

**Senator Chuck Grassley
Questions for the Record**

**Patricia Ann Millett
Nominee, United States Circuit Judge for the D.C. Circuit**

- 1. You have extensive appellate experience, particularly before the Supreme Court of the United States. Certainly during that time you have reflected on the judges or Justices before whom you have appeared. Please describe for us some traits or judicial philosophy that you would like to emulate as a judge, if confirmed.**

Response: I admire many traits in Judge Tang, for whom I clerked, as well as in other judges and justices before whom I have appeared. In my view, the most critical traits for a judge to have are an open and impartial mind, an unyielding devotion to the rule of law, a desire to faithfully steward a fair and evenhanded system of justice, respect both for the lawyers and parties who appear before the court and for judicial colleagues, a rigorous analytical mind, and the ability to communicate legal decisions in clear and cogent writing.

- 2. You wrote an amicus brief in the case of *United States v. Windsor* arguing that the Bipartisan Legal Advisory Group (BLAG) did not have Article III standing and furthermore that the Supreme Court did not have jurisdiction because the United States had suffered no injury sufficient to invoke Article III standing. Given your argument that BLAG lacked standing, what recourse do you see available for Congress when the executive branch decides to stop defending a lawfully enacted statute?**

Response: I co-wrote that brief as an advocate in support of the court-appointed *amica curiae*. In that capacity, the Supreme Court specifically directed us to present the best arguments available for two propositions: (i) that the Bipartisan Legal Advisory Group (BLAG) lacked Article III standing in the case, and (ii) that the Executive Branch's agreement with the court below that the Defense of Marriage Act is unconstitutional deprived the Court of jurisdiction to decide the case. *See* Order, *United States v. Windsor*, 133 S. Ct. 814 (Dec. 11, 2012). In the *Windsor* decision, the Supreme Court did not answer the question of whether BLAG had standing. *See United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013) (“[T]he Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority.”). Accordingly, it remains an open question whether Congress may defend the constitutionality of a law when the Executive Branch declines to defend it. *See also id.* at 2712-2714 (Alito, J., dissenting) (expressing the view that, in certain circumstances, Congress would have standing to defend the constitutionality of a statute when the Executive Branch declines to defend it). In addition, Congress could appear, as it commonly does, as

amicus curiae in a case to present a constitutional defense of a law. Finally, Congress has its traditional Article I powers to respond, in a system of checks and balances, to the Executive Branch's actions.

- 3. You have spoken in various forums about the values and importance of diversity, and addressed that issue in your nomination hearing. You noted diversity works outward, as a symbol to everyone in the country that opportunities here are based on merit and hard work, not race, gender, ethnicity, religion, or any of those lines; and that diversity increases open-mindedness. In panel discussions regarding Justice Sotomayor's stance that her decisions would be different as a Latina woman than what a white man would decide, you defended her invocation of diversity as a strong positive value, and were somewhat critical about the nominations process not being a forum for sophisticated discussion about diversity. Could you further explain your view regarding the role of diversity on the bench and how it does or should influence adjudicating cases or the outcome of a case?**

Response: First, I believe that diversity on the bench takes many forms and extends not just to characteristics like race, ethnicity, and gender, but also to such factors as experiential diversity in one's professional life (public and private sector work, areas of substantive expertise, second careers), military service, and hardships overcome. Second, diversity on the bench communicates to the public equality of opportunity and evenhandedness of the rule of law. It also builds trust in the judicial process. Third, ensuring that judges approach cases with fully open minds is critical to preserving the rule of law and ensuring that the judiciary stays within the proper limits of its role in a limited federal government. Diversity enhances open-mindedness, and when judges approach each case with fully open minds, they are best equipped to render decisions directed entirely by text, precedent, and the rules of legal analysis prescribed by case law.

- 4. You drafted an amicus brief in the Supreme Court case of *Fisher v. University of Texas at Austin*. In it you wrote that the facts of American life have not so drastically changed in the years since *Grutter* was decided to warrant its reexamination.**
 - a. Is this statement representative of your beliefs about the legality of affirmative action programs? Please explain.**

Response: I wrote that brief on behalf of the law firm's clients, the former commissioners and general counsel of the Federal Communications Commission and the Minority Media and Telecommunications Council, and the views expressed in that brief are the clients' views. In my practice, my role has always been to give my clients a voice in the legal system; I would not consider it appropriate to use my clients' cases to voice any personal views of my own.

b. Please explain your views on the constitutionality of affirmative action programs, specifically in higher education.

