

**Senator Jeff Sessions
Questions for the Record**

**Responses of Cornelia Pillard
Nominee, United States Circuit Judge for the D.C. Circuit**

- 1. At your hearing, in response to a question by Senator Flake, you testified that you believe judges should look to the original meaning of the words and phrases of the Constitution when applying them to current cases. You also testified that in your role as a judge you “would be bound by the precedents and the precedents that direct [judges] to look at the original meaning.”**

- a. Do you believe that judges are bound to follow the “original public meaning” of the text of the Constitution where it can be ascertained?**

Response: The duty of a judge is to follow the interpretive approaches that precedent dictates. The Supreme Court has in some cases employed originalism as a method of interpreting the Constitution, and I would apply such precedents. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court used an originalist methodology—specifically, original meaning—to interpret the Second Amendment to protect an individual right to bear arms, and in *United States v. Jones*, 132 S. Ct. 945, 949-50 (2012), the Court relied on original meaning in deciding that physical trespass by public officials triggers the Fourth Amendment, so that police placement of a global positioning device on a car to gather information amounted to a search under the Amendment. However, the Supreme Court has not adopted “original public meaning” as a blanket methodology to be applied to all constitutional questions. If confirmed, and if presented with a case involving a particular constitutional question, I would carefully examine Supreme Court and D.C. Circuit precedents relevant to the question and apply those precedents’ interpretive approach.

- b. Before your hearing, had you ever stated that “original public meaning,” “original meaning,” or “original intent” methodology was the best way to interpret the Constitution? If so, when and to whom?**

Response: I do not believe that I have ever stated that any single methodology was the best way to interpret the Constitution.

- c. In your testimony, by “original meaning,” were you referring to the originalist methodology that aims to discern the meaning of a constitutional provision at the time that it was ratified; as distinct from original intent meaning what the Framers intended the meaning to be? If not, how do you define the phrase “original meaning”?**

Response: As I stated in response to Senator Flake at my hearing, I believe that “precedents on method ... are equally binding on judges as the substance of the opinions themselves.” The Supreme Court has looked to the original meaning of constitutional text (as you define it in your question), on two recent occasions, as I mentioned above—*Heller* and *Jones*. If confirmed, I would be bound by those as by any other precedents—their method and their substance. To the extent that another binding Supreme Court was based on another methodology, such as original intent rather than original meaning, I would equally be bound by that precedent.

- d. **Where the “original meaning” is not sufficiently clear to settle whether a democratic enactment violates a provision of the Constitution, is it proper for a judge to resort to other resources to decide the meaning of the provision? If so, please explain your view on the best way for a judge to do so, including what other resources you view as relevant and important. If not, does the lack of clarity require that the judge defer to the democratic enactment?**

Response: Judges are bound in interpreting the Constitution to follow judicial precedent of their own court and higher courts. The Supreme Court’s precedents make clear that, in addition to considering the text of a constitutional provision, judges may legitimately refer to constitutional structure and historical sources such as THE FEDERALIST PAPERS, and may be guided by canons of interpretation and prudential rules. If consulting those sources does not yield a clear result, deference to democratic enactments may be appropriate.

- e. **Based on your current understanding of the original meaning of the Fourteenth Amendment, do you believe, or have you previously stated, that the original meaning (however you define that phrase) of the Fourteenth Amendment supports recognition of a constitutional right to abortion?**

Response: I have not developed or stated a view on original constitutional meaning and abortion rights. The Supreme Court has held in a line of cases that the Fourteenth Amendment’s Due Process Clause supports a constitutional right to abortion in certain circumstances. See *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). If I were confirmed as a judge, I would be bound to apply the Court’s precedents with respect to abortion, as on any other issue.

