Raymond Chen

Deputy General Counsel for Intellectual Property Law and Solicitor

Raymond Chen was named the Deputy General Counsel for Intellectual Property Law and Solicitor in December 2008. In this role, he defends the Under Secretary of Commerce and Director of the USPTO and the agency in court-related procedures relating to intellectual property issues.

As an Associate Solicitor, Mr. Chen spent 10 years defending the USPTO’s decisions in federal court, briefing and arguing numerous cases before the U.S. Court of Appeals for the Federal Circuit. His notable Federal Circuit arguments include In re Bilski, In re Nuijten, and In re Comiskey. Mr. Chen also has provided legal advice to the USPTO on new regulations and examination guidelines.

The Office of the Solicitor provides legal counsel to the Under Secretary and Director and the Commissioners for Patents and Trademarks on intellectual property matters. The office’s primary responsibility is to defend decisions of the Under Secretary and Director, Board of Patent Appeals and Interferences, Trademark Trial and Appeal Board, and examiners in patent and trademark cases. The office also represents the Under Secretary and Director at depositions of USPTO employees, maintains the Solicitor's Law Library, provides legal advice on proposed regulations and correspondence, and monitors publication of USPTO decisions. The Solicitor's Office, in coordination with the Department of Commerce, also provides representation for the Under Secretary and Director in the interagency deliberations on intellectual property matters.

Before joining the USPTO, Mr. Chen served for two years as a Technical Assistant at the U.S. Court of Appeals for the Federal Circuit. Prior to that, he was an associate at Knobbe, Martens, Olson & Bear in Newport Beach, California, where his practice focused on patent prosecution and litigation. Before entering law school, Mr. Chen was a scientist for Hecker & Harriman in Los Angeles, California, specializing in patent prosecution for electronics and computer-related technologies. He received his J.D. from the New York University School of Law and his B.S. in Electrical Engineering from the University of California at Los Angeles.

About the USPTO

Since 1790, the basic role of the United States intellectual property system has remained the same: to promote the progress of science and the useful arts by securing for limited times to inventors the exclusive right to their respective discoveries (Article I, Section 8 of the United States Constitution). Today, the United States Patent and Trademark Office (USPTO) is a federal agency in the Department of Commerce, headquartered in Alexandria, Virginia. Through the issuance of patents, the USPTO encourages technological advancement by providing incentives to invent, invest in, and disclose new technology worldwide. Through the registration of trademarks, the agency assists businesses in protecting their investments, promoting goods and services, and safeguarding consumers against confusion and deception in the marketplace. By disseminating both patent and trademark information, the USPTO promotes an understanding of intellectual property protection and facilitates the development and sharing of new technologies worldwide.
Bernard Knight, General Counsel

Bernard Knight was sworn-in as the USPTO's General Counsel on April 19, 2010. Previously, Mr. Knight served as the agency's first Deputy General Counsel for General Law from 2001 to 2006. Between 2007 and 2010, Mr. Knight was the Acting General Counsel and the Assistant General Counsel at the Department of the Treasury.

As USPTO's General Counsel, Mr. Knight is the principal legal advisor to the Under Secretary of Commerce for Intellectual Property and Director of the USPTO. He supervises the provision of legal advice and court representation on intellectual property and administrative matters for the agency. Mr. Knight is responsible for providing legal advice on patent, trademark, and copyright matters as well as administrative issues such as government contracts, personnel, and budgetary matters. He is one of the lead executives responsible for the development and implementation of the America Invents Act, including drafting legislation, regulations and guidance documents. Mr. Knight lectures extensively on intellectual property law, the importance of intellectual property to the United States' economy and USPTO operations. He has lectured before trade associations such as the American Intellectual Property Lawyers Association, the Intellectual Property Owners Association and the American Bar Association. He has also addressed various topics before representatives from the biotechnology, software and high technology sectors. Mr. Knight represents the USPTO at international conferences and provides legal advice with respect to the USPTO's relationship with various international organizations such as the World Intellectual Property Organization and foreign intellectual property offices. As necessary, he coordinates with the Department of Justice, Department of Commerce and other agencies in developing the U.S. position on major intellectual property cases before the Supreme Court and Courts of Appeals.

While at the Department of the Treasury as the Acting General Counsel, Mr. Knight provided legal and policy advice during the critical period from the beginning of the Obama administration until the selection and confirmation of a new General Counsel. He advised the Secretary and other senior officials on the administration's financial crisis response and managed the work of approximately 2,000 attorneys. Also at the Department of the Treasury, Mr. Knight served as the Assistant General Counsel for General Law, Ethics and Regulation and supervised the Chief Counsels of the United States Mint, the Bureau of Engraving and Printing, and the Alcohol, Tobacco, Tax and Trade Bureau.