Response: The constitutionality of considerations of race in university admissions must be analyzed under the strict scrutiny test prescribed by *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

5. When is it appropriate for the federal government to preempt state law? If confirmed, what sources and approaches would you utilize to assess whether Congress or the Executive Branch in fact intended to preempt state law and acted within the scope of their authority in doing so.

Response: To preempt state law, Congress must exercise properly one of its enumerated powers under the Constitution, thereby triggering (most commonly) the Supremacy Clause under the Constitution if state law conflicts with the federal law. Preemption can be express by the terms of a statute. Preemption also can be implied if compliance with both state and federal law is impossible, or if state law stands as a barrier to the objects and purposes of federal law. To determine whether Congress intended to preempt state law, I would analyze the relevant federal statutory authority, the contradictory state law, and precedent, including Supreme Court and D.C. Circuit cases addressing the application of a presumption against preemption and the proper framework for analysis when compliance with both federal and state law is deemed impossible, *see, e.g., Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011); *Wyeth v. Levine*, 555 U.S. 555 (2009).

6. Do you ascribe to the concept of a living Constitution? Please explain.

Response: I recognize that the phrase “living Constitution” can have different meanings for different people. In my view, the Constitution is, most fundamentally, a bargain or contract between the people of the United States and the federal government, prescribing the limited powers assigned to the federal government, identifying some limitations on state and local governments, and reserving the balance of rights and authority to the people and the States. While the factual circumstances and scenarios to which the Constitution’s terms must be applied can change over time, the terms of that fundamental bargain as expressed in the Constitution’s text do not change.

7. What is your judicial philosophy or approach in applying the Constitution to modern statutes and regulations?

Response: If confirmed, my approach in applying the Constitution to contemporary statutory and regulatory issues would be (i) to determine at the outset whether the case is properly

before the court (verifying standing, jurisdiction, ripeness, and procedural barriers to the suit), (ii) to apply principles of constitutional avoidance where applicable, (iii) to analyze the relevant constitutional text and the arguably conflicting statutory provisions, (iv) to ensure that any regulatory action falls within the scope of delegated authority, (v) to consult and apply relevant precedent of the Supreme Court and D.C. Circuit, (vi) to consider for whatever persuasive value they might have the opinions of other circuits, and (vii) to study carefully the briefs and arguments of the parties and the views of other judges.

8. 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: A judge’s personal opinions should have no role in interpreting the Constitution.

9. At your hearing, I asked about First Amendment rights and government mandates. From a different perspective, what is your understanding of the current state of the law with regard to the interplay between the establishment clause and free exercise clause of the First Amendment?

Response: The Supreme Court reaffirmed in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), that “ ‘there is room for play in the joints between’ the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause,” *id.* at 713-714 (citation omitted). Were I to be confirmed, that is the precedent I would apply in analyzing governmental activities in this area.

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

Response: Starting with *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court has repeatedly held that the death penalty is permissible when applied in accordance with the Constitution’s requirements. In addition, the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution textually presuppose capital punishment when they require “due process of law” before a person is “deprived of life.” U.S. CONST., Amend. V; *see* U.S. CONST. Amend. XIV (requiring “due process of law” before a State can “deprive any person of life”); *see also* U.S. CONST., Amend. V (“No person shall be held to answer for a capital *** crime, unless on a presentment or indictment of a Grand Jury[.]”).

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

Response: The Constitution has a number of provisions that protect the interests of individuals in autonomy or privacy from governmental regulation, and there is Supreme

Court precedent interpreting and applying those provisions to which I would adhere, were I to be confirmed.

a. Where is it located?