- f. **Based on your current understanding of the original meaning of the Fourteenth Amendment, do you believe, or have you previously stated, that the original meaning (however you define that phrase) of the Fourteenth Amendment supports recognition of a constitutional right to same-sex marriage or of a constitutional obligation on the part of any government not to define marriage as the union of a man and a woman?**

Response: I have not developed or stated a view on original constitutional meaning and the definition of marriage. The Supreme Court has not ruled on the existence or not of a constitutional right to same-sex marriage, nor on the constitutionality under the Fourteenth Amendment of state law defining marriage as the union of a man and a woman. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Court held that the federal Defense of Marriage Act was unconstitutional, relying primarily on the Fifth Amendment, but with reference to the Fourteenth Amendment: “The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.” *Id.* at 2695 (internal citation omitted). If I were confirmed as a judge, I would be bound to apply the Court’s precedents with respect to marriage, as on any other issue.

2. **At your hearing you were asked whether you still hold the views that you made in a statement at a press briefing on the *Hosanna-Tabor* case, where you said that the position that the church has a First Amendment right to choose who it hires was a “substantial threat to the American rule of law.” You testified that you “called that case wrong,” which appears to be an explanation of another part of your statement predicting how the court would rule. Below is the full statement:**

“The Lutheran Church-Missouri Synod defends its very broad version of the ministerial exception by arguing that teachers play a pivotal role in disseminating the faith and in being powerful, Christian role models for students. It is certainly plausible that religious organizations are more effective in their missions when everyone associated with them exemplifies in every possible respect the Church’s teachings, and when the Church can command that its own dispute resolution processes oust any external legal system. But the Lutheran Church’s position here is a substantial threat to the American rule of law – it would effectively empower any religion to create its own autonomous Vatican City-style regime for employment-law purposes, a sovereign unto itself over which the federal courts lack civil rights jurisdiction. It is hard to see the Supreme Court deciding that that is what the First Amendment law requires.”

Your testimony addressed only your prediction on how the court would rule, not your statement that if the Court were to adopt the Lutheran Church’s position, it would pose a “substantial threat to the American rule of law.” Please take this opportunity to answer whether you still hold the view that “the Lutheran Church’s position here is a substantial threat to the American rule of law.”

Response: The First Amendment protects religious freedom and, because of that important right, religious observers and institutions are entitled to be free from

governmental interference in how they select or remove their religious leadership. In my notes, prepared before the Supreme Court rendered its *Hosanna-Tabor* decision, I explained that, although the Supreme Court had never before recognized a “ministerial exception” to generally applicable civil rights laws, the courts of appeals had done so. I stated that “[i]t would be unexceptional for the Court to conclude that the First Amendment prevent[s] courts from second-guessing religious communities’ choice of their leadership, and keeps courts from adjudicating core questions of church doctrine.” Where my prediction erred was in the difficult question of precisely how broadly the Court would define the exception. I pointed to some public consequences that might arise if the Court issued an especially broad decision against the petitioner, a teacher, in her employment discrimination case against the Lutheran church. Under a broad decision, institutions run by churches, temples or mosques could simply dub all of their employees—from accountants to janitors to cafeteria workers—as “ministers” or their equivalent, and thereby bar them from access to courts in cases of unlawful retaliation or discrimination. The Court’s decision is in fact much more limited and contextually based. The Court noted that it was “reluctant ... to adopt a rigid formula for deciding when an employee qualifies as a minister,” but emphasized that the respondent in this case “held herself out as a minister,” had a “significant degree of religious training,” and that her work involved “conveying the Church’s message and carrying out its mission.” *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694, 707-08 (2012). The Court’s nuanced decision is not a “threat to the American rule of law.”

3. You are the founding Academic Co-Director of and Professor at the Center for Transnational Studies. You have described that organization’s mission as “based on recognition that now we need to make some shifts from nation- or region-centric to a more broadly transnational, even global, orientation.” At your hearing, you were asked whether international human rights could be a potential source of social rights in the U.S., to which you answered: “Not unless Congress would so legislate.”

a. Before your hearing, had you ever stated that it is not appropriate to rely on foreign law in deciding the meaning of the U.S. Constitution? If so, when and to whom?