He is the recipient of two Department of the Treasury's "Distinguished Service Awards." One was awarded by Secretary Henry M. Paulson in 2009 for extraordinary service in establishing the Troubled Asset Relief Program and for his key managerial role in revitalizing the Treasury Legal Division and the second was awarded by Secretary Timothy F. Geithner in 2010 for his work as Acting General Counsel leading the Department of the Treasury's Office of the General Counsel during the administration's financial crisis response.

Mr. Knight has also served as a Senior Trial Attorney with the Department of Justice's Tax Division where he received Outstanding Attorney Awards for his achievements. Before joining the Department of Justice, Mr. Knight worked at the law firms of Vinson and Elkins in Houston, and Hopkins and Sutter in Chicago. As an Adjunct Professor of Law at DePaul University in Chicago, Mr. Knight taught several classes in the Master of Laws in Taxation program.

Mr. Knight received his juris doctorate degree from the University of Southern California in Los Angeles, master degrees in developmental psychology and clinical community counseling from Johns Hopkins University in Baltimore, and a bachelor's degree in business administration from Drake University in Des Moines, Iowa.

Raymond T. Chen, Deputy General Counsel for Intellectual Property Law and Solicitor

Raymond Chen was named the Deputy General Counsel for Intellectual Property Law and Solicitor in December 2008. In this role, he defends the Under Secretary of Commerce and Director of the USPTO and the agency in court proceedings relating to intellectual property issues.

As an Associate Solicitor, Mr. Chen spent 10 years defending the USPTO's decisions in federal court, briefing and arguing numerous cases before the U.S. Court of Appeals for the Federal Circuit. His notable cases include In re Bliksi, In re Nuijten, and In re Comiskey. Mr. Chen has also provided legal advice to the USPTO on new regulations and examination guidelines.

The Office of the Solicitor provides legal counsel to the Under Secretary and Director and the Commissioners for Patents and Trademarks on intellectual property matters. The office's primary responsibility is to defend decisions of the Under Secretary and Director, Board of Patent Appeals and Interferences, Trademark Trial and Appeal Board, and examiners in patent and trademark cases. The office also represents the Under Secretary and Director at depositions of USPTO employees, maintains the Solicitor's Law Library, provides legal advice on proposed regulations and correspondence, and monitors publication of USPTO decisions. The Solicitor's Office, in coordination with the Department of Commerce, also provides representation for the Under Secretary and Director in the interagency deliberations on intellectual property matters.

Before joining the USPTO, Mr. Chen served for two years as a Technical Assistant at the U.S. Court of Appeals for the Federal Circuit. Prior to that, he was an associate at Knobbe, Martens, Olson & Bear in Newport Beach, California, where his practice focused on patent prosecution and litigation. Before entering law school, Mr. Chen was a scientist for Hecker & Harriman in Los Angeles, California, specializing in patent prosecution for electronics and computer-related technologies.
James Payne, Deputy General Counsel for General Law

James Payne has served as Deputy General Counsel for General Law since November 2011. The Office of General Law provides legal counsel on the administration and management of the agency, including on financial, employment and labor matters, as well as on administrative law and legislative matters. The Office also represents the agency in litigation before administrative tribunals.

Mr. Payne has served as lead counsel successfully resolving over 200 affirmative and defensive litigation cases. The cases commonly involved technical and scientific experts. He has frequently spoken at and chaired conferences on litigation practice. He has authored five statutes and testified three times before Congress. He was registered as a patent attorney in 2006.

Mr. Payne comes to the PTO after twelve years at the U.S. Department of Justice, where he served as Senior Counsel in the Environment and Natural Resources Division. He was lead counsel for general law, policy and legislative matters and for special litigation. When the Deepwater Horizon oil platform sank in the Gulf of Mexico, he led a team of 60 attorneys across the Government who supported the emergency response with coordinated legal advice on an expedited basis at the request of the White House. He led a similar team for the Japan nuclear crisis. He also led an interagency and White House team that developed the Memorandum of Understanding on Environmental Justice, in which 17 department Secretaries and agency heads agreed to carry out strategic plans to improve health and environmental protection in minority and low-income communities. He received nine outstanding attorney awards, including the Attorney General’s Award for Excellence in Information Technology for leading the U.S. Department of Justice and other departments and agencies in improving electronic discovery practices in civil litigation and criminal prosecutions.

