Responses of Paul J. Watford
Nominee to be United States Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Chuck Grassley

1. **At your hearing I inquired into your views on the constitutional rights enjoyed by illegal aliens. You replied that you couldn't respond "off the top of my head the full range …" which is understandable. Would you please take this time to review appropriate materials and provide a response?**

   Response: There are fewer definitive answers in this area than one might have expected. In part, that is because the Supreme Court has often been asked to decide whether aliens possess the same constitutional rights as citizens, but has done so in the context of aliens who are *lawfully* present in this country. *See, e.g.*, *Almeida-Sanchez v. United States*, 413 U.S. 266, 273-74 (1973) (Fourth Amendment); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (First Amendment). In contrast, the focus of this question is on the constitutional rights possessed by those who are *unlawfully* present in this country, a subject on which the Supreme Court has provided less guidance.

   Nonetheless, I can offer a few observations. The Supreme Court has held that even aliens who are unlawfully present in the country are entitled to certain constitutional rights. Those rights include the due process and equal protection guarantees afforded by the Fifth and Fourteenth Amendments. *Plyler v. Doe*, 457 U.S. 202, 210-11 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). The Court has also held that those unlawfully present in this country are entitled to the criminal procedure protections afforded by the Fifth and Sixth Amendments. *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896).

   As far as my research has disclosed, the Court has not yet decided whether other provisions of the Bill of Rights, such as the First Amendment, the Fourth Amendment, and the Fifth Amendment's Takings Clause, also apply to aliens who are unlawfully present in the country. For example, in the case referenced in the next question, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court held that a foreign national with no voluntary connection to this country could not claim the protections of the Fourth Amendment with respect to a search of property located in a foreign country. The Court left unresolved the question relevant here – whether the Fourth Amendment would apply to those who are unlawfully (but voluntarily) present in this country with respect to a search of property located in the United States. *Id.* at 272-73.

2. **In addition, you stated that you would follow Supreme Court and Ninth Circuit precedent in addressing the question of constitutional protections that undocumented persons should be afforded in U.S. Courts. Please review relevant precedent and address the following questions.**

   a. **In *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Supreme Court overturned the Ninth Circuit and held that DEA agents did not violate the Fourth Amendment when they searched a Mexican citizen's residence in Mexico. In coming to this decision, the majority relied on the use of the term**

"the people" saying that "*the people* protected by the Fourth Amendment …refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." In your view, would the term "the people" as used in other parts of the Constitution and amendments also be read as a limitation on the scope of who is protected by such rights?

Response: The Supreme Court suggested in *Verdugo-Urquidez* (494 U.S. at 265) that its interpretation of the term "the people" in the Fourth Amendment may also apply to the First, Second, Ninth, and Tenth Amendments. And the Court made the same point more recently in *District of Columbia v. Heller*, 554 U.S. 570 (2008), where the Court noted that "in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 580. I would note that the majority opinion in the case mentioned in Question 2(c) below reached a different conclusion, at least with respect to use of the term "the people" in the Second and Fourth Amendments. *See United States v. Portillo-Munoz*, 643 F.3d 437, 440-41 (5th Cir. 2011) ("[W]e do not find that the use of 'the people' in both the Second and the Fourth Amendment mandates a holding that the two amendments cover exactly the same groups of people. The purposes of the Second and the Fourth Amendment are different.").

b. The Court references "community" in *Verdugo-Urquidez*. In your view, could an illegal alien ever develop a sufficient connection with the U.S. to be considered part of its community? Please explain.

Response: The Supreme Court stated in *Verdugo-Urquidez* that "the people" refers to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. at 265. The Court has not specified in subsequent cases, however, what sorts of "connections" would suffice to render someone part of our national community. Thus, I do not think a definitive answer to this question can be given on the basis of existing Supreme Court (or Ninth Circuit) precedent, and I would not feel comfortable attempting to resolve this question in the abstract, outside the confines of a concrete case providing the benefit of briefing and argument from opposing parties on both sides of the issue.

c. In *U.S. v. Armando Portillo-Munoz*, 643 F.3d 437 (2011), the Fifth Circuit upheld a federal law making it a crime for an illegal alien to possess a firearm, holding that the use of the phrase "the people" in the Second Amendment did not include aliens illegally in the United States. Do you agree with this holding? Please explain.

Response: Because this is an issue that has not yet been resolved by the Supreme Court or the Ninth Circuit and will almost certainly arise in the future, it would

not be appropriate for me to opine on whether the Fifth Circuit's resolution of that issue is correct or not. I know that the Eighth Circuit recently adopted the Fifth Circuit's holding (*United States v. Flores*, __ F.3d __, 2011 WL 6266033 (8th Cir. Dec. 16, 2011)), and I am not aware of any circuit that has reached a contrary conclusion. If I were confirmed and confronted with a case in which no controlling Supreme Court or Ninth Circuit precedent was on point, I would carefully consider the reasoning of other circuits on the same issue.

d. In your brief you argued that the Arizona statue prohibiting illegal aliens from soliciting work violated the First Amendment. The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of *the people* peaceably to assemble, and to petition the Government for a redress of grievances." Please explain in your view why the use of the term "the people" in this amendment should not also be read to limit the free speech rights of illegal aliens.[1]

Response: It is possible that use of the term "the people" in the First Amendment will be read to exclude aliens who are unlawfully present in this country. Resolution of that issue will depend on whether the Supreme Court ultimately concludes that the term "the people" means the same thing in both the First and Fourth Amendments, and if it does, whether those unlawfully present in the United States have sufficient "connections" to this country to be deemed part of the national community under the standard articulated in *Verdugo-Urquidez*. Neither the Supreme Court nor the Ninth Circuit has resolved those questions. Because it is entirely foreseeable that those questions could arise in the future, it would not be appropriate for me to try to answer those questions here.