I have not stated a view on that issue. I have referred to the Supreme Court citation to foreign sources in a set of notes for remarks at a judges’ retreat that I provided to this Committee. (Discussion of the Supreme Court Term at the Eastern District of Pennsylvania Judges’ Retreat on October 16, 2003.) My notes stated that the majority opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), “adverted to foreign legal sources” which “this Court has rarely done,” and opined that the references to foreign sources were “confirmatory...rather than persuasive.”

If I were confirmed as a judge, I would not rely on foreign courts’ decisions to determine the meaning of the United States Constitution, except in the very limited instances in which the United States Supreme Court or D.C. Circuit precedents explicitly rely on foreign court decisions. For example, in interpreting

the Seventh Amendment right to a trial by jury in civil cases, the Supreme Court has looked to the common law in England at the time of the Amendment's adoption. *Chauffeurs, Teamsters, and Helpers Local No. 391 v. Terry*, 494 U.S. 558 (1990).

- b. **Justice Breyer has offered this reason in defense of the practice of invoking foreign court decisions in deciding the meaning of the Constitution:**

“[I]n some of these countries there are institutions, courts that are trying to make their way in societies that didn’t used to be democratic, and they are trying to protect human rights, they are trying to protect democracy. They’re having a document called a constitution, and they want to be independent judges. And for years people all over the world have cited the Supreme Court, why don’t we cite them occasionally? They will then go to some of their legislators and others and say, ‘See, the Supreme Court of the United States cites us.’ That might give them a leg up, even if we just say it’s an interesting example.”

Do you agree with this reason or find it persuasive? If so, why?

I do not read Justice Breyer’s remarks as advocating that foreign court decisions should play any determinative role in deciding the meaning of the United States Constitution. In any event, as noted above, if I were confirmed as a judge I would not rely on foreign court decisions to determine the meaning of the United States Constitution except in the very limited instances in which the United States Supreme Court or D.C. Circuit precedents explicitly rely on foreign court decisions.

- c. **Justice Breyer has also offered this reason why the decision of a foreign court may be relevant in deciding the meaning of the Constitution:**

“Well, it’s relevant in the sense that you have a person who’s a judge, who has similar training, who’s trying to, let’s say, apply a similar document, something like cruel and unusual or—there are different words, but they come to roughly the same thing—who has a society that’s somewhat structured like ours. And really, it isn’t true that England is the moon, nor is India. I mean, there are human beings there just as there are here and there are differences and similarities.... And the fact that this has gone on all over the world and people have come to roughly similar conclusions, in my opinion, was the reason for thinking it at least is the kind of issue that maybe we ought to hear in our court, because I thought our people in this country are not that much different than people other places.”

Do you agree with this reason or find it persuasive? If so, why?

Response: I do not read Justice Breyer's remarks as advocating that foreign court decisions should play any determinative role in deciding the meaning of the United States Constitution. Again, if I were confirmed as a judge I would not rely on foreign court decisions to determine the meaning of the United States Constitution except in the very limited instances in which the United States Supreme Court or D.C. Circuit precedents explicitly rely on foreign court decisions.

- 4. Have you ever expressed an opinion on whether the death penalty is unconstitutional? If so, what was that opinion? If not, do you have such an opinion?**

Response: I have not stated a view on that issue, and any personal beliefs on that or other questions that might come before me if I were confirmed as a judge would not be relevant to how I would decide the issues. The Supreme Court has held in a line of cases that the death penalty is a constitutionally valid form of punishment in certain circumstances. See *Gregg v. Georgia*, 428 U.S. 153 (1976). If I were confirmed as a judge, I would be bound to apply the Court's precedents with respect to the death penalty, as on any other issue.

