

Response of Raymond T. Chen
Nominee to be United States Circuit Judge for the Federal Circuit
to the Written Questions of Senator Chuck Grassley

1. **At your confirmation hearing I asked questions pertaining to the Whistleblower Protection Act (WPA). I appreciated your taking the time to familiarize yourself with some of these issues prior to the hearing. While in *White v. Department of Air Force*, 391 F.3d 1377 (2004), the Federal Circuit appears to have backed off of the “irrefragable proof” standard annunciated in *LeChance v. White*, 174 F.3d 1378 (1999), I have concerns that the irrefragable proof standard has not been completely extinguished.**
 - a. **In *White*, the Federal Circuit used a formulation of gross mismanagement that could cause confusion. The Court held that “for a lawful agency policy to constitute ‘gross mismanagement,’ an employee must disclose such serious errors by the agency that a conclusion the agency erred is not debatable among reasonable people.” In your understanding of *White*, are disclosures of “gross mismanagement” subject to a higher standard than the reasonable belief standard applied to other disclosures? Please review any applicable precedent in addressing this question.**

Response: One of the elements that an aggrieved employee must show to prove that a federal agency violated the Whistleblower Protection Act (WPA) is that the aggrieved employee made a disclosure protected under the WPA. The Act defines a protected disclosure as any disclosure the employee reasonably believes evidences “(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.” 5 U.S.C. § 2302(b)(8). The protected disclosure standard thus has two requirements: (1) a reasonable belief by the employee, and (2) a wrongdoing by an agency. The Federal Circuit, in *White v. Department of Air Force*, 391 F.3d 1377 (Fed. Cir. 2004), did not state that the reasonable belief requirement changes with the type of alleged wrongdoing, but, in focusing on the meaning of “gross mismanagement” in the context of an agency policy dispute, the opinion contemplates that each statutory item of wrongdoing has its own meaning.

In *White*, which dealt with whether an agency policy constituted “gross mismanagement,” the Federal Circuit articulated the test for a protected disclosure as follows: “could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence gross mismanagement?” *Id.* at 1381 (internal quotation marks omitted). The court noted that legitimate differences in opinion as to the wisest policy choice for an agency do not rise to the level of “gross mismanagement.” The court went on to hold that a disputed, but lawful, agency

policy constitutes “gross mismanagement” when the error in policy “is not debatable among reasonable people.” *Id.* at 1382.

The non-debatable requirement for gross mismanagement does not apply to all categories of wrongdoing listed in section 2302(b)(8). For example, *White* points out that “[t]his non-debatable requirement does not, of course, apply to alleged violations of statutes or regulations.” *Id.* at 1382 n.2. Likewise, the non-debatable requirement is not part of the standard for a disclosure of a substantial and specific danger to public health or safety. See *Chambers v. Department of the Interior*, 515 F.3d 1362, 1368-69 (Fed. Cir. 2008).

- b. In your understanding of Federal Circuit precedent, is there any context where a whistleblower would be required to rebut by “irrefragable proof” the “presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations”?**

Response: I am not aware of any Federal Circuit precedent, since the 2004 *White* opinion, discussing an “irrefragable proof” standard in the whistleblower protection context. *White* explained that a whistleblower is not required under the WPA to present irrefragable proof that agency officials did not perform their duties correctly.

- c. Do you believe “substantial evidence” would be a more appropriate standard in this context for whistleblower cases?**

Response: I do not have an opinion as to what the appropriate evidentiary standard should be in this context. If confirmed, I would follow the provisions provided in the WPA, as well as the amendments to the WPA set forth in the Whistleblower Protection Enhancement Act (WPEA) enacted last year. Likewise, I would be bound by any applicable precedent that was not overruled by the WPEA.

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

Response: Of the many important attributes of a judge, I believe the most important is fidelity to the rule of law. A judge may not substitute his own views for that of Congress or governing precedent. I believe I possess this attribute.

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

Response: A judge should be respectful, patient, and courteous to litigants and fellow judges. A judge should also maintain an open-mind and fully understand and weigh the competing points of view before rendering a decision. I believe I meet this standard.

- 4. 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.

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

Response: Under the doctrine of constitutional avoidance, a court should avoid deciding a constitutional issue if the case can be resolved on a different basis. A federal statute is presumed to be constitutional and should not be struck down unless it violates a provision of the Constitution or if Congress clearly exceeded its constitutional powers.