Previously, Mr. Payne served as an Assistant Attorney General in the Environmental Enforcement Section of the Ohio Attorney General’s Office. He authored an 18-State amicus brief adopted by the U.S. Supreme Court in its leading constitutional case on state sovereignty, New York vs. U.S., and led a nationwide team of State litigators who successfully brought to the Court a series of cases in this area. He received the National Association of Attorneys General’s highest recognition, the Marvin Award.

Mr. Payne received from Dartmouth College an A.B. with a major in Engineering Sciences. His J.D. is from Ohio State University. As a law student he founded the Ohio State Journal on Dispute Resolution, which the American Bar Association adopted as its official journal promoting use of mediation and other forms of "alternative dispute resolution" to avoid litigation.

William R. Covey, Deputy General Counsel and Director for Office of Enrollment and Discipline

William R. Covey is the Deputy General Counsel and Director of the Office of Enrollment and Discipline (OED). In this role, he manages an office of attorneys, paralegals and support staff which is responsible for registering patent attorneys and agents to practice before the USPTO, overseeing the Law School Clinic Certification Program, and investigating grievances alleging misconduct by practitioners authorized to practice before the USPTO. In furthering these objectives, OED evaluates the credentials of applicants for registration, develops and administers a registration examination to determine if applicants have the necessary knowledge of patent law and practice to render patent applicants valuable service, maintains a public roster of attorneys and agents recognized to practice before the Office in patent matters, and conducts surveys of active registered practitioners. Additionally, OED has implemented the USPTO Rules of Professional Conduct.

Prior to his appointment, Mr. Covey served as the USPTO's Deputy General Counsel for the Office of General Law for over four years. Mr. Covey was appointed to the Senior Executive Service in 2007. Before joining the USPTO in 2000, Mr. Covey served at the Pentagon in the U.S. Army's Office of the General Counsel. He serves in the Army Reserve, and has completed combat tours in Iraq (2007) and Afghanistan (2011). He served as Deputy Legal Counsel to the Chairman, Joint Chiefs of Staff, and is currently assigned to the Office of the Army General Counsel.

Mr. Covey received his undergraduate degree from Fordham University (Magna Cum Laude; Phi Beta Kappa) and his J.D. from Fordham University School of Law in 1991. He graduated from Harvard University's John F. Kennedy School of Government (Senior Executive Fellowship) in 2005 and received a M.S. degree in Strategic Studies from the U.S. Army War College in 2010.
Raymond T. Chen

From Wikipedia, the free encyclopedia


Biography  [edit]

Chen was born in 1968 in New York City. He received his Bachelor of Science degree in electrical engineering in 1990, from the University of California, Los Angeles and his Juris Doctorate in 1994 from the New York University School of Law. He joined the intellectual property law firm of Knobbe, Martens, Olson & Bear in Irvine, California. He prosecuted patents and represented clients in intellectual property litigation at that firm. From 1996 to 1998, he served as a technical assistant at the United States Court of Appeals for the Federal Circuit, performing the functions of a staff attorney. In 1998, he joined the United States Patent and Trademark Office as an assistant solicitor and was promoted to Solicitor in 2008. He represents the USPTO before the Federal Circuit, personally arguing twenty cases, including In re Bilski, In re Nuijten, and In re Comiskey.[1] He issues guidance to patent examiners, advises the agency on legal and policy issues and helps promulgate regulations. He has co-chaired the Patent and Trademark Office Committee of the Federal Circuit Bar Association and is a member of the Advisory Council for the Federal Circuit.[2][3]

Nomination to the Federal Circuit  [edit]

On February 7, 2013, President Obama nominated Chen to serve as a United States Circuit Judge of the United States Court of Appeals for the Federal Circuit, to the seat vacated by Judge Richard Linn who took senior status on October 31, 2012. His nomination was reported by the Senate Judiciary Committee on May 16, 2013, by voice vote.[4][5]

References  [edit]

1. ^ USPTO bio for Raymond T. Chen
2. ^ Nomination announcement from whitehouse.gov
3. ^ Senate Judiciary Committee Nomination Questionnaire
4. ^ Nomination announcement from whitehouse.gov
5. ^ Senate Judiciary Committee

This American law-related biographical article is a stub. You can help Wikipedia by expanding it.
Raymond T. Chen - PENDING

On February 7, 2013, President Obama nominated Raymond T. Chen to the United States Court of Appeals for the Federal Circuit. Chen currently serves as the Deputy General Counsel for Intellectual Property Law and Solicitor for the United States Patent and Trademark Office (USPTO), a position he has held since 2008. President Obama has said that Raymond T. Chen has "displayed exceptional dedication to public service throughout [his] career[ ]," stating that he is "honored to nominate [Chen] today to serve the American people on the United States Court of Appeals" and he is "confident that [Chen] will be [a] judicious and esteemed addition[] to the Federal Circuit."
Response of Raymond T. Chen  
Nominee to be United States Circuit Judge for the Federal 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: My judicial philosophy would be best characterized as an unwavering commitment to the rule of law. Regardless of personal views, a judge is bound by the applicable statutes and precedent, and must apply the law in a consistent, impartial manner. Furthermore, an appellate judge may not remake the record created below or substitute his views for those of the lower tribunal on a fact finding.