- 5. In your article *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, you wrote "[i]n the context of one-party dominance of the three branches, however, the rights-protecting effect of separation of powers is reduced." You further stated, "[f]ollowing 9/11, with Republicans dominating all three branches and war ongoing, risks of governmental myopia ran high." Is it your view that the judicial branch was "dominated" by "Republicans" following 9/11? If so, does such domination continue? If not, when did it end?**

Response: The point made in the text, and the supporting citations to THE FEDERALIST NO. 51 (James Madison) and to Daryl J. Levinson, *Empire-Building Government In Constitutional Law*, 118 HARV. L. REV. 915, 952 (2005), was principally about the political branches, and issues arising in the war on terror that I identified as involving "partially unreviewable power in the political branches." To the extent that the point referred to the Court, it was an observation that seven of the nine Justices of the Supreme Court at that time had been appointed by Republican presidents. In retrospect, the point might have been clearer if I had consistently limited my observations to the political branches. In any event, I would not want my comments to be read to imply that a judge's decisions are dictated by the party of the President who appointed him or her. To the contrary, in my view, such an implication is inaccurate and inconsistent with judicial independence and the legal, as distinct from political, nature of Article III courts. See THE FEDERALIST NO. 78 (Alexander Hamilton). Judges are bound to decide cases by impartial application of the law to the facts before them. Neither a judge's own personal politics, nor the politics of the appointing President, should play any role.

6. In your article *United States v. Virginia: the Virginia Military Institute, Where the Men are Men and So are the Women*, you wrote that “the length and magnitude of the VMI litigation attests to the inadequacies of the ‘intermediate scrutiny’ standard of constitutional review of sex-based policies and laws, such as VMI’s male-only admissions policy.” In addition, you appeared to express disappointment that the case of *Nguyen v. INS* used “a watered-down heightened scrutiny” and that the “the [Nguyen] decision adds weight to arguments that equal protection doctrine is, at least in some fact settings, substantially less skeptical than the Court’s recent *Virginia* decision had seemed to establish.”

- a. What level of scrutiny do you believe current Supreme Court doctrine requires in reviewing sex-based policies?

Response: The Supreme Court has made clear that sex-based distinctions in the law are subject to review under “intermediate” constitutional scrutiny. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 730-31 (2003). If confirmed as a judge, I would apply the Court’s precedents with respect to the level of constitutional scrutiny applicable to sex-based classifications, as with any other issue.

- b. Do you believe, or have you ever written, that sex-based policies should be reviewed under strict scrutiny, the same level of scrutiny required for race-based policies?

Response: In a brief that I drafted in my role as Assistant to the Solicitor General, the United States argued that classifications that deny opportunities to individuals based on their sex should be subjected to strict judicial scrutiny. See Brief for the Petitioner at 33-36, *United States v. Virginia*, 518 U.S. 515 (1996). As stated in response to part a. of this question, the Court has since made clear that intermediate scrutiny is the applicable standard, and that is the standard that I would apply as a judge if I were confirmed.

7. In your article *Plenary Power Underground in Nguyen v. INS*, you wrote “[o]ne reading of *Nguyen* is that equal protection doctrine may not (yet) be everything *Nguyen* and his father might have wished for, but at least the Court accorded them the same individual constitutional rights as United States citizens, and that is a particularly important advance for aliens generally. Viewed from that perspective, the individual’s loss is a footnote to a larger victory: assuring aliens the full benefit of constitutional principles applicable to citizens.”

- a. Do you believe that illegal aliens should have the same individual constitutional rights as U.S. citizens?

Response: The Supreme Court has not held that illegal aliens have individual constitutional rights identical to those of United States citizens. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 & n. 4 (1977). In the decision my article examined,

Nguyen v. INS, 533 U.S. 53 (2001), the Court held that, because the challenged sex-based classification survived the intermediate scrutiny applicable to United States citizens, the Court had no need to “decide whether some lesser degree of scrutiny pertains because the statute implicates Congress’ immigration and naturalization power.” *Id.* at 61. If confirmed as a judge, I would apply the Court’s precedents with respect to illegal aliens, as with any other issue.

b. What is included in the “full benefit of constitutional principles applicable to citizens”? Does this include a right to healthcare?

Response: I am not aware of any Supreme Court or D.C. Circuit precedent creating a constitutional right to health care, whether applicable to United States citizens or illegal aliens.