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

Response: If the matter concerned the interpretation of a statute, I would first and foremost look to the text of the statute itself. If the statute is clear, then I would follow its plain meaning. I would also look to related statutory provisions that are part of the same Act to confirm that the same terms are used consistently and also that no terms are rendered superfluous. If the statutory text was ambiguous, I would apply accepted canons of statutory construction, including reviewing the legislative history. I would also review decisions relating to the issue by other circuit courts or district courts for their persuasive value.

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

Response: No, it is not proper for judges to seek to reconcile our Constitution with foreign law or the views of the world community. The Supreme Court has, on occasion, consulted English common law in ascertaining the meaning of certain constitutional provisions.

- 8. 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 is bound by its prior panel and *en banc* decisions, which the court can overrule only when it is sitting *en banc*. *En banc* review may be warranted in rare and exceptional circumstances, such as when there are conflicting decisions in the court’s precedent, or when there is strong evidence that the court’s precedent is based on a misreading of a statute. Also, an appellate court must overturn its precedent if an intervening Supreme Court decision requires it to do so.

- 9. 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 the Committee that if confirmed I would faithfully follow the applicable precedent and text of the law. My entire career has been apolitical. I have not served in political positions in the government, nor have I been involved in any political campaigning or advocacy. And political ideology or motivation would have no role in my decision-making as a judge.

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

Response: It is essential for the administration of justice and public confidence in the court system that judges treat all parties equally, fairly, and respectfully. Judges and lawyers should also perform their respective roles without regard to their personal views. I believe that my professional reputation, which I have developed while working in both the government and private practice, reflects a commitment to those principles. If confirmed, I would continue to adhere to those principles and apply the law in a neutral, impartial manner.

- 11. You have spent most of your legal career as an advocate for the United States Government. 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 as a judge, my role would be to apply the governing law to the facts of a case in a neutral, impartial manner. I would study the record and briefs before me to ensure that I understand each side's arguments. For guidance, I would look to all applicable legal authority, including the Constitution, statutes, and precedent. I understand that the role of a judge is very different from that of an advocate, in the sense that an advocate is necessarily outcome-oriented, whereas a judge must keep an open-mind. I anticipate that the most difficult part of the transition for me will be to quickly become knowledgeable in the non-patent areas of the Federal Circuit's jurisdiction.

- 12. Do you think that collegiality is an important element of the work of the Federal Circuit? Please explain how you would approach your work and interaction with colleagues on the Court.**

Response: Yes, I believe collegiality is one of the most important attributes of a circuit judge. If confirmed, I would approach my work in the same way I have conducted myself throughout my career, by carefully considering the views of the other judges on the same panel, engaging in respectful discussions, and striving for consensus.

13. At your hearing, you and Senator Lee had a conversation about the law providing a “right answer” in cases. 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: Yes, I agree. I understand Justice Scalia to be explaining that a judge's role is to faithfully apply the law as it is, not as it should be in the eyes of the judge.

b. In your view, is it possible in a case to arrive at the “right answer” even though it might not be the “best answer?”

Response: Yes, it is possible that the law may require a “right answer” for resolving a dispute that differs from what the judge believes is the “best answer.” In that situation, a judge is bound by that “right answer” even if the judge personally disagrees with it.

c. 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. When determining what the law is, a judge must always avoid injecting his or her own personal policy preferences. The legislature retains the role of designing laws based on its policy judgments, and a judge may not second-guess those judgments.

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

Response: My philosophy is that constitutional interpretation follows the same mode of analysis regardless of whether the challenged statute or regulation is new or old. I would follow any controlling Supreme Court or Federal Circuit precedent on the particular issue. If no controlling precedent exists, I would look to the text of the applicable

constitutional provision to discern what its plain meaning is and also consider it in the context of the Constitution as a whole. I would also follow the established methodology for interpreting the Constitution set forth by the Supreme Court. If any other circuit courts have opined on the matter, I would also consult those decisions for their persuasive value.

15. 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: If confirmed as an appellate judge, I would follow the methodology set forth in governing Supreme Court precedent for resolving a constitutional question. The Constitution itself changes only by constitutional amendment.

16. 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. When, if ever, do you think it is appropriate for appellate judges to conduct research outside the record of the case?

Response: If confirmed as an appellate judge, I would not reach a decision based on evidence developed outside the record of a case.

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

Response: I received these questions on May 1, 2013, and I drafted my answers to them. On May 3, 2013, I sent my draft to an attorney at the Department of Justice for review and made revisions to the draft after receiving comments.

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

Response: Yes.