3. Can you please clarify your role in the in *Friendly House v. Whiting* case.

Response: My role on the case was a limited one, both with respect to my role on the team of Munger, Tolles & Olson lawyers who worked on the case and with respect to our firm's role as part of the legal team representing the plaintiffs in the case.

One of my partners brought the *Friendly House* case into the firm and assembled a team of five or six lawyers from our firm to work on it with him. He asked if I would be willing to join the team to help analyze the legal issues raised by the preliminary injunction motion our clients intended to file and to assist in editing that brief once a draft was prepared. I agreed to help in that capacity and my involvement has thus far been limited to those tasks, which included providing editing suggestions on the brief in support of the preliminary injunction motion. I have not been substantively involved in the case since that motion was filed in June 2010, although our firm continues to play an active role in the litigation. (The *Friendly House* case has proceeded in the district court

[1] *See* 494 U.S. 259, 266 ("Excludable alien is not entitled to First Amendment rights, because [h]e does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law") citing *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292, (1904) (internal quotations omitted)

notwithstanding the ongoing appellate proceedings in the related case, *United States v. Arizona*.)

The legal team representing the plaintiffs in the *Friendly House* case included more than 30 lawyers in total. Most of those lawyers were affiliated with the three co-lead counsel in the case: the ACLU's Immigrants' Rights Project; the Mexican American Legal Defense and Educational Fund; and the National Immigration Law Center. Our firm was substantially involved in drafting and editing the preliminary injunction motion and handled the logistics of filing the motion and supporting declarations. But the three co-lead counsel took the lead in drafting the preemption arguments and had final say over the substance of the brief as a whole.

a. You indicated your role was to edit the brief. What editing authority did you have?

Response: I was one of three or four Munger, Tolles lawyers who were involved in editing a draft of the brief in support of the preliminary injunction motion. I do not remember the specifics of how the process worked internally, but in some fashion we compiled our collective edits to the brief and sent them to the three co-lead counsel. As noted in my answer to Question 3, our firm did not have final say over the substance of the brief.

b. Why were the statements of foreign leaders included in the brief?

Response: The brief contains two references to statements by President Calderon of Mexico, but there are no references to statements by any other foreign leaders. President Calderon's statements were included in the brief to emphasize the foreign affairs implications of Arizona's enactment of S.B. 1070. Those implications were relevant to the merits of our clients' preemption argument; the Supreme Court had noted similar foreign affairs concerns in past cases holding state immigration laws preempted. And the statements were relevant to the equitable showing our clients needed to make in order to obtain preliminary injunctive relief, particularly the likelihood that irreparable harm would result in the absence of injunctive relief. Secretary of State Clinton had already indicated that Arizona's S.B. 1070 was straining our country's relations with Mexico. President Calderon's criticism of the law supported that view.

c. Your response indicated that part of the reason for that "is that the United States itself had asserted that there were foreign affairs implications…" Can you please identify those assertions by the United States?

Response: Secretary of State Clinton appeared on "Meet the Press" on May 2, 2010. During that appearance she discussed the strains on U.S.-Mexico relations caused by Arizona's S.B. 1070, particularly with respect to America's efforts to secure the ongoing cooperation of President Calderon in fighting cross-border crime associated with drug and arms trafficking. On May 19, 2010, President

Obama and President Calderon appeared at a Rose Garden ceremony during President Calderon's state visit. President Obama acknowledged that the two leaders had discussed Arizona's S.B. 1070 during their visit; among other things, President Obama described the law as "a misdirected expression of frustration over our broken immigration system, and which has raised concerns in both our countries."

After the *Friendly House* preliminary injunction motion was filed, the United States filed its own preliminary injunction motion, which was accompanied by declarations from officials at the State Department and Department of Homeland Security explaining in detail the negative foreign affairs implications of Arizona's S.B. 1070. *See United States v. Arizona*, Plaintiff's Motion for Preliminary Injunction, Exhs. 1 & 6.

4. You co-authored an amicus brief in *Baze v. Rees* and on another occasion represented a death row inmate in a habeas petition.

a. Do you hold any personal convictions or religious beliefs that would impact the way you rule in a death penalty case?

Response: No, I do not. If confirmed, I would have no difficulty ruling fairly and impartially in cases involving the death penalty.

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

Response: Yes. The Supreme Court has held that the death penalty is an acceptable form of punishment in all but a handful of circumstances. If confirmed, I would have no difficulty faithfully applying that precedent.