Our constitutional system is based on a separation of powers between the branches of government, and the judiciary’s role in reviewing the decisions of the democratically elected branches is a limited one. Moreover, it is a judge’s role to faithfully apply the laws enacted by Congress regardless of a judge’s personal 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: It is essential for our administration of justice and public confidence in the court system that judges treat all parties equally, fairly, and respectfully. I believe that my professional reputation that I have developed while working in both the government and private practice reflects a commitment to those principles. If confirmed, I would continue to adhere to those principles and apply the law in a neutral, impartial manner.

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: The integrity of our judicial system depends on predictability and stability in the rule of law. It is therefore imperative that judges bind themselves to the doctrine of stare decisis. If confirmed as a circuit court judge, I would be bound by all Supreme Court precedents as well as prior panel and en banc decisions by the Federal Circuit. Only in exceptional circumstances should an appellate court overturn its prior precedent through en banc review.
Response of Raymond T. Chen
Nominee to be United States Circuit Judge for the Federal Circuit
to the Written Questions of Senator Chuck Grassley

1. At your confirmation hearing I asked questions pertaining to the Whistleblower Protection Act (WPA). I appreciated your taking the time to familiarize yourself with some of these issues prior to the hearing. While in White v. Department of Air Force, 391 F.3d 1377 (2004), the Federal Circuit appears to have backed off of the “irrefragable proof” standard annunciated in LeChance v. White, 174 F.3d 1378 (1999), I have concerns that the irrefragable proof standard has not been completely extinguished.

a. In White, the Federal Circuit used a formulation of gross mismanagement that could cause confusion. The Court held that “for a lawful agency policy to constitute ‘gross mismanagement,’ an employee must disclose such serious errors by the agency that a conclusion the agency erred is not debatable among reasonable people.” In your understanding of White, are disclosures of “gross mismanagement” subject to a higher standard than the reasonable belief standard applied to other disclosures? Please review any applicable precedent in addressing this question.

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

In White, which dealt with whether an agency policy constituted “gross mismanagement,” the Federal Circuit articulated the test for a protected disclosure as follows: “could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence gross mismanagement?” Id. at 1381 (internal quotation marks omitted). The court noted that legitimate differences in opinion as to the wisest policy choice for an agency do not rise to the level of “gross mismanagement.” The court went on to hold that a disputed, but lawful, agency
policy constitutes “gross mismanagement” when the error in policy “is not debatable among reasonable people.” *Id.* at 1382.

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

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

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

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

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

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

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

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

Response: A judge should be respectful, patient, and courteous to litigants and fellow judges. A judge should also maintain an open-mind and fully understand and weigh the competing points of view before rendering a decision. I believe I meet this standard.
4. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Yes.

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

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

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

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

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

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

8. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?

Response: An appellate court is bound by its prior panel and en banc decisions, which the court can overrule only when it is sitting en banc. En banc review may be warranted in rare and exceptional circumstances, such as when there are conflicting decisions in the court’s precedent, or when there is strong evidence that the court’s precedent is based on a misreading of a statute. Also, an appellate court must overturn its precedent if an intervening Supreme Court decision requires it to do so.
9. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?

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

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

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

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

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

12. Do you think that collegiality is an important element of the work of the Federal Circuit? Please explain how you would approach your work and interaction with colleagues on the Court.
Response: Yes, I believe collegiality is one of the most important attributes of a circuit judge. If confirmed, I would approach my work in the same way I have conducted myself throughout my career, by carefully considering the views of the other judges on the same panel, engaging in respectful discussions, and striving for consensus.

13. At your hearing, you and Senator Lee had a conversation about the law providing a “right answer” in cases. At a speech in 2005, Justice Scalia said, “I think it is up to the judge to say what the Constitution provided, even if what it provided is not the best answer, even if you think it should be amended. If that’s what it says, that’s what it says.”

a. Do you agree with Justice Scalia?

Response: Yes, I agree. I understand Justice Scalia to be explaining that a judge’s role is to faithfully apply the law as it is, not as it should be in the eyes of the judge.