Response: The First Amendment’s protections enforce zones of privacy in association, religious exercise, and speech. The Third and Fourth Amendments enforce the privacy of the home and bodily integrity against governmental entry or intrusion without a duly authorized warrant (or a recognized emergency exception to the warrant requirement). The Supreme Court has also found that the Due Process Clause protects certain types of intimate decisionmaking that are deeply rooted in the Nation’s history, legal traditions and practices—for example, the rights to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), to direct the education of one’s children, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to have marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965), to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and to refuse life-saving nutrition and hydration, *see Washington v. Glucksberg*, 521 U.S. 702 (1997) (discussing *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261 (1990)).

b. From what does it derive?

Response: Please see the constitutional provisions discussed in the answer to Question 11(a), above.

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

Response: Please see the answer to Question 11(a), above.

12. 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. 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”? Please explain.

Response: The starting point in any case arising under the Constitution or asserting a constitutional right would be the actual text of the Constitution itself and precedent interpreting that text from the Supreme Court or D.C. Circuit. Were I to be confirmed, I would apply all relevant precedent of the Supreme Court in deciding cases arising under the Constitution without impermissibly reading between the lines.

13. Is it appropriate for a judge to search for “penumbras” and “emanations” in the Constitution?

Response: Judges adjudicating constitutional cases should adhere to the Constitution’s text and governing precedent from the Supreme Court and their circuit.

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

Response: The Supreme Court has not yet decided what standard of scrutiny applies to federal or state gun laws, although footnote 27 of *Heller* noted that rational basis review would not be appropriate. *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”). Following *Heller* and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the D.C. Circuit adopted a two-step approach to analyzing Second Amendment challenges, under which the court first determines whether the regulation governs conduct that falls within the scope of the Second Amendment’s fundamental individual right to bear arms and, if it does, next determines the level of scrutiny based on the nature of the regulation. *See Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) (applying intermediate scrutiny). Like challenges under the First Amendment, the D.C. Circuit has determined that the level of scrutiny “depends on the nature of the conduct being regulated, and the degree to which the challenged law burdens” the right protected by the Amendment. *Heller*, 670 F.3d at 1257; *see also Schrader v. Holder*, 704 F.3d 980, 989 (D.C. Cir. 2013). “[A] regulation that imposes a substantial burden on the [Amendment’s] core right of self defense *** must have a strong justification, whereas a regulation that imposes a less substantial burden “should be proportionately easier to justify.” *Schrader*, 704 F.3d at 989. I would adhere to Supreme Court and D.C. Circuit precedent in this area should I be confirmed.

15. What assurances can you give this Committee that you will not allow political persuasions to play a role in your judicial making philosophy?

Response: Any personal opinions, political or otherwise, have never played a role in my representation of clients, nor would they have any role whatsoever in my judicial decisionmaking were I to be confirmed. I was drawn to the law as a career because I believe devotedly in the justice system—and the carefully calibrated and balanced governmental system—that our Constitution creates. That justice system has endured and enjoys the trust of the people it serves precisely because it engenders faith that decisions are made based on the fair, impartial, and evenhanded application of the law, not personal predilections. Were I so fortunate as to be confirmed to be a steward of that justice system, I would not and could not betray the public’s, the parties’, or the Framers’ trust in that process by injecting any personal or political preferences into my decisionmaking.

16. You have spent your legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?

Response: Were I to be confirmed, my methodology in deciding cases would be to approach each case with a fully open mind, to review carefully the underlying (judicial or administrative) decision, to study closely the relevant text (*i.e.*, constitutional, statutory, regulatory, or contractual), to examine the record and procedural posture of the case (including verifying jurisdiction, standing, and related considerations), to review and analyze relevant case law, to study the briefs, to listen thoughtfully to the views of attorneys and judicial colleagues, and on that basis to come to the right decision to the best of my ability. I would then strive to articulate the reasoning clearly and cogently in opinion writing.

Fully appreciating the gravity of the task for which I have been nominated, I expect that, if I were confirmed, the transition would bring challenges, starting with establishing my chambers and becoming acclimated to the court's distinct processes and procedures and the execution of my role in that system.

17. Miguel Estrada has a professional background similar to yours. Much of the objection to his nomination was focused on the request that internal Solicitor General memoranda be provided to the Committee. Do you think that was an appropriate request, and would it be appropriate for you to provide similar materials to the Committee in support of your nomination? Please explain.

