

Response of Pamela Ki Mai Chen
Nominee to be United States District Judge for the Eastern District of New York
to the Written Questions of Senator Chuck Grassley

- 1. You were a member of the Criminal Justice Act Felony I Appointment Committee which issued a report proposing criteria for appointment of attorneys to handle Felony I cases. I am interested in how this experience may influence you, if confirmed as a judge. Specifically,**

- a. Please explain the problem that the Committee was trying to solve with their proposals.**

Response: To the best of my recollection, the Committee was formed by the District of Columbia Superior Court to identify professional criteria that could be used to determine the eligibility of attorneys appointed by the District of Columbia Superior Court to represent defendants in cases involving the most serious offenses under District of Columbia penal law.

- b. What was your role in writing the recommendations?**

Response: I was one of five attorneys selected by the District of Columbia Superior Court to participate in the Committee. As a committee member, I discussed and eventually agreed with the other committee members on a set of professional criteria for court-appointed defense counsel in Felony I cases. These recommendations were set forth in a report to the District of Columbia Superior Court in 1995.

- c. In your view, why was the defense bar unable to regulate this by themselves?**

Response: I have no personal view on this issue, nor was I or the Committee asked to formulate or express a view on this issue. Notably, four of the five members on the Committee were practicing members of the defense bar.

- d. As a judge, would you be influenced by recommendations put forth by such a committee?**

Response: Pursuant to the Criminal Justice Act plan in the Eastern District of New York, the court where I would sit if confirmed, there is a selection panel that decides on the admission of court-appointed attorneys. Only one district judge participates in the selection panel. Therefore, it is unlikely that I would participate in the selection of Criminal Justice Act attorneys or have any occasion to consider recommendations from an outside committee regarding eligibility requirements. However, if I were a

member of the Criminal Justice Act selection panel in my district and if the panel chose to solicit recommendations from a committee similar to the one in which I participated in 1995, I would consider those recommendations, but I cannot say in the abstract whether I would be influenced by them. Furthermore, the selection panel would not be bound by such committee recommendations.

e. Do you find such proposals to be necessary or rather an Interference with judicial discretion?

Response: I do not believe that such proposals or recommendations are necessary. At the same time, I do not believe that they interfere with judicial discretion because the court is not bound by them.

2. You indicated in your questionnaire that have unable to find notes, transcripts, or recordings for several of your speeches related to hate crimes. Could you provide the committee with a more detailed description of the points covered than is provided in your original questionnaire for the following talks?

a. April 26, 2012 Keynote Speaker, Third Annual Friendship Dinner hosted by the Turkish Cultural Center.

Response: The speech was given at the Turkish Cultural Center in Staten Island, New York. In the speech, I described a hate crime that had occurred in Staten Island in November 1998, and the prosecution of the perpetrators of that crime by my office, the United States Attorney's Office for the Eastern District of New York. (The prosecution, *United States v. Nicoletti*, is discussed in my Senate Judiciary Questionnaire (Q.17(4).) The case involved a series of racially motivated assaults on three men, two of whom were African American and one of whom was white, but mistaken by the attackers as being African American. The most seriously injured victim was in a coma for several weeks and suffered brain damage. I explained that all four perpetrators pled guilty to participating in a federal hate crime conspiracy and that they received sentences ranging from 55 to 108 months' incarceration. I also acknowledged the tremendous assistance and cooperation provided by the Richmond County District Attorney's Office and the New York City Police Department, which had investigated the case with the Federal Bureau of Investigation.

b. June 6, 2011, Panelist, Civil Rights Table

Response: I participated in this panel as a representative of the United States Attorney's Office for the Eastern District of New York to discuss hate crimes

investigation and prosecution. Although I provided notes of my remarks with my Senate questionnaire, the notes are admittedly brief and unclear. During this event, I discussed: (1) how federal authorities address allegations of hate crimes, which included an explanation of the federal hate crimes statutes and examples of potential hate crimes; (2) avenues for proving actual, as opposed to perceived, hate crimes, including finding concrete evidence to prove an alleged perpetrator's motivation and intent; (3) the types of information needed to investigate and prosecute a federal hate crime; and (4) law enforcement and community resources for potential victims of hate crimes.

