

Response of Mark A. Barnett
Nominee to be a Judge of the United States Court of International Trade
to the Written Questions of Senator Chuck Grassley

- 1. Please describe factors you will take into account as you consider the appropriate level of deference the Court of International Trade (CIT) should give to the U.S. International Trade Commission (ITC) on questions of statutory interpretation, particularly in appeals of determinations in antidumping and countervailing duty cases.**

Response: If I am confirmed as a Judge of the United States Court of International Trade, on questions of statutory interpretation, I would give deference to the United States International Trade Commission (ITC) consistent with the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al.*, 467 U.S. 837 (1984). If the statute is unambiguous, I would apply the statute and decide the case in accordance with the unambiguously expressed intent of Congress. If the statute is ambiguous, I would affirm an ITC interpretation of the statute if that interpretation was based on a permissible construction of the statute. In evaluating the permissibility of the interpretation, I would follow applicable precedent from the Supreme Court and the Court of Appeals for the Federal Circuit.

- 2. Please describe your view on the appropriate level of deference the CIT should give to the ITC on questions of fact when presented with "Substantial Evidence" questions and challenges. What will be your approach to such challenges, and what factors would you consider in such cases?**

Response: If confirmed, on questions of fact, I would defer to the ITC when their decision was supported by substantial evidence. In so doing, it would not be my role to reweigh the evidence that was before the ITC, but to apply the standard of review required by statute, as interpreted in precedent of the Supreme Court and the Court of Appeals for the Federal Circuit. In accordance with that precedent, I would examine whether the evidence and reasonable inferences from the record evidence support the agency's findings and I would affirm an agency finding consistent with such evidence, even when the evidence supports the possibility of drawing two inconsistent conclusions.

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

Response: In my view, the most important attribute of a judge is a commitment to the rule of law and the application of that law in a fair and impartial manner. A judge should not place his or her personal beliefs or views above the law. I believe that I possess the commitment to the rule of law that would allow me to be a fair and impartial judge.

- 4. 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 most important elements of judicial temperament are being fair, diligent, open-minded, and respectful and courteous to the litigants appearing before you. Such elements help to foster respect for the law and the judicial system. I believe that I possess the traits necessary to have the appropriate temperament of a good judge.

- 5. In general, Supreme Court precedents are binding on all lower federal courts, and Federal Circuit precedents are binding on the Court of International Trade. 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.

- 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 confirmed, in deciding a case of first impression, I would first examine the text of the statute to determine if the text was clear. If the text of the statute was unclear or ambiguous, in an appeal of an agency interpretation of the statute, I would determine whether the agency interpretation was permissible, consistent with the standards articulated in *Chevron* and other precedent, as appropriate. In other cases not involving an appeal of an agency interpretation, if the text of the relevant statute was not clear, I would next examine the legislative history, relevant precedent, and decisions of other federal or state courts for relevant, persuasive authority.

- 7. 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 the binding precedent of the Supreme Court or the Court of Appeals in rendering a decision, regardless of my personal beliefs about that precedent.

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

Response: Properly enacted statutes are presumed to be constitutional. A federal court should only declare a statute to be unconstitutional if Congress exceeded its constitutional authority or contravened a constitutional provision in enacting the statute.

- 9. Do you agree with the Federal Circuit's decision in *SFK USA, Inc. v. U.S. Customs and Border Protection*, 556 F.3d 1337 (2009) regarding the constitutionality of the Byrd Amendment to the Continued Dumping and Subsidy Offset Act (CDSOA) of 2000? What will be your approach in cases regulating commercial speech?**

Response: The Federal Circuit's decision in *SKF USA, Inc. v. U.S. Customs and Border Protection* is a precedential decision binding on the Court of International Trade. If I am confirmed as a Judge of the United States Court of International Trade, that precedent would be binding on me and I would follow it. My approach to cases regulating commercial speech, as in all cases, would be to follow relevant precedent from the Supreme Court or the Court of Appeals for the Federal Circuit.

- 10. Please describe your understanding of the workload of the Court of International Trade. If confirmed, how do you intend to manage your caseload?**

Response: The Court of International Trade handles a steady, substantial caseload largely consisting of appeals of agency determinations in unfair trade cases and civil actions pertaining to the classifications and valuation of imported merchandise. If I am confirmed, I will consult with my colleagues on the court to understand the best practices they have developed for management of their caseloads. I will incorporate those best practices into my approach and rule on motions and issue decisions promptly. I will also seek to use my experience in the international trade field to facilitate a prompt resolution of the case.

- 11. 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: I believe that judges do have a role in controlling the pace and conduct of litigation. If confirmed, I would use status conferences and scheduling orders and enforce reasonable deadlines to control my docket, in addition to the approach described in response to Question 10.

- 12. Please describe with particularity the process by which these questions were answered.**

Response: I received these questions on September 26, 2012. I prepared these responses and provided them to the Department of Justice on September 30, 2012. After reviewing them

with a representative of the Department of Justice, I authorized the Department of Justice to submit them to the Senate Judiciary Committee on my behalf.

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

Response: Yes