing the particular facts at issue in the case presented.

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

Response: Ever since *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court has held that the death penalty may lawfully be used as a form of punishment in certain circumstances, and I would faithfully apply all relevant Supreme Court and First Circuit precedent in any case implicating the death penalty, as I would in any case. My personal views, if any, would have no bearing on how I would decide such a case, just as they would have no bearing on any other case I would be called upon to decide if I were confirmed.

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

Response: The Constitution is a written text, and judges have no warrant to change its words or meaning. In that respect, I do not agree with the contrary suggestion that may be implicit

in the view that the Constitution is “constantly evolving” as society interprets it. The Supreme Court has interpreted the Constitution to account for new developments, such as the rise of unforeseen technology in the connection with its Fourth Amendment jurisprudence, or the longstanding practices of the political branches in connection with separation of powers doctrine. If confirmed as a Circuit judge, I would faithfully apply all applicable Supreme Court and First Circuit precedent in interpreting the constitutional text in any properly presented case or controversy.

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

- a. Where is it located?**
- b. From what does it derive?**
- c. What is your understanding, in general terms, of the contours of that right?**

Response: The Supreme Court has recognized privacy rights in different contexts, including with respect to the liberty component of the Due Process Clause in connection with “marital privacy,” *see Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), and in connection with the Fourth Amendment, *see Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011). The Court has stated, though, “the Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’ That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.” *See Katz v. United States*, 389 U.S. 347, 350 (1967). Accordingly, my understanding is that the contours of a privacy right must be examined in connection with the particular facts of the case at issue as they pertain to the particular constitutional provision that is claimed to be the source of the specific protection sought. In resolving any case that sought the protection of a right of privacy premised on the Constitution, I would, if confirmed, faithfully apply the applicable precedents of the Supreme Court and the First Circuit to the particular facts at issue.

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

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

Response: My understanding of the Supreme Court’s precedents is that the rights secured by the Constitution are to be found in its textual provisions and not “between the lines” of those provisions. In determining whether, in a particular case, on the

facts presented, the constitutional text provides the protection claimed by a litigant, I would apply the precedents of the Supreme Court and of the First Circuit.

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

Response: No.

**56. 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: The parties to a dispute are responsible for developing the factual record of the case, and judges rely on them to do so. To the extent that issues arise regarding possible reliance on evidence outside the record, I would apply the precedents of the First Circuit, and of the Supreme Court, in deciding how those issues should be resolved.

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

Response: If in the course of deciding a case as a Circuit judge an issue arose regarding the propriety of relying on such studies, I would base my decision on the standards set forth in the Federal Rules of Evidence, as well as any applicable precedents of the First Circuit and the Supreme Court.

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

Response: The Supreme Court has set forth standards for evaluating Second Amendment challenges to federal and state gun laws in *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). In those cases, the Court has made clear that the Second Amendment codifies a personal and fundamental constitutional right, and it stated in *Heller* that “[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.” If confirmed, I would apply those precedents, along with any applicable Supreme Court and First Circuit precedent, in deciding any Second Amendment challenge to a state or federal gun law that came before me.

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

Response: I believe an activist judge is one who decides cases on the basis of their personal beliefs rather than on the basis of the particular facts at issue and the applicable law, including prior judicial precedent. I also believe an activist judge is one who ignores the various doctrines and rules that ensure that judges do not decide issues, constitutional or otherwise, unnecessarily.

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

Response: From the earliest days of the Republic, the Supreme Court has made clear that “it is the duty of the court to effect the intention of the legislature.” *The Schooner Paulina's Cargo v. United States*, 11 U.S. (7 Cranch) 52, 60 (1812) (Marshall, C.J.). In performing that task, Circuit judges are required to apply relevant precedents of the Supreme Court and of the Circuit court. The plain meaning of the statutory provision controls in the absence of judicial precedent regarding the proper interpretation of a particular statutory provision. In determining plain meaning, the text, standing alone, may be clearly determinative. Where it is not, courts must use traditional tools of statutory construction, consistent with applicable precedent, in determining the provision’s meaning. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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

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

Response: No.

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

Response: No.

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

Response: I received these written questions by email on Wednesday, November 27, 2013 from the Office of Legal Policy in the Department of Justice. I then prepared draft answers to them, after consulting my own papers and relevant judicial decisions, and returned them in draft form to an attorney at the Office of Legal Policy, revised my draft answers, and then submitted them in final form to the Committee via the Office of Legal Policy.