c. July 15, 2010, Speaker, El Centro del Immigrante and Project Hospitality

Response: I participated in this community event on behalf of the United States Attorney's Office for the Eastern District of New York, along with a representative of the Richmond County District Attorney's Office, at the request of the Department of Justice's Community Relations Service ("CRS"). The event was organized and hosted by CRS and community organizations in Staten Island, New York in response to a series of assaults and robberies that had been committed against Latinos in Staten Island. My brief remarks during the event consisted of describing the federal hate crimes statutes and explaining the deference given by federal authorities to State and local authorities to investigate and prosecute hate crimes in the first instance. I also answered some questions from the audience that, to the best of my recollection, related to practical issues, such as to whom potential hate crimes should be reported.

d. February 21, 2009, Panelist, "Evolving Understandings of Hate Crimes Against Asian and Middle-Eastern Americans in Pre- and Post-9/11 America: Economic Motivations and the Myth of the 'Perpetual Foreigner'"

Response: To the best of my recollection, I discussed the fact that following the events of September 11, 2001, there was an increase in allegations of anti-Muslim hate crimes, some of which were committed against Sikhs, who were mistakenly believed to be Muslims. I also explained that the majority of hate crimes in the New York City area are prosecuted by State and local authorities because (1) the federal hate crimes statutes are limited in scope and application; and (2) in most cases, there will be many more State or local crimes that can be charged than under federal law with respect to the hate crime incident.

3. In 2003, you were involved in the prosecution of Angel D'Angelo. In *United States v. D'Angelo* in 2004 the district court suggested that "the government knew or should have known" that the government's cooperating witnesses had perjured themselves at

trial. While I recognize that the Office of Professional Responsibility later determined that there was no wrongdoing on your part, please explain your role in this case and the events surrounding the incident the district court references.

Response: *United States v. D'Angelo* was a murder prosecution in which the defendant, Angel D'Angelo, was convicted of a gang-related murder at trial. I was the lead prosecutor on the government's two-person trial team. The district court overturned the jury's verdict and granted the defendant a new trial, based, in part, on the district court's finding that the government's cooperating witnesses had testified falsely at trial regarding specific events. Following the district court's granting of a new trial, D'Angelo pled guilty to lying to federal agents regarding his whereabouts on the night of murder, and was sentenced to time served.

In its written decision, the district court was most troubled by specific testimony by one of the government's cooperating witnesses, Albert Alvarado. At trial, Alvarado, in response to cross-examination by defense counsel, denied telling a detective during an interview shortly after the murder (the "July 12 interview") that someone other than D'Angelo had committed the murder. On re-direct, my co-counsel sought to have Alvarado further explain his recollection of the July 12 interview. The re-direct, however, only created confusion and caused the district court to believe that Alvarado had testified falsely on re-direct examination and that the government had at least negligently elicited that testimony.

Although I did not present Alvarado's testimony at trial, I assisted in preparing Alvarado for trial and responding to the court post-trial regarding Alvarado's testimony. While I respect the district court's decision, I respectfully disagree with some of its conclusions. In particular, neither I nor my co-counsel knowingly or negligently presented perjured testimony by Alvarado. Prior to trial, we had questioned Alvarado extensively about the discrepancy between his and the detective's account of the July 12 interview. We ultimately credited Alvarado's explanation that he did not identify someone other than D'Angelo as the murderer during the interview, but that he may have said something ambiguous that led the detective to believe that Alvarado was identifying someone else -- which is the information my co-counsel sought, unsuccessfully, to elicit during Alvarado's re-direct examination. Prior to trial, we disclosed the discrepancy between Alvarado's and the detective's accounts of the July 12 interview, and produced the detective's report of the interview. At trial, we made the detective available for the defense to call as a witness, although the defense declined to do so. With regard to Alvarado's testimony at trial, we believed that his re-direct answers created confusion because he was referring to other police interviews in which he had identified D'Angelo as the murderer, and not the July 12 interview. We therefore did not believe at the time of trial, or any time, that Alvarado had knowingly perjured himself on this