5. In *Baze v. Rees,* you filed an *amicus brief* on behalf of a number of medical professionals and ethicists. That brief focused on the medical and ethical issues surrounding the use of a paralytic in Kentucky's three-drug lethal injection protocol. The brief lent support to petitioner's legal argument that the protocol posed an "unnecessary risk" of pain sufficient to constitute cruel and unusual punishment under the Eighth Amendment. In a fractured 7 to 2 ruling, Kentucky's protocol was upheld. The plurality opinion of Roberts, Alito, and Kennedy annunciated a "substantial risk of serious harm" standard. Three other justices, including Justice Breyer, who concurred in the judgment, and two dissenters, would have applied a lower standard of "untoward" risk.

a. Most, if not all, courts since *Baze* have applied the Robert's plurality opinion as the holding of the Court. Do you agree that the standard annunciated in the plurality opinion is the correct standard to be applied by lower courts?

Response: Yes, I agree. The Ninth Circuit has explicitly held that the plurality opinion in *Baze* provides the governing standard under the rule established in *Marks v. United States*, 430 U.S. 188 (1977), because the plurality's standard represents the narrowest ground "necessary to secure a majority in any given challenge to a method of execution." *Dickens v. Brewer*, 631 F.3d 1139, 1145 (9th Cir. 2011). And, as the court noted in *Dickens*, the Supreme Court itself cited the plurality's standard in a subsequent order that vacated a temporary restraining order barring an execution from proceeding in Arizona. *Brewer v. Landrigan*, 131 S. Ct. 445 (2010).

b. In his concurring opinion, Justice Alito warned that a "[m]isinterpretation of the standard set out in the plurality opinion or adoption of the standard favored by the dissent and Justice Breyer would create a grave danger of extended delay." In your view, does the holding in *Baze* set a high bar or a low bar for those challenging a mode of execution? What does an individual challenging a method of execution have to show in order to succeed?

Response: I think it would be fair to say that the plurality opinion in *Baze* sets a higher bar than Justice Breyer and the two dissenting Justices would have imposed, but a lower bar than that favored by Justices Thomas and Scalia. Under the plurality's standard, an inmate seeking to prevail on a method-of-execution challenge must show the existence of an alternative procedure that is "feasible" and "readily implemented," and which will "in fact significantly reduce a substantial risk of severe pain." *Baze*, 553 U.S. at 52. The plurality explained that "[i]f a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment." *Id.*

6. You filed an amicus brief in *Adarand v. Mineta* arguing in favor of the constitutionality of the Transportation Department's Disadvantaged Business Enterprise program. One of the key issues in the debate was whether findings of discrimination by Congress were sufficient to demonstrate a compelling interest. Your brief argued for a very high degree of deference to congressional findings contending that "a reasonable congressional finding of discrimination" is sufficient under strict scrutiny.

a. Is it your view that a "reasonable" finding of fact as to discrimination satisfies the stringent doctrine of strict scrutiny?

Response: When Congress enacts race-conscious measures to remedy the effects of racial discrimination, the degree of deference owed to its findings of discrimination remains unsettled. In *Fullilove v. Klutznick*, 448 U.S. 448

(1980), Justice Powell concluded that "a reasonable congressional finding of discrimination" satisfies strict scrutiny, given the unique remedial powers Congress exercises under Section 5 of the Fourteenth Amendment. *Id.* at 503 n.4 (Powell, J., concurring). The Court itself has not yet expressly adopted or rejected that view. It did not address the issue in *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001), because the Court ultimately dismissed the writ as improvidently granted. The Court's subsequent decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), all involved race-conscious measures adopted at the state or local level.

Because the question whether a reasonable congressional finding of discrimination satisfies strict scrutiny remains open, and is likely to be a subject of litigation in cases that could come before the Ninth Circuit, I do not believe it would be appropriate for me to offer any additional views on that question here.

b. While the Supreme Court ultimately dismissed cert in this case, the Tenth Circuit held that congressional findings of discrimination must be supported by a "strong basis in evidence." This was the standard used by the Supreme Court in evaluating state and local government findings of discrimination in *Wygant v. Jackson Board of Education* and *City of Richmond v. Croson*. Is it your view that while the Supreme Court has held that strict scrutiny applies to all government classifications based on race, Congress is afforded a greater degree of deference than state and local governments? Please explain.

Response: That is the position I argued on behalf of my clients in the amicus brief filed in *Adarand Constructors, Inc. v. Mineta*, but the Supreme Court has not yet resolved the question. For the same reason stated in my answer to Question 6(a), it would not be appropriate for me to offer any views on the resolution of that question here.

7. In 2003, you conducted a presentation focused on 2002 – 2003 Supreme Court term. Your presentation included a discussion of the Supreme Court's decisions in *Gratz* and *Grutter*, which concerned affirmative action policies at the University of Michigan. In your slides you pose three questions relating to the implications of these rulings:

(1) "What do the decisions mean for colleges and universities throughout the country?"
(2) What is their "effect on affirmative action policies in the business sector?"
(3) "Does the decision to uphold affirmative action have 25 year expiration?"

Would you please address each of these questions in turn?

