

Response of Ketanji B. Jackson
Nominee to be United States District Judge for the District of Columbia
to the Written Questions of Senator Chuck Grassley

- 1. Please identify the provision in the Fair Sentencing Act of 2010 that granted authority for the United States Sentencing Commission to give retroactive effect to parts of the Commission's permanent amendment to the federal sentencing guidelines that implements the Act.**

Response: The Commission's authority—and duty—to consider giving retroactive effect to the Commission's permanent amendment to the federal sentencing guidelines arose not from the Fair Sentencing Act itself but from another statute passed by Congress, Title 28 section 994(u). Sections 2 and 3 of the Fair Sentencing Act reduce the statutory penalties for certain crack cocaine offenses, and section 8 requires the Commission to make conforming reductions in the sentencing guidelines. As a result, the Commission was required to consider giving retroactive effect to those guideline amendments under section 994(u), which the Commission has long interpreted to require it to consider retroactivity whenever it reduces the term of imprisonment recommended in a guideline.

- 2. The intent of the Fair Sentencing Act of 2010 was that new sentencing guidelines were to be applied only prospectively. As a Commissioner and Vice-Chair of the Sentencing Commission, what led you to believe that Congress intended a retroactive application?**

Response: The Fair Sentencing Act of 2010 is silent on the matter of retroactivity. By contrast, Title 28 section 994(u) expressly states that “[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.” The bi-partisan members of the Commission unanimously determined that, because no provision in the Fair Sentencing Act abrogates the Commission's duties under § 994(u), Congress intended for the Commission to consider the circumstances, if any, and the extent of any retroactive application of the FSA guideline amendments.

- 3. In arriving at your decision to support retroactive application, what weight did you give to concerns regarding administrative and financial burdens that would result from retroactive application?**

Response: Whether or not retroactive application of a guideline amendment will result in administrative and/or financial burdens is one of the three primary factors that the

Commission considers when it undertakes the required retroactivity analysis. At the Commission's hearing on the retroactivity of the FSA amendments, judges, prosecutors and defense counsel testified regarding their experience with administering crack offender retroactivity applications in 2007, and every witness who spoke to this issue testified that the process was not administratively or financially burdensome. I gave great weight to this testimony in arriving at my decision to support retroactivity.

4. The Sentencing Commission determined that approximately 12,000 prison inmates would be released because of retroactive application. As a Commissioner, what weight did you give to this factor in arriving at your vote to support retroactive application of the amendment?

Response: The Commission conducted a detailed data analysis regarding the retroactive effect of the FSA guideline amendments and estimated that approximately 12,000 inmates would be eligible to apply for a sentence reduction if the FSA guideline amendments were made retroactive. The submission of such an application does not in itself result in the release of the applying inmate; rather, it permits the sentencing judge to review the individual inmate's sentence and it requires the judge to consider various factors such as the risks to public safety when deciding whether a reduction in the term of imprisonment is appropriate in a particular case. As a Commissioner, I gave great weight to the Commission's data analysis and the fact that a judge would have to make a specific determination regarding the appropriateness of a sentence reduction in each case in arriving at my vote to support retroactivity.

5. Please explain how the release of 12,000 prisoners, with high recidivism rates, helps to preserve public safety.

Response: The release of an inmate who has a high risk of recidivism does not help to preserve public safety; consequently, no prisoners were automatically released as a result of the Commission's retroactivity determination. Instead, retroactive application of the FSA guideline amendments permitted certain inmates who had been convicted of crack cocaine offenses to seek a reduced sentence by submitting an application for a penalty reduction to the sentencing court. Under the procedures set forth in Title 18 section 3582(c)(2) and U.S.S.G. § 1B1.10, the sentencing courts that received such applications were required to make individual determinations regarding the appropriateness of a sentence reduction after considering many specific factors, including the potential impact on public safety as a result of reducing an inmate's term of imprisonment.

6. Given that the Sentencing Commission previously reduced crack cocaine sentences – in 2007 without Congressional approval – why do you believe it is fair to give these defendants a sentencing windfall by granting another opportunity for further sentence reductions?

Response: In 2007, the Commission unanimously determined that crack cocaine penalties under the guidelines should be reduced by two levels and that this sentence reduction should apply retroactively. The Fair Sentencing Act subsequently reduced the statutory mandatory minimum penalties and corresponding guidelines for crack cocaine offenses by an even greater amount. The defendants whose sentences were previously reduced by only two levels pursuant to the Commission's action do not receive a windfall as a result of retroactivity; rather, they are provided the same opportunity as other eligible inmates to apply to the sentencing court for an individualized determination regarding the appropriateness of the application of the lower guideline penalties prescribed in the Fair Sentencing Act.