Response: Any such memoranda belong not to me, but to the Justice Department and the Office of the Solicitor General as the custodial clients of my work. Any such request would have to be directed to those entities. While the decision to turn over any such work thus would not be mine but the client's, I share the concerns expressed by Miguel Estrada and (I believe) every past Solicitor General in my lifetime that such disclosure of internal memoranda might harm the litigating positions of the federal government and might also have a chilling effect on the Office of the Solicitor General's ability to obtain the confidential advice needed to conduct litigation in the best interests of the United States.

18. In *Brown v. Entertainment Merchants Association*, Justice Breyer supplemented his opinion with appendices comprising scientific articles on the sociological and psychological harm of playing violent video games.

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

Response: Justice Breyer’s opinion in *Brown* was a dissent and thus is not binding precedent that an appeals court judge would need to follow. With respect to going outside the record: (1) the Supreme Court has ruled that, in applying the law, judges are duty-bound to apply the full body of law bearing on asserted claims and not confine themselves to the cases cited by the parties in the record, see *Elder v. Holloway*, 510 U.S. 510 (1994); (2) in administrative law cases, the Supreme Court has ruled that judicial review is strictly confined to the agency record and may not be supplemented through litigation, see *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); and (3) with respect to the facts of a case, I would expect that the parties would develop the factual record in the district court, and, were I to be confirmed, I would hew to Supreme Court and D.C. Circuit precedent concerning the scope of the record for appellate decisionmaking.

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

Response: Cases must be decided on the basis of the factors made relevant by constitutional or statutory text and precedent. In *Brown*, California was required to show that its law satisfied strict scrutiny because it was a content-based regulation of speech. In attempting to demonstrate a compelling interest in regulating speech based on its content, California relied on psychological and sociological scientific studies in an effort to establish a linkage between violent video games and criminal and other socially harmful behavior. The majority opinion in *Brown* ruled that the “State’s evidence [wa]s not compelling” because “[n]early all of the research is based on correlation, not evidence of causation.” *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729, 2739 (2011) (internal quotation marks and citation omitted).

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

Response: There are two types of judicial decisionmaking that would exceed the proper bounds of a judge’s role. First, it is improper and exceeds the prescribed bounds of adjudication for a judge to fail to hew to limitations on the judicial role prescribed by the Constitution, statute, and case law. The federal government is a government of limited, enumerated powers, and the federal judiciary’s role is limited still further. Failure to enforce

limitations on jurisdiction, standing, ripeness, or the fact-finding provinces of juries and trial courts would be examples of rulings that would transgress the proper judicial role. Second, it is also improper and in excess of the judicial function for a judge to inject personal opinion or private views into the decision of a case, rather than resolving the case based on the analysis of text and precedent.

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

Response: In my opinion, the most important attribute for a judge to possess is to have an open mind, including a willingness to listen and think carefully and circumspectly. The rule of law and the preservation of a fair and impartial justice system that people can trust depend at their foundation on judges coming to each case without preconceptions or personal views, and considering carefully what the law says (in terms of relevant textual direction and precedent), what the parties say, and what judicial colleagues say. I possess that attribute.

21. Previously, you have made comments about allowing cameras in the courtroom, stating, “When I think about it objectively and take my personal interests out of the picture, I think cameras should be there.” Would you support legislation that allows for cameras in federal courtrooms, including the Supreme Court, and if allowed, what actions would you undertake to ensure cameras were operated in your courtroom? Please explain.

Response: I personally support the principle of enhanced access for people to *their* judicial system, including through the use of cameras. I note, in that regard, that the D.C. Circuit has decided to provide for the same-day releases of audio recordings of oral arguments beginning in September 2013. *See* United States Court of Appeals for the District of Columbia Circuit, News Release – Audio Recordings of Oral Arguments, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/Announcement++News+Release++Audio+Recordings+of+Oral+Arguments> (last visited July 20, 2013). With respect to the appropriateness of any particular piece of legislation, that would depend on how the law balances countervailing considerations in the judicial process (such as juror anonymity, protection for confidential information, and similar considerations). If I were to be confirmed, I would share my views with judicial colleagues. But I also recognize that appellate courts are collegial bodies and that such a decision would be made by the court as a whole, not by an individual judge.

22. Do you think that collegiality is an important element of the work of a Circuit Court? If so, how would you approach your work on the court, if confirmed?