Response: In our presentation in 2003, we raised these questions solely to highlight the potential implications of *Grutter* and *Gratz* going forward, rather than to offer definitive answers of our own. Even today no definitive answers can be given. Many state colleges and universities modified their admissions policies in response to the rulings in *Grutter* and *Gratz*, and litigation challenging the legality of some of those modifications remains pending. *See, e.g.*, *Fisher v. University of Texas*, 631 F.3d 213 (5th Cir. 2011), *petition for cert. filed*, No. 11-345 (U.S. Sept. 15, 2011). The Supreme Court has not addressed the applicability of *Grutter* and *Gratz* to affirmative action policies in the business sector, so the impact the decisions may have in that area remains unclear. As for the durational limit applicable to the use of race in university admissions programs, only the Supreme Court can decide whether 25 years, or some shorter or longer period, is appropriate. It is clear, however, that to satisfy strict scrutiny, a race-conscious admissions program "must be limited in time." *Grutter*, 539 U.S. at 342. The Court has repeatedly held that "all governmental use of race must have a logical end point." *Id.*

8. In 2004, you wrote an article on the Supreme Court's ruling in *Blakely v. Washington*. In that article you argued that Congress should make the federal guidelines voluntary and "restore to district judges some of the sentencing authority they should rightfully possess." Of course, under the Supreme Court's decision in *United States v. Booker*, the federal sentencing guidelines are now advisory, rather than mandatory.

a. In light of *Booker*, what do you see as the role of the guidelines in making sentencing determinations? Do district judges have unfettered discretion?

Response: Even after *Booker*, the Sentencing Guidelines continue to play a key role in sentencing determinations because they provide "the starting point and the initial benchmark" for every sentencing decision. *Gall v. United States*, 552 U.S. 38, 49 (2007). Although the Guidelines are now advisory, district judges do not have unfettered discretion in selecting an appropriate sentence. They must begin by correctly calculating the applicable Guidelines range; they must explain and justify any decision to depart from the prescribed range; and they must consider all of the sentencing factors specified in 18 U.S.C. § 3553(a), one of which is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Courts of appeals, in turn, have an obligation to review the substantive reasonableness of sentences imposed by district judges, and to reverse sentences that are unreasonable. *Rita v. United States*, 551 U.S. 338, 354 (2007).

b. Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?

Response: Yes, I agree. The principal defect of the pre-Guidelines regime was that it permitted tremendous sentencing disparities for similarly situated defendants based on the sentencing proclivities of the individual judge assigned to

a case. In addition to producing sentences that were sometimes either unfairly lenient or unfairly harsh in a given case, the disparities permitted under the pre-Guidelines regime undermined the public's confidence in the integrity of the federal criminal justice system.

c. Do you believe that the guidelines are unnecessarily harsh on certain offenders?

Response: No. I am not aware of any category of cases in which the Guidelines produce sentences that are unnecessarily harsh.

d. If so, which offenders do you believe the guidelines treat unfairly?

Response: I am not aware of any category of offenders that the Guidelines treat unfairly.

9. Interpretation of the Commerce Clause is a longstanding cause for debate and dissention among constitutional scholars. The Supreme Court placed judicial limits on Congress' Commerce Clause power in *United States v. Lopez*. Other Supreme Court precedent has taken a more expansive view, relying on *Wickard v. Filburn*, to find a broad congressional power to regulate commerce on even non-economic activity as long as it relates to a wider and proper federal scheme. Currently unanswered questions, such as whether Congress can mandate individual behavior and/or regulate economic inactivity, leave a lot of room for lower court interpretation.

a. If assessing a commerce clause issue where Congress has mandated action from a group of previously inactive citizens, what case precedent would you apply? Assume that this is an economic activity that plainly affects interstate commerce.

Response: I am not aware of any decision in which the Supreme Court or the Ninth Circuit has addressed a Commerce Clause challenge to a statute that mandated action from previously inactive citizens. A lower court faced with such a fact situation would look primarily to the Supreme Court's most recent Commerce Clause decisions (*Lopez*, *Morrison*, and *Raich*) as well as *Wickard v. Filburn* and the Court's other relevant precedents for guidance. Those cases supply the analytical framework relevant to determining the scope of Congress's Commerce Clause power.

b. Are there any scenarios you can think of where Congress may mandate private citizens to purchase certain goods or services under penalty of fine and/or jail time?

Response: I do not think it is possible, or appropriate, to answer that question in the abstract, outside the confines of a concrete case. Congress has recently

mandated that private citizens purchase a minimum level of health insurance on pain of paying a financial penalty, and the Supreme Court may soon decide whether that mandate is within Congress's power to enact. I am not aware of any other instance in which Congress has mandated that private citizens purchase goods or services under penalty of fine or imprisonment, nor any prior decision of the Supreme Court addressing the constitutionality of such a mandate.

c. Under current Court precedent, the Court aggregates intrastate economic activity to determine whether it substantially affects interstate commerce. This has allowed the Court to find that a farmer growing wheat for his own personal consumption substantially affected interstate commerce. Under this theory of the Commerce Clause, are you able to give me an example of purely intrastate economic activity that Congress could not regulate?

Response: As with Questions 9(a) and (b), I do not think it would be appropriate for me to answer this question outside the context of a concrete case or previous guidance from the Supreme Court. I am not aware of any cases in the post-*Wickard* era in which the Supreme Court has determined that a particular intrastate activity constituted economic activity but nonetheless held that Congress lacked the power to regulate it.

d. Is there any justiciable limit to Congress' power to regulate purely intrastate economic activity?

Response: Under current precedent, the primary limitations on Congress's Commerce Clause power are set forth in the Supreme Court's decisions in *Lopez* and *Morrison*. Those cases hold that Congress may regulate in only three areas: "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted); *see also United States v. Morrison*, 529 U.S. 598, 608-09 (2000). In addition, the Court has held, in *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992), that principles of state sovereignty inherent in the Constitution place limits on Congress's power under the Commerce Clause.