7. Please provide to the Committee any prepared statements, or transcripts of statements you made at any hearings, public meetings, or Commission business meetings regarding crack cocaine sentencing.

Response: There were four occasions in which I participated in public Commission hearings or meetings that considered crack cocaine sentences, all of which were included in the questionnaire that I submitted to the Committee in connection with my nomination:

On October 15, 2010, the Commission held a public meeting concerning the Commission's adoption of a temporary emergency amendment implementing the Fair Sentencing Act. There is no transcript or video of that meeting. The minutes indicate only that I "noted that the proposed amendment is a temporary emergency amendment that seeks to adhere closely to congressional intent and that the Commission will have the opportunity to consider the §2D1.1 guideline in the course of this amendment cycle."

On June 30, 2011, I made a statement at the public Commission meeting in which the Commission unanimously voted to apply the final Fair Sentencing Act guideline amendments retroactively. My Committee questionnaire included a link to the video from this meeting, as well as the meeting minutes. In addition, here is a link to the transcript, which is posted on the Commission's website:

http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110630/Meeting_Transcript.pdf.

On March 17, 2011, and June 1, 2011, I questioned witnesses during the Commission's public hearings related to the enactment of the Fair Sentencing Act amendments and retroactivity. As noted in my Committee questionnaire, the hearing transcripts are available on the Commission's website at the following links:

http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110317/Hearing_Transcript.pdf, and
http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Hearing_Transcript.pdf.

- 8. Do you agree that the sentencing guidelines, if applied properly and followed faithfully, can go a long way to assure predictability and uniformity in sentencing?**

Response: Yes.

- 9. If you are confirmed, how would you apply the sentencing guidelines?**

Response: Although the sentencing guidelines are now advisory, sentencing judges must consider the guidelines and policy statements pursuant to 18 U.S.C. § 3553(a)(4) and (a)(5), and the Supreme Court has repeatedly emphasized that sentencing judges must properly calculate and consider the guidelines as the first step of the federal sentencing process. *See, e.g., Rita v. United States*, 127 S. Ct. 2456, 2465 (2007). The guidelines are “the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions,” *Gall v. United States*, 128 S. Ct. 586, 594 (2007), and they are both “the starting point and the initial benchmark” of federal sentencing. As a Commissioner on the Sentencing Commission, I am well aware of the careful process by which the sentencing guidelines have been developed and the importance of the guidelines in promoting nationwide consistency and uniformity in sentencing. If confirmed as a judge, I will give great weight to the sentencing guideline range in every criminal case.

- 10. At your hearing, I asked you about your understanding of the current state of law regarding those detained as a result of the United States Global War on Terrorism. Now that you have had time to review that issue, please provide a response.**

Response: The law regarding individuals who have been detained by the United States pursuant to the global war on terrorism is a complicated and fact-specific body of law that has been developing by federal statute and in the cases of the Supreme Court and the D.C. Circuit over the past decade. I have not handled detainee cases in many years and have no expertise in this area of the law, but I understand that the Supreme Court has

interpreted federal statutes to provide the Executive Branch with the authority to detain unlawful enemy combatants indefinitely. In *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), the Court concluded that the detention of unlawful enemy combatants, “for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.” Moreover, the *Hamdi* Court signaled that detained enemy combatants may be tried by “appropriately authorized and properly constituted military tribunals,” 542 U.S. at 538, and Congress subsequently enacted the Military Commissions Act of 2006, P.L. 109-366, 120 Stat. 2600 (2006), to “establish[] procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States.” If confirmed and presented with a case involving these issues, I would carefully research the applicable statutes and precedents and faithfully apply the law, as I would in any other case.

a. How will you approach terrorism/detainee issues, if confirmed?

Response: It is my understanding that the judges of the U.S. District Court of the District of Columbia have decided that new terrorism/detainee cases involving detainees held at the U.S. facility in Guantanamo Bay will only be assigned to judges who have previously handled these matters. To the extent that I am confirmed and assigned a terrorism/detainee case in another context, I will research the law carefully and apply it faithfully, giving full consideration and effect to the applicable federal statutes and the terrorism/detainee-related precedents of the Supreme Court and the D.C. Circuit.

b. Will you recuse, if assigned terrorism/detainee cases?

Response: I will review the recusal standards established in the judicial code of conduct in all cases, and would recuse myself in any case that warrants such action under those standards, including any terrorism case.

11. You have participated in events involving the American Constitution Society for Law and Policy. There is nothing wrong with participation or membership in such groups. Peter Edelman, as chair of the board of directors for American Constitution Society for Law and Policy, indicated that a goal of the organization is “countering right-wing distortions of our Constitution.” Do you agree with this sentiment? If confirmed, would you follow what Mr. Edelman has described as a “progressive perspective of the constitution”?