Response: Collegiality is a signature aspect of appellate decisionmaking. The requirement of collective decisionmaking underscores the importance of appellate decisions to the law. It also ensures the impartial and evenhanded enforcement of the rule of law, as well as the stability and durability of judicial decisions. Finally, making appellate decisions based on jointly shared judicial judgments enhances public respect for those rulings. Beyond that, the best decisions are the most informed and carefully thought out decisions, and working through legal questions in a collective, collaborative manner provides the best framework for fully considering and analyzing all of the relevant legal authorities.

Because I would cherish the collegial nature of deliberations and decisionmaking, if confirmed I would approach each case with openness to the perspectives, analyses, and concerns of fellow panel members. I would also endeavor to ensure that all discussions and even disagreements are undertaken in a respectful and conscientious manner.

23. 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: The appropriate temperament for a judge is one of deep respectfulness and openness to the views and insights of others. Respect must always be shown to the parties and litigants, and to the public whom the justice system serves. Respect for colleagues—whether respectful agreement or disagreement—is vital. And respect for the rule of law must always predominate.

24. In general, Supreme Court precedents are binding on all lower federal courts. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Yes, I am fully committed to adhering to precedent of the U.S. Supreme Court and the D.C. Circuit. Any personal views have no place in judicial decisionmaking.

25. 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: The sources to which I would turn in deciding an issue of first impression are: (i) the relevant text, whether constitutional, statutory, or regulatory; (ii) the body of law and related precedent from the Supreme Court and D.C. Circuit; (iii) decisions of other circuit courts or, if relevant, state appellate courts, that involve related issues (while these sources

would not be binding, they might constitute persuasive authority); (iv) arguments of attorneys in the briefs submitted to the court and the cases that they cite; (v) analysis of the issue at oral argument and by judicial colleagues on the case; and (vi) secondary sources deemed appropriate for consideration by precedent, such as the FEDERALIST PAPERS.

26. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?

Response: Decisions of the Supreme Court are binding on lower appeals courts, and I would adhere to such precedent regardless of whether I considered it erroneous. Likewise, a panel of the D.C. Circuit is bound by prior panel decisions within that Circuit. If I believed a panel had erred, my recourse would be to humbly reconsider my own views and to learn from the new decision. If still concerned about the outcome, I could suggest rehearing en banc. But unless and until that occurs, I would dutifully follow circuit precedent. The legal system simply cannot work and cannot provide for the stable, evenhanded administration of justice if judges fail to adhere to binding precedent on those terms.

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

Response: It is the solemn duty of the judicial branch to declare a federal law unconstitutional if, and only if, it transgresses the limits that the Constitution imposes on the legislative power. That is a grave duty that should be undertaken only when necessary. The starting point should be the presumption of constitutionality that applies to all duly enacted laws. In addition, a judge must ensure, at the outset, that the case appropriately presents the constitutional issue by analyzing threshold matters like jurisdiction, standing, and ripeness. Precedent governing the appropriateness of facial versus as-applied challenges should also be followed. Finally, principles of constitutional avoidance, like those outlined by Justice Brandeis in his concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), should be applied when appropriate because they are an important limitation on the judicial power.

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

Response: The best evidence of legislative intent is the text of a statute itself, and that text should control unless it is too ambiguous to answer the question presented. If such ambiguity arises in an administrative-law case, then principles of *Chevron* deference would govern deference to an agency's interpretation of legislative purpose and intent. *See Chevron*,

U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). In addition, any Supreme Court or D.C. Circuit precedent addressing the statute’s meaning, purpose, and operation would be applied to resolve the ambiguity. I would also adhere to Supreme Court and D.C. Circuit precedent governing whether and when legislative history may be considered to answer any remaining textual ambiguity.

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

Response: The Constitution defines the relationship between the people of the United States and their federal government (and, at times, state governments), and thus it is an organic document, the meaning of which should be determined with reference to the authorized domestic sources of authority, which are primarily text, precedent, and original documents like the FEDERALIST PAPERS. Accordingly, international law should not play any role unless text or precedent specifically provide for it, such as might occur with the Law of Nations Clause, U.S. CONST., Article I, § 8, cl. 10.