10. 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. In that passage, Justice Scalia rejected the notion that a judge's role is to arrive at what the judge believes to be the "correct" answer, irrespective of what the Constitution provides. I agree that judges have no authority to do that. As Justice Scalia put it in the passage quoted above, if the Constitution provides the answer to a question, a judge is bound by that answer whether the judge agrees with it or not.

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: I do not believe there are any circumstances in which a judge should consider his or her own values or policy preferences in determining what the law means. Under the Constitution, elected officials are charged with making value judgments and policy choices as part of the legislative process. A judge's role is to ensure that the legislature remains within the limits of its assigned authority under the Constitution. Judges have no authority to second-guess the wisdom of the value judgments and policy choices the legislature has made.

11. 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: As a general rule, I do not think judges should consider current societal preferences when ruling on constitutional challenges. However, when interpreting the meaning of the Cruel and Unusual Punishments Clause of the Eighth Amendment, the Supreme Court has considered current societal preferences (as reflected in legislative enactments) in evaluating whether a particular punishment should be deemed unconstitutional. If confirmed, I would be bound to faithfully follow that precedent.

I think the circumstances in which precedent should be overruled are rare. The Supreme Court has held that relevant considerations in deciding whether precedent should be overruled include the soundness of the reasoning supporting the precedent in question, the reliance interests that have developed around the precedent, and whether the rule established by the precedent has proved unworkable in practice. I do not think current societal preferences would ordinarily be a relevant consideration.

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

Response: I do not have a judicial philosophy that would call for applying the Constitution any differently to modern statutes and regulations than to statutes and regulations of older vintage. In either scenario, a judge's task would be to interpret the meaning of the Constitution based on the text of the provision involved, its history, and the precedent interpreting it. The meaning of the Constitution would not vary based on when the challenged statute or regulation was enacted.

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

Response: As a general rule, I do not think a judge's opinions of the evolving norms and traditions of our society have any role in interpreting the meaning of the Constitution. However, the Supreme Court has considered evolving norms and traditions (as reflected in legislative enactments) when interpreting the Cruel and Unusual Punishments Clause, and I would faithfully follow that precedent if confirmed.

14. What would be your definition of an "activist judge"?

Response: I would define an "activist judge" as a judge who invalidates the will of the people as expressed through their democratically elected representatives based not on what the law requires but on the judge's own moral values or policy preferences.

15. 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: During the course of my career, I have not had occasion to litigate or research issues involving the interplay between the two clauses. This is not a subject on which I could speak with any authority at this point.

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

Response: Yes, the Supreme Court has so held in a line of cases that includes *Griswold v. Connecticut*, 381 U.S. 479 (1965).

a. Where is it located?

Response: The Court's cases since *Griswold* have held that the right to privacy is encompassed within the "liberty" interest protected by the Due Process Clause of the Fifth and Fourteenth Amendments.

b. From what does it derive?

Response: The Court's post-*Griswold* cases have explained that the Due Process Clause protects certain fundamental rights and that the right to privacy is one of those rights.

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

Response: The Court has described the right to privacy as protecting "personal decisions relating to marriage, procreation, contraception, family relationships,

child rearing, and education." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

17. 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: The Court has long held that the Constitution protects certain fundamental rights that are not explicitly enumerated in the Constitution's text, while at the same time emphasizing that courts must proceed with great caution in recognizing such rights. I do not think judges should attempt to find such rights by "reading between the lines" of the Constitution. Instead, judges should determine whether a claimed unenumerated right is " 'deeply rooted in this Nation's history and tradition.' " *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

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

Response: No. I do not believe the Court's more recent substantive due process cases have followed the mode of reasoning Justice Douglas employed in *Griswold*.

18. You acted as counsel on an amicus brief submitted by Blizzard/Activision in the Supreme Court case, *Brown v. Entertainment Merchants Association*. In this brief, you argued a voluntary video game rating system, intended to inform parents and prevent children from purchasing games rated for mature ages and adults, was so effective that a state regime instituting a mandatory ratings scheme and a prohibition on the sale of certain video games to minors was a violation of the First Amendment.

The Court agreed and found that video games qualify as speech and are entitled to the protections of the Constitution. Would you apply this same standard to all corporate speech, such as product advertising, political donations and the content of movies, even those which may have inherent political motives?

Response: The legal principle that formed the basis of the amicus brief in *Brown* applies when strict scrutiny governs, as was the case in *Brown* (131 S. Ct. at 2738). In that context, a statute that "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another … is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004)

(internal quotation marks omitted). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent governing all forms of corporate speech.

I have not had occasion to thoroughly research the law governing each of the other categories of speech identified in the question. I know that the Supreme Court has applied strict scrutiny to regulations burdening speech in some of those categories, including the movie at issue in *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 898 (2010). Regulations of product advertising, in contrast, are generally reviewed under the more deferential standard applicable to commercial speech. *See, e.g.*, *Thompson v. Western States Medical Center*, 535 U.S. 357, 366-67 (2002).

19. In *Brown*, 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 judges to conduct research outside the record of the case?