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

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

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

Response: No. When determining what the law is, a judge must always avoid injecting his or her own personal policy preferences. The legislature retains the role of designing laws based on its policy judgments, and a judge may not second-guess those judgments.

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

Response: My philosophy is that constitutional interpretation follows the same mode of analysis regardless of whether the challenged statute or regulation is new or old. I would follow any controlling Supreme Court or Federal Circuit precedent on the particular issue. If no controlling precedent exists, I would look to the text of the applicable
constitutional provision to discern what its plain meaning is and also consider it in the context of the Constitution as a whole. I would also follow the established methodology for interpreting the Constitution set forth by the Supreme Court. If any other circuit courts have opined on the matter, I would also consult those decisions for their persuasive value.

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

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

16. In Brown v. Entertainment Merchants Association., Justice Breyer supplemented his opinion with appendices comprising scientific articles on the sociological and psychological harm of playing violent video games. When, if ever, do you think it is appropriate for appellate judges to conduct research outside the record of the case?

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

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

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

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

Response: Yes.
Response of Raymond T. Chen
Nominee to be United States Circuit Judge for the Federal Circuit
to the Written Questions of Senator Ted Cruz

Judicial Philosophy

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

Response: My judicial philosophy would be best characterized as an unwavering commitment to the rule of law. Regardless of personal views, a judge is bound by the applicable statutes and precedent, and must apply the law in a consistent, impartial manner. Furthermore, an appellate judge may not remake the record created below or substitute his views for those of the lower tribunal on a fact finding.

I have not sufficiently analyzed the philosophies of the Supreme Court justices who served on these particular Courts to single out any one as analogous to my own conception of a judge’s role. At my hearing, I identified Judge Learned Hand as a judicial role model because of his insistence on judicial restraint as well as his contributions to patent law.

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

Response: When interpreting the Constitution, a court applies the established tools of interpretation set forth by the Supreme Court. In several cases, including District of Columbia v. Heller, 554 U.S. 570 (2008), the Supreme Court has recognized the need to interpret the terms in the Constitution as they were understood at the time of the Constitution’s ratification.

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: If I am fortunate enough to be confirmed as a Circuit Judge for the Federal Circuit, I would be bound by Supreme Court precedent and could not overrule it. I would also be bound by prior panel and en banc decisions of the Federal Circuit, which that court could overrule only when it is sitting en banc. Exceptional circumstances may warrant en banc review, such as when there are conflicting decisions in the court’s precedent, or when there is strong evidence that the court’s precedent is based on a misreading of a statute. Also, I would follow any intervening Supreme Court decision that overruled Federal Circuit precedent.

Congressional Power

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
Response: In *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985), the Supreme Court explained that the Constitution and the structure of the Federal government protect the States’ sovereign powers. If confirmed, I would follow *Garcia*, as I would any Supreme Court precedent, regardless of my personal views.

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

Response: The Commerce Clause permits Congress to regulate three areas: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce. *See, e.g.*, *Perez v. United States*, 402 U.S. 146, 150 (1971). If called upon to determine whether a statute exceeds Congress’s Commerce Clause authority, I would faithfully follow all applicable precedent, including *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). In both cases, the Supreme Court ruled that Congress lacked the authority to regulate certain types of non-economic activity.

**Presidential Power**

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

Response: In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court held that the President’s ability to issue an executive order “must stem either from an act of Congress or from the Constitution itself.” *Id.* at 585. Justice Jackson’s concurrence provided a framework that courts continue to apply in assessing the validity of an executive order. *Id.* at 635-38. If confirmed, I would follow that precedent and other Supreme Court and Federal Circuit precedent outlining the limits of Presidential power.

**Individual Rights**

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

Response: The Supreme Court held that the Due Process Clause protects fundamental rights and liberties that are “objectively, ‘deeply rooted in this Nation’s history and tradition,’” and “‘implicit in the concept of ordered liberty,’” such that ‘neither liberty nor justice would exist if they were sacrificed[,]” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Included among those fundamental rights are the right to marry, to have children, to marital privacy, and to bodily integrity. *Id.* at 720.
When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: Under the Equal Protection Clause, strict scrutiny applies “when a statute classifies by race, alienage, or national origin.” City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985). The same is true for state laws that infringe personal rights protected by the Constitution. Id. Intermediate scrutiny applies to classifications regarding gender and illegitimacy, because such classifications “bear[] no relation to ability to perform or contribute to society.” Id. at 441.


Response: I do not have a personal view or expectation as to whether, within a certain time frame, the use of racial preferences in public higher education will continue to be necessary. If confirmed, and called upon to confront this issue, I would follow Grutter, as I would with any binding precedent, regardless of my own views.