30. 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: I can provide assurance and evidence of my impartiality and ability to disregard personal views in three ways: First, I have represented a broad spectrum of clients over the course of more than two decades of practice—both prosecutions and criminal defendants; big businesses, small businesses, trade associations, and individual employees; civil rights plaintiffs and civil rights defendants; and every level of government from the federal government to States to local governments to Indian tribes. My personal views, if any, have never played a role in the vigorousness of my advocacy on a client’s behalf, and I would bring that experience to the bench. Second, while I have represented a diverse array of clients, I know that they all have one thing in common: they want nothing more than a fair and impartial judicial process that they can trust. Trust in impartial adjudication is the coin of the realm for the judicial process because, as FEDERALIST 78 explained, the judiciary has “neither force nor will.” I could never betray that trust; I know how vitally important it is to the litigants that come to court each day. Third, were I to be confirmed, I would take the judicial oath which would bind me irrevocably to that complete impartiality to which the people are entitled and that the Constitution requires.

31. 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: A court of appeals judge has no capacity to overrule precedent except as a member of the court's en banc process, or in the rare circumstance when intervening Supreme Court precedent is so directly on point and indistinguishable as to render prior circuit precedent "clearly an incorrect statement of current law." *United States v. Dorcely*, 454 F.3d 366, 373 n.4 (D.C. Cir. 2006). My understanding is that such panel decisions are circulated to the full court prior to publication to ensure concurrence.

If confirmed, when serving as a member of an en banc court, I would adhere to Supreme Court and Circuit precedent governing when departures from stare decisis are and are not permitted, focusing on the effect of unsettling expectations and disturbing reliance interests, the workability of precedent, and the erosion of decisional law undergirding the prior ruling. Mere disagreement with the prior decision's outcome is emphatically not enough to warrant overturning precedent. Stability in the law is far too important for that. Finally, principles of stare decisis are most weighty in the statutory context because the legislature has the capacity to correct any error.

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

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

Response: I have not had any contact with the AAJ or the AAJ Judicial Task Force, and to my knowledge no individual or representative of that group has approached me regarding the nomination on behalf of that organization.

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

Response: No.

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

Response: I reviewed the questions carefully and thoughtfully, undertook needed research, and drafted answers. I submitted those answers for review by a Justice Department attorney in the Office of Legal Policy. I made subsequent revisions and finalized my answers for submission.

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

Response: Yes, these answers are my own true and personal views.

Questions for the Record for all nominees
Senator Ted Cruz
7/10/13 “Judicial Nominations” Hearing
Responses of Patricia Millett

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

Response: While I have the greatest respect for the Supreme Court’s members, I cannot claim familiarity with any particular judicial philosophies the Justices might possess. Nor do I have a judicial philosophy myself, as I have devoted my career to the practicalities of litigating as an advocate for a broad array of clients. I can, however, describe the methodology for adjudication that I would bring to the bench if confirmed. I would build primarily on lessons learned from the judge for whom I clerked, Judge Thomas Tang, who taught me to work each case diligently to find the right answer. I would approach each case with a fully open mind, review carefully the underlying (judicial or administrative) decision, study closely the relevant text (*e.g.*, constitutional, statutory, regulatory, or contractual), examine the record and procedural posture of the case (including verifying jurisdiction, standing, and related considerations), review and analyze relevant case law, study the briefs, listen thoughtfully to the views of attorneys and judicial colleagues, and on that basis come to the right decision to the best of my ability. I would then strive to articulate the reasoning clearly and cogently in opinion writing.

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

Response: I believe that the Constitution should be interpreted with loyalty to text and precedent. The text is an enduring rulebook for governance, while precedent illuminates its application to particular cases. If confirmed, I would adhere to Supreme Court and D.C. Circuit precedent about the role of original text and intent in applying the Constitution to cases before me.