Response: I do not think it would be appropriate for a judge to conduct research outside the record with respect to adjudicative facts – *i.e.*, the facts of a particular case – unless perhaps the facts concerned matters of which the court could take judicial notice. *See* Federal Rule of Evidence 201. I think it is appropriate, and sometimes necessary, for judges to supplement the research conducted by the parties when legislative facts are at issue. The Advisory Committee Note to Rule 201 explains that, with respect to legislative facts, a judge " 'may make an independent search for persuasive data or rest content with what he has or what the parties present.' "

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

Response: I think the circumstances in which it would be appropriate for a judge to do so are quite limited, but it would depend on the nature of the issues raised in the case. For example, in determining the admissibility of certain types of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), it might well be appropriate for a judge to base his or her decision on peer-reviewed psychological or sociological scientific studies.

20. Many states frequently engage in the practice of "direct democracy" by allowing people to pass laws through ballot propositions. What do you believe the role of courts should be in reviewing these decisions?

Response: I do not believe federal courts should review state laws enacted through the initiative process any differently from laws enacted by the legislature. In either context, a federal court's role is to determine whether the law violates a provision of the federal

Constitution, not to second-guess the wisdom of the policy choices the legislature or the voters have made.

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

Response: I think the most important attribute a judge should possess is open-mindedness: the ability to approach each case from a position of neutrality and a willingness to listen carefully but skeptically to what both sides have to say. To be truly open-minded, I think a judge must have a measure of self-doubt. One of my favorite quotes from Learned Hand is his statement, "The spirit of liberty is the spirit which is not too sure that it is right." He was speaking on a different subject there but I think that quote applies in this context as well. A judge convinced that he or she already has all the right answers will not be able to listen with an open mind to what both sides have to say. I believe I am open-minded in the sense described here.

22. 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: In my view the most important elements of judicial temperament are courage, integrity, independence, humility, and collegiality. I believe I meet that standard.

23. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. 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. Respect for precedent is essential to maintaining a legal system based on the rule of law. If confirmed, I would faithfully follow and apply Supreme Court and Ninth Circuit precedent regardless of whether I agreed or disagreed with the precedent in question.

24. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded 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: In a statutory case of first impression, I would first look to the text of the provision. If the text were ambiguous, I would also consider the historical context in which the provision was adopted, the drafting history of the provision, and the provision's relationship with the broader statutory scheme as a whole. I would also review relevant decisions of the Supreme Court and the Ninth Circuit. In my experience as a litigator, even when there is no controlling precedent that dispositively resolves the issue at hand, there is virtually always precedent to which a court can and should look for guidance. Often past cases have dealt with similar issues in an analogous context, or at

least provide the basic analytical framework a court should use to resolve issues of the same general nature. If the issue were one on which neither the Supreme Court nor the Ninth Circuit had spoken, but which other circuits had addressed, I would also look to such out-of-circuit authority for guidance.

25. 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 own best judgment of the merits?

Response: I would apply that decision faithfully, as indicated in my response to Question 23 above. I do not think a judge presented with binding precedent is free to disregard that precedent and render his or her own best judgment on the merits, even if the judge believes the precedent in question was erroneously decided.

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

Response: Federal statutes bear a strong presumption of constitutionality, and I believe the circumstances in which it would be appropriate for a court to declare a federal statute unconstitutional are rare. Such action would be justified only if the statute exceeds the powers granted to Congress by the Constitution or infringes a right protected by the Constitution.

27. 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: Only the court sitting en banc can overrule circuit precedent, and I think the circumstances in which the court would be justified in taking a case en banc to overrule a prior decision are very limited. One obvious circumstance that comes to mind would involve the unlikely scenario in which two prior panel decisions are in direct and irreconcilable conflict, such that only one of the decisions can stand. Otherwise, some of the factors the court should consider in deciding whether to grant en banc review to overrule prior circuit precedent include: whether the issue involved is of exceptional importance; whether other circuits have uniformly rejected the rule announced by the precedent in question; the reliance interests that have developed around a previously settled rule; and whether the rule has proved unworkable in practice.

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

Response: I prepared a draft of the answers to these questions. I sent the draft to a lawyer at the Department of Justice for review and made additional revisions to the answers after receiving his comments.

29. Do these answers reflect your own views?

Response: Yes.

Responses of Paul J. Watford
Nominee to be United States Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Amy Klobuchar

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

   Response: I believe judges should play a very modest role in our constitutional system. Elected officials are responsible for making the policy choices and value judgments that shape the law, and the primary function of courts is to ensure that the executive and legislative branches remain within the limits of their assigned authority under the Constitution. That is certainly an important function, but under the guise of exercising it a judge has no authority to second-guess the wisdom of choices made by the elected branches based on the judge's own moral values or policy preferences.

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

   Response: Resolving cases based solely on what the law requires and without regard to the identity of the parties is the most solemn obligation a judge undertakes upon assuming judicial office. Any judge who did otherwise would be violating his or her oath of office, which requires judges, among other things, to "administer justice without respect to persons, and do equal right to the poor and to the rich." If confirmed, I would faithfully abide by that oath in every case I was called upon to decide.

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

   Response: I think that judges should be strong adherents to the doctrine of *stare decisis*, and that the circumstances in which a court should overrule its prior precedent are rare. The factors a court should consider in making that decision include the soundness of the reasoning supporting the precedent in question, the reliance interests that have developed around a previously settled rule, and whether the rule established by the precedent in question has proved unworkable in practice.

   Judges who serve on the courts of appeals will seldom be called upon to overrule precedent because they have no authority to overrule Supreme Court precedent and three-judge panels have no authority to overrule circuit precedent. Only the court sitting en banc may overrule circuit precedent, and as just noted I think the circumstances in which that would be justified are rare.