Response: I was asked to be a panelist at a single event sponsored by the American Constitution Society. I have never been a member of the organization, nor was I previously aware of any statements that the organization’s leaders have made regarding

the organization's goals or constitutional views. Given my limited involvement with this organization, I cannot opine on any characterization of its goals. If confirmed, I would follow the text of the Constitution as interpreted by the Supreme Court and the D.C. Circuit.

12. What is your view of the role of the courts on improving the lives of everyday citizens?

Response: Courts have a role in making sure that everyday citizens have access to justice. To this end, judges should convey respect in all of their interactions with the litigants and should ensure that the courtroom is a welcoming environment—one in which everyday citizens are encouraged to make their arguments to the best of their ability, and the presented claims are fully heard and fairly considered. Courts should decide pending matters expeditiously for the benefit of the parties, also should also encourage the local bar to provide representation for any litigant who wants counsel, regardless of their ability to pay.

13. Do you believe, as Delegate Norton testified, that the citizens of her district are “denied many of the ordinary rights enjoyed by other Americans.” If so, what would be your role as a District Judge for the District of Columbia, to identify and guarantee those rights?

Response: If confirmed, my role as a judge would be to decide cases and controversies that come before me, based only on the law as set forth in federal statutes and handed down by the Supreme Court and the D.C. Circuit.

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

Response: The most important attribute of a judge is professional integrity, which includes reverence for the rule of law, total impartiality, and the ability to apply the law to the fairly determined facts of the case without bias or any preconceived notion of how the case is supposed to turn out. I believe that I possess this attribute.

15. 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 treat everyone who appears before her with dignity and respect. She should have a calm, even-tempered, and thoughtful demeanor, and rule efficiently and decisively. Most importantly, a judge must be an effective communicator, both orally and in writing, so that the parties understand what has been decided and what to expect going forward. I believe that I meet this standard.

16. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Please describe your commitment to following the precedents of higher

courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: If confirmed, I would be committed to following the precedents of the Supreme Court and the D.C. Circuit, even if I personally disagreed with them.

17. 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: In cases of first impression involving the interpretation of a statute, I would look at the plain language of the statute, the structure of the statutory provision, and any precedents regarding analogous legal provisions or similar issues. I would employ standard canons of statutory interpretation and interpret the statute consistent with existing precedents addressing related questions. Under all circumstances, I would studiously review the opinions of the Supreme Court, the D.C. Circuit, and other federal courts of appeals that address similar situations.

18. 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: I would apply any and all decisions of the Supreme Court or the D.C. Circuit, even those that I personally believed were rendered erroneously.

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

Response: A federal court must respect Congress and its enactments, and should only declare a federal statute unconstitutional in the narrowest of circumstances. Such circumstances include when a statute has been enacted without authority, based on clear and controlling precedents established by the Supreme Court or a Court of Appeals.

20. 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?

Response: No, it is not proper for judges to rely on foreign law or the views of the “world community” in determining the meaning of the Constitution.

21. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?

Response: Managing mounting caseloads is a primary responsibility of a judge and is essential to stemming excessive litigation costs. Judges must actively engage in the supervision of cases and settlements, hold regular status hearings, streamline discovery,

rule on dispositive motions efficiently, and utilize the time and talents of magistrate judges. If confirmed, I would consider it my obligation to manage my cases, and I would employ all of these tools, and others, to achieve that goal.

22. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: Yes, I believe that district court judges have an obligation to monitor and control the pace and conduct of the matters that are assigned to them. A federal judge can control his or her docket by paying careful attention to progression of cases, holding regular status hearings, issuing case management orders, ruling definitively and efficiently on dispositive motions, and working in concert with magistrate judges. If confirmed, I would take all of these steps, and others, to control my docket.

23. You have spent your entire legal career as an advocate for your clients, or in public policy positions. 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, I will decide cases and controversies by applying the law to the fairly determined facts in a straightforward, neutral manner. For guidance, I will look to all relevant legal authorities, including the Constitution and the plain language of federal statutes, as well as the binding precedents of the Supreme Court and the D.C. Circuit. The most difficult part of the transition from criminal justice policy is likely to be handling the variety of subject matters and issues that are presented to a district court judge.

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

Response: I reviewed the questions posed and drafted the answers on my own and without assistance. I then submitted my draft answers to an official at the Department of Justice, who discussed them with me. Shortly thereafter, I finalized the answers and forwarded them to the Department for submission to the Committee.

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

Response: Yes.