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

Response: As a court of appeals judge, I would have no capacity to overrule precedent except (i) as a member of the court’s en banc process, or (ii) in the rare circumstance when intervening Supreme Court precedent is so directly on point and indistinguishable as to render prior D.C. Circuit precedent “clearly an incorrect statement of current law,” *United States v. Dorcely*, 454

F.3d 366, 373 n.4 (D.C. Cir. 2006). My understanding is that, in the latter circumstance, the panel decision is circulated to the full court prior to publication to ensure concurrence. If I were confirmed, when serving as a member of an en banc court, I would adhere to Supreme Court and D.C. Circuit precedent governing when departures from stare decisis are permitted. That precedent focuses on settled expectations and reliance interests, the proven unworkability of precedent, and the erosion of the authority undergirding the prior ruling. In addition, principles of stare decisis are most weighty in the statutory context because the legislature has the capacity to correct any error.

Explain whether you agree that “State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.” *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).

Response: The statement that “State sovereign interests *** are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power” is, as noted, from the Supreme Court’s decision in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985). The *Garcia* decision and subsequent decisions addressing state sovereignty and constitutional limitations on congressional power, like *New York v. United States*, 505 U.S. 144 (1992), are binding precedent to which I would adhere in adjudicating cases.

Do you believe that Congress’ Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?

Response: The extent of Congress’s Commerce Clause power has been addressed in cases such as *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Gonzales v. Raich*, 545 U.S. 1 (2005), and I would adhere to those precedents in adjudicating cases were I to be confirmed. Those cases spell out three particular categories of activities that fall within Congress’s Commerce Clause power: (1) the use of the channels of interstate commerce, (2) the regulation and protection of the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) activities that, in the aggregate, have a substantial effect on interstate commerce. I note that, in a concurring opinion in *Raich*, Justice Scalia expressed the view that “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.” 545 U.S. at 37 (Scalia, J., concurring in the judgment).

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

Response: The starting point for considering judicially enforceable limits on executive orders and actions is the Supreme Court’s decision in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and in particular the tripartite analysis outlined in Justice Jackson’s concurring opinion. That opinion explains that executive authority is at its greatest when the “President acts pursuant to an express or implied authorization of Congress,” *id.* at 635 (Jackson, J., concurring); and it is at its nadir when the President acts in a manner “incompatible with the expressed or implied will of Congress,” *id.* at 637 (Jackson, J., concurring). In the absence of any congressional direction, the President must act pursuant to an independent executive power or concurrent power. *Id.* at 637. The Supreme Court’s decision in *Medellín v. Texas*, 552 U.S. 491 (2008), also identified a federalism limitation on the Executive’s power in the context of a non-self-executing treaty. Executive actions in the form of regulatory action are subject to substantive statutory limitations on the scope and terms of the legislative delegation, the Administrative Procedure Act, and precedent governing the scope of agency action like *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and *Gonzales v. Oregon*, 546 U.S. 243 (2006). I would adhere to governing Supreme Court and D.C. Circuit precedent in any case raising questions concerning the scope of executive authority.

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

Response: In *Chavez v. Martinez*, 538 U.S. 760 (2003), the Supreme Court reconfirmed that “[o]nly fundamental rights and liberties which are ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty’ qualify for [substantive due process] protection,” *id.* at 775. That is the precedent that I would apply were I to be confirmed. *See also McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 (2010) (a right is fundamental for purposes of incorporation into the Fourteenth Amendment when it is “fundamental to *our* scheme of ordered liberty and system of justice”) (emphasis in original).

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

Response: The Supreme Court has applied heightened scrutiny (whether strict scrutiny or intermediate scrutiny) under the Equal Protection Clause to a narrow set of classifications like race, ethnicity, gender, religion, and illegitimacy. Classifications that trigger strict scrutiny are

those that so rarely have any relevance to the achievement of a legitimate governmental objective that the Supreme Court considers statutory reliance on such a classification to more likely reflect prejudice or stereotyping. Classifications subject to intermediate scrutiny (like gender) are those that are sometimes relevant, but that, in the Supreme Court's judgment, commonly do not provide a legitimate basis for differential treatment. Were I to be confirmed, I would adhere to binding Supreme Court and D.C. Circuit precedent on any such question should it come before me.

Do you “expect that [15] years from now, the use of racial preferences will no longer be necessary” in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: As noted, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court predicted that, by 2028, “the use of racial preferences will no longer be necessary to further the interest” of promoting diversity in public institutions of higher education, *id.* at 343. Were I to be confirmed, the constitutional test that I would apply to analyze the constitutionality of considerations of race in university admissions is the strict scrutiny test prescribed by *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).