Responses of Paul J. Watford
Nominee to be United States Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Tom Coburn, M.D.

1. **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: No, I do not agree with that view.

   a. **If not, please explain.**

      Response: I think the Constitution's text expresses core principles that do not change over time. Some of the Constitution's provisions use broad and general language to describe principles that the framers knew would need to be applied in different circumstances confronting succeeding generations. But the principles themselves are enduring and constant.

2. **Justice William Brennan once said: "Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized." Do you agree with him that constitutional interpretation today must take into account this supposed transformative purpose of the Constitution?**

   Response: I do not understand the point Justice Brennan was attempting to make in this passage well enough to state whether I agree or disagree with it.

   a. **Please explain.**

      Response: In the passage immediately following the language quoted above, Justice Brennan stated, "Thus, for example, when we interpret the Civil War amendments – abolishing slavery, guaranteeing blacks equality under the law, and guaranteeing blacks the right to vote – we must remember that those who put them in place had no desire to enshrine the status quo." That observation seems to me to be obviously correct. But it is not clear to me what impact Justice Brennan believed this observation should have on interpretation of the amendments in question. Understanding the purpose the drafters sought to achieve is surely an important tool in constitutional interpretation. If Justice Brennan intended to convey something beyond that basic proposition, it is not apparent what he meant, and thus is not something I am in a position to evaluate.

3. **Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

   Response: No, I do not agree, with two small caveats noted below.

   a. **If not, please explain.**

Response: As stated in my answer to Question 1 above, I do not believe the core principles of the Constitution change over time; they are enduring and constant. I cannot think of any instance in which the Supreme Court has held that social movements were relevant to interpreting the meaning of the Constitution. But when interpreting the Cruel and Unusual Punishments Clause, the Court has found an examination of legislative changes to be relevant, and in the realm of substantive due process the Court has found an examination of historical practice to be relevant.

4. Do you believe empathy is an essential ingredient for arriving at just decisions and outcomes and should play a role in a judge's consideration of a case?

Response: No.

a. If not, please explain.

Response: I think it is important for a judge to have the capacity to understand an issue from another person's point of view, because that helps ensure the judge has fully and fairly understood each litigant's position before arriving at the correct legal decision in a case. But judges cannot be guided by their personal feelings or sympathies in deciding cases. They must decide cases based solely on what the law requires.

b. Can you provide an example of a case where you had to set aside your feelings of empathy for the litigant and, instead, pursue a result that was consistent with the law?

Response: I cannot think of any case I have litigated that fits this description.

5. In 2005, you wrote an article entitled: "State Lines: Redefining the Reach of the Commerce Clause May Be One of the Important Legacies of the Rehnquist Court," which traced the evolution of the Supreme Court's commerce clause jurisprudence from our nation's founding through the post-*Raich* decisions.

Given your familiarity with the Court's commerce clause jurisprudence, what would you say are the limitations on the federal government's power under the commerce clause?

Response: This of course is a subject on which the Supreme Court may provide further guidance in the near future. Under current precedent, the primary limitations on Congress's Commerce Clause power are set forth in the Supreme Court's decisions in *Lopez* and *Morrison*. Those cases hold that Congress may regulate in only three areas: "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted); *see also United States v. Morrison*, 529 U.S. 598, 608-09 (2000). In addition, the Court has held, in *Printz v. United States*, 521 U.S. 898 (1997), and *New*

York v. United States, 505 U.S. 144 (1992), that principles of state sovereignty inherent in the Constitution place limits on Congress's power under the Commerce Clause.

a. Is any transaction involving the exchange of money subject to Congress's commerce clause power?

Response: No. The transactions would still need to fall within one of the three categories mentioned above and regulation of those transactions could not violate principles of state sovereignty.

b. In the 2005 article, you state: "The *Raich* decision calls into question the notion, widely accepted until now, that the Rehnquist Court has initiated a dramatic realignment of the legislative powers held by Congress and those reserved to the states." Prior to *Raich* did you see the *Lopez* and *Morrison* decisions as a "dramatic realignment of the legislative powers held by Congress and those reserved to the states?"

Response: No. But I did regard *Lopez* and *Morrison* as significant developments in the Court's Commerce Clause jurisprudence.

i. In what sense was it dramatic?

Response: Those two decisions marked the first time in 60 years that the Supreme Court had invalidated a federal statute on the ground that the statute was beyond Congress's Commerce Clause power to enact.

c. Which do you believe is closer to the original meaning of the commerce clause, the decisions in *Lopez* and *Morrison* or the Supreme Court's decisions in *NLRB v. Jones & Laughlin Steel Corp.* and *U.S. v. Darby*"? Please explain.

Response: All four decisions remain binding precedent, and I would be bound to faithfully follow all of them if confirmed. Given that fact, I do not believe it would be appropriate for me to comment on whether *Lopez* and *Morrison* better reflect the original meaning of the Constitution than do *Jones & Laughlin* and *Darby*.

d. In the 2005 article, you state: "In the late 1930s the Court responded to the exigencies created by the Great Depression by relaxing the limits it had earlier placed on Congress' authority to legislative under the commerce clause." Do you believe this was an appropriate and justified response by the Court?