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

Response: Yes.

**Questions for the Record**  
**Senator Ted Cruz**

**David Jeremiah Barron**  
**Nominee, U.S. Circuit Judge for the First Circuit**

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

Response: I do not have a judicial philosophy as such. Instead, I have a view about the proper approach to judging. That approach is based on the understanding that judges decide cases on the basis of particular facts and only in properly presented cases or controversies. That approach is also rooted in a recognition that the rule of law depends on judges being impartial, faithful in their adherence to precedent, and committed to the use of traditional methods of legal interpretation of authoritative legal texts, whether statutory, constitutional or regulatory. There is no single Justice from the Warren, Burger, or Rehnquist Courts whose judicial philosophy I would feel comfortable characterizing, given the full range of opinions that each of them has issued. In particular, I would be remiss if I did not mention my great respect for Justice John Paul Stevens, for whom I clerked. He served on both the Burger and Rehnquist Courts, and he instilled in me, as he has instilled in all his clerks, a great reverence for the role that the federal judiciary plays in maintaining the rule of law.

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

Response: The intentions of those involved in drafting constitutional provisions, as well as the public meaning of those provisions at the time of their ratification, supply important, and potentially dispositive, evidence of their proper interpretation. Circuit court judges are bound by applicable Supreme Court and Circuit precedents in deciding when and how to use such evidence in interpreting particular provisions of the Constitution. Thus, I would be guided by the precedents of the First Circuit and of the Supreme Court regarding the proper weight to give to originalist evidence in any particular case that came before me.

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

Response: As a court of appeals judge, I would have no authority to overrule a decision of the Supreme Court. While serving on a panel of the Circuit, I also would have no authority to overrule a precedent of the Circuit, at least absent intervening Supreme Court precedent that was directly controlling. In deciding whether to vote *en banc* to overrule a precedent of the Circuit, I would be required to make that decision in a manner consistent with applicable precedents regarding the doctrine of *stare decisis*. That doctrine sets forth the limited considerations -- such as whether a prior line of case law has become "unworkable" or whether it has generated reliance -- that may bear on the decision to overrule a precedent.

**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: Federalism is a cornerstone of the constitutional structure, and the Supreme Court has made clear that there are judicially enforceable, federalism-based limits on federal governmental power in a number of cases that were decided after *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985). See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 488 U.S. 1041 (1992). I would faithfully apply all of these precedents, and any others that were relevant, in deciding any case that came before me that sought to enforce federalism-based limits on federal governmental power.

**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 (1995), the Supreme Court invalidated statutes that it held went beyond Congress’s commerce power. In doing so, the Court stressed the non-economic nature of the activity that Congress sought to regulate in those cases. The Supreme Court did not hold in either case that Congress’s power under the Commerce Clause could never reach non-economic activity. In a concurring opinion in *Gonzalez v. Raich*, 545 U.S. 1 (2005), Justice Scalia reviewed the Supreme Court’s precedents in this area, including *Morrison* and *Lopez*. He stated “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). In reviewing any case that might come before me concerning Congress’s commerce power, as with any other issue, I would carefully review the precedents of the Supreme Court and of my Circuit. I would faithfully apply them to the particular facts at issue in that case.

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

Response: Any executive order or executive action that is undertaken by the President must be premised on a valid grant of authority, whether constitutional or statutory. See *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). In making such determinations, it is important to inquire whether the President is acting (1) with express or implied authorization from Congress, (2) on the basis of his independent constitutional powers in the face of congressional silence, or (3) in a manner that is incompatible with the express or implied will of Congress. *Id.* at 635-638. In addition, even if an executive order and executive action is otherwise authorized by statute or the Constitution, it will still be invalid if, for example, it infringes a constitutional limitation on governmental power, such as a provision of the Bill of Rights.

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

Response: The Supreme Court reviewed its prior precedents in this area in *Chavez v. Martinez*, 538 U.S. 706 (2003). It stated that the Court had held that “the Due Process Clause also protects certain ‘fundamental liberty interest[s]’ from deprivation by the government, regardless of the procedures provided, unless the infringement is narrowly tailored to serve a compelling state interest.” *Id.* at 715. The *Chavez* Court further stated that the only “fundamental rights and liberties” qualifying for such protection are those “which are ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty[.]’” *Id.* at 716 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). *Chavez* further stated that *Glucksberg* requires a “‘careful description’” of the asserted fundamental liberty interest for the purposes of substantive due process analysis; vague generalities . . . will not suffice. 521 U.S., at 721.” If confirmed, I would apply this precedent, and any other applicable Supreme Court and First Circuit precedent, in deciding a properly presented case or controversy, based on the particular facts at issue, that claims protection of a fundamental right for purposes of the substantive due process doctrine.

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

Response: The Supreme Court has subjected a limited set of classifications to heightened scrutiny. For example, in the case of gender discrimination, the Court has held that “intermediate” scrutiny applies. *See, e.g., Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 730-31 (2003), while in the case of race discrimination, the Court has held that “strict” scrutiny applies. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). If confirmed, on this issue, as on any issue, I would follow the precedents of the Supreme Court and of the First Circuit.

**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 decision in *Grutter v. Bollinger*, 539 U.S. 343 (2003) is binding Supreme Court precedent, and a Circuit judge must apply it faithfully in any case that implicates it. If confirmed, any expectations I might have in this area would not be relevant to my judicial decisionmaking. If any case concerning the constitutionality of such preferences were to come before me as a Circuit judge in a properly presented case or controversy, I would determine their lawfulness by faithfully applying the precedents of the Supreme Court, including its recent decision in *Fisher v. University of Texas*, 570 U.S. \_\_\_ (2013), and of the First Circuit.



**Senator Chuck Grassley**  
**Follow-Up Questions for the Record**

**David Jeremiah Barron**  
**Nominee, U.S. Circuit Judge for the First Circuit**

- 1. During your hearing, I asked you about your role in providing guidance regarding the Affordable Care Act. You said it is the ordinary task of the Office of Legal Counsel to review legislation that is pending in Congress. But you would not answer my questions because you did not want to waive a privilege.**

**To be clear, I am not asking you to detail specific conversations, but as you know, answering my questions regarding what you worked on while at OLC does not implicate any privilege. With that in mind, while at OLC, did you provide, formally or informally, any advice on the following topics:**

- a. The constitutionality of Obamacare?**
- b. An assessment or judgment regarding possible litigation based on any proposed or actual procedural event that occurred in either chamber concerning Obamacare?**

Response: While information about whether or not a client asked a particular question is confidential, I can say that one function of the Office of Legal Counsel (OLC) is to review virtually all pending federal legislation for constitutional issues, and I have been authorized by the Department of Justice to confirm that I did so here in my role as the Acting Assistant Attorney General for the Office.

- 2. Please describe your involvement with the Obamacare legislation and/or the administration's preparation or planning for potential litigation regarding that legislation, including but not limited to your attendance at meetings, whether you provided any opinions, views or comments, and whether you reviewed and/or approved any documents with respect to the foregoing.**

Response: As indicated in response to question 1, OLC regularly reviews pending legislation for constitutional issues and did so for the Affordable Care Act. In addition, it is not unusual for Department of Justice litigators to solicit and consider OLC's input on legal issues that arise in litigation, and I have been authorized by the Department to say that in my role as head of OLC I participated in the Department's process for developing a response to litigation challenging the constitutionality of aspects of the Affordable Care Act.

**3. Would you commit to providing the Committee with any documentation of the foregoing?**

Response: I am no longer employed by the Department of Justice, and I have no documentation relating to the foregoing in my possession.

**4. In your responses to my questions, you stated that it was “not accurate or useful to ascribe the outcome of a particular decision to a judge’s conservative or progressive ‘tilt,’” and proceeded to suggest that a judge only decides cases at hand in accord with the facts particular to that case. If a judge is to rely only on the relevant legal texts and judicial precedent reflecting them, how do you account for varying opinions within the federal judiciary?**

Response: I believe it is a judge’s obligation to decide a case on the basis of the facts and the law, including precedent. While judges do at times disagree about what the facts and the law and precedent require in some specific cases, statistically they agree more often than they disagree. I do not believe there is any single explanation that accounts for the differing judgments of judges in particular cases. There are no Justices on the Supreme Court, for example, who vote the same in every case.

**5. You also said that a judge should not base a decision on whether an outcome could be classified as “progressive” or “conservative.” Rather than focusing on an outcome, is it not true that judges do, in fact, interpret constitutional provisions according to some preconceived theory of interpretation?**

Response: Assuming the phrase “preconceived theory of interpretation” also encompasses a commitment to use traditional methods of interpretation as explicated by applicable precedent then it would be accurate to say that judges likely have such theories.

**6. When you stated that “Federalism is what we make of it,” and “It’s time for progressives” to do so, did you mean progressives should “make the most of Federalism,” in an outcome-centered way or in an interpretative way?**

Response: I made that statement at the conclusion of an article I wrote as an academic. In that statement, I cautioned critics of the Rehnquist Court’s federalism decisions not to assume that defenses of unlimited national power would promote what might be called “progressive” outcomes. In doing so, I did not argue that judges should decide a particular case implicating federalism on the basis of whether the outcome could be classified as “progressive” or “conservative.” I also argued in that article that, outside the courts, state and local governments were important sources of policymaking, including

for what might be considered “progressive” policies, and the quoted statement was also referring to that point.

- 7. In response to one of my questions related to the above quote, you said that you would simply “apply all relevant Supreme Court and First Circuit precedent to the particular facts,” and nothing more. Certainly every judge or Justice presumes he or she is doing simply that when deciding cases. How would you differentiate yourself from those who do, in fact, espouse a certain judicial philosophy or theory of interpretation?**

Response: My own view is that a judge is bound to apply traditional methods of legal interpretation in light of applicable judicial precedent in resolving particular cases on the basis of the facts at issue. I do not feel I am in a position to characterize how that approach to judging may differ from the approach that others may espouse.

- 8. If it is not accurate or useful to describe divergences on the federal bench as “progressive” or “conservative,” why have you followed the practice of other commentators in using the terms with respect to the Supreme Court?**

Response: While I do not believe it is accurate or useful to use the terms “progressive” or “conservative” to ascribe the basis for the divergences on the Court in any particular case that is at issue, I have used those terms in the course of academic debates to challenge arguments that some scholars have made regarding the need to substantially diminish the traditional role of the Supreme Court in resolving constitutional controversies in order to promote what might be called “progressive” outcomes. I have also joined in the academic practice of using those terms in discussing divergences on the Court in certain types of closely divided cases, such as cases concerning federalism.

- 9. In my Questions for the Record, I asked you to identify any “‘right-wing distortions of the Constitution’ you are concerned about of feel need to be countered” and you responded that you were not familiar with Mr. Edelman’s article. His article aside, my questions remain. Do you believe there are any right-wing distortions of the Constitution? If so, please identify them.**

Response: In our history, persons of various views have surely made claims about the Constitution that have distorted its meaning, but I do not know what is meant by the phrase “right-wing distortions,” as it is not a phrase I believe I have ever used, and so cannot offer any examples that might fall within it. In any event, I do not believe the appropriate role of a judge would be to “counter” any distortions that might be put forward. The role of a judge is to decide the particular case at issue in light of the factual record and the applicable law.

**10. In my Questions for the Record, I also asked you to identify decisions where you found a court's decision to be incorrect. You told me that you would follow precedent faithfully. But I am trying to understand how you analyze cases. Are there federal cases outside of the Supreme Court or the First Circuit that in your view have been incorrectly decided? Please list them and explain why the legal reasoning is faulty.**

Response: Although as an academic there have been instances in which I have raised concerns about the reasoning in a federal court's opinion, I recognize that in doing so I did not have the benefit of the briefing of the parties, discussion with fellow judges hearing the case, and consideration of the full factual record. The role of a federal judge is very different from that of an academic; if I were fortunate enough to be confirmed as a federal judge, I would apply precedent without regard to any personal views I might have, if any, regarding the correctness of a particular case. In terms of indications of my approach to analyzing cases, I would point to the opinions I have given to the Committee that I signed while serving as Acting Assistant Attorney General of the Office of Legal Counsel.

**11. You told me that you submitted your answers to my original questions to an attorney at OLP then revised your draft answers before submitting them in final form. What did you change after speaking to an attorney at OLP? Please submit the answers you drafted before their content was edited by OLP.**

Response: The answers I provided to the Committee on December 9, 2013 are solely my own, and they are based on my own judgments. For that reason, I believe only those answers, and not any earlier drafts, accurately reflect my true and personal views about the questions that you asked.

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