Response: I do not believe it would be appropriate for me to critique the Court's work in that fashion. The Court's cases from that era have not been overruled and remain binding precedent. If confirmed, I would be bound to apply those decisions faithfully whether I agreed or disagreed with their underlying rationale.

i. Do national emergencies justify judges deviating from the text of the Constitution?

Response: No. I think that is the principal lesson to be drawn from *Korematsu v. United States*, 323 U.S. 214 (1944).

1. **If so, in what specific circumstances?**

   Response: I cannot think of any such circumstances.

ii. **In Federalist Paper No. 78, Alexander Hamilton states: "[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."**

Are justices who relax limits on legislative power during exigent circumstances treating the constitution as fundamental law?

Response: No. If they are relaxing limits imposed by the Constitution, they are not treating the Constitution as fundamental law.

6. **What principles of constitutional interpretation would you look to in analyzing whether a particular statute infringes upon some individual right?**

Response: The Supreme Court itself has never articulated a single approach to constitutional interpretation; it has instead emphasized different approaches in different contexts and cases. With respect to any given provision, absent contrary direction from the Supreme Court, I would focus most closely on the text of the constitutional provision, the historical context in which the provision was adopted, the drafting history of the provision, the provision's relationship with the broader constitutional scheme, and prior precedent interpreting the scope of the rights protected by the provision.

7. **The U.S. Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment of the United States Constitution "protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." As Justice Scalia's opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Leaving aside the *McDonald v. Chicago* decision, do you personally believe the right to bear arms is a fundamental right?**

Response: I do not believe it would be appropriate for me to offer my personal views on that subject; any such views would play no role in any decision I would be called upon to make if confirmed as a judge. The Supreme Court clearly held in *McDonald* that the

individual right to bear arms protected by the Second Amendment is a fundamental right, and I would have no difficulty faithfully applying that decision.

a. Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.

Response: The Supreme Court has held that almost all of the substantive rights guaranteed in the Bill of Rights are fundamental rights enforceable against the States. As to the handful of rights that have not yet been declared fundamental, I would not feel comfortable expressing an opinion on whether they should be declared fundamental outside the confines of a concrete case providing the benefit of briefing and argument from opposing parties on both sides of the issue.

b. Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.

Response: Yes, that is my understanding. The Supreme Court has followed a policy of selective incorporation, pursuant to which those rights found to be fundamental are enforceable against the States under the Fourteenth Amendment.

c. The *Heller* Court further stated that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." Do you believe that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.

Response: The Supreme Court has held that the Second Amendment codified a pre-existing right. As the Court explained, "[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.' " *Heller*, 554 U.S. at 592.

d. What limitations remain on the individual, Second Amendment rights now that the amendment has been incorporated against the States?

Response: That will have to be resolved by the lower courts in the first instance and, ultimately, by the Supreme Court. If past experience involving other fundamental rights is any indication, I suspect the process of determining permissible limitations on the scope of the right to bear arms will be ongoing for some time. In the Ninth Circuit, litigation is still pending to determine the standard of review that applies when restrictions on the right to bear arms are challenged as unconstitutional. *See Nordyke v. King*, 644 F.3d 776 (9th Cir. 2011), *rehearing en banc granted*, __ F.3d __, 2011 WL 5928130 (9th Cir. Nov. 28, 2011). Some of the substantive questions that remain open relate to the types of firearms protected, which classes of persons may be prohibited from possessing firearms, and whether there are sensitive locations in which the possession of firearms may be restricted. *See Heller*, 554 U.S. at 626.

8. In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the "evolving standards of decency" to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter and you are obliged to follow it, but do you agree with Justice Kennedy's analysis?

Response: I do not believe it would be appropriate for me to state whether I agree or disagree with Justice Kennedy's analysis in *Roper*. Justice Kennedy wrote the opinion for the Court and the decision in *Roper* remains binding precedent. Regardless of whether I agreed or disagreed with that decision, if confirmed I would faithfully follow it.

a. When determining what the "evolving standards of decency" are, justices have looked to different standards. Some justices have justified their decision by looking to the laws of various American states,[1] in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries.[2] Do you believe either standard has merit when interpreting the text of the Constitution?

Response: In some cases, as in *Roper* and *Graham*, the Supreme Court has found the practices of American States and foreign countries relevant to its analysis. I do not believe it would be appropriate for me to comment on whether the Court's approaches have merit; if confirmed I would be bound to follow the Supreme Court's precedent in this area whether I agreed or disagreed with it.

i. If so, do you believe one standard more meritorious than the other? Please explain why or why not.

Response: Please see my answer to Question 8(a) above.

9. In your view, is it ever proper for judges to rely on foreign or international laws or decisions in determining the meaning of the Constitution?

Response: As a general rule, I think our Constitution should be interpreted in accordance with U.S. law. However, in some cases the Supreme Court has held that foreign or international law may be relevant when determining the meaning of the Cruel and Unusual Punishments Clause. I am not aware of any other context in which the Court has held that it is permissible to consider foreign or international law in determining the meaning of a constitutional provision, and absent direction from the Supreme Court, I would not do so.

a. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: I would do so only as directed by the Supreme Court, as in certain of its cases interpreting the meaning of the Cruel and Unusual Punishments Clause.

[1] *Roper v. Simmons*, 543 U.S. 551, 564-65.
[2] *Graham v. Florida*, 130 S.Ct. 2011, 2033-34.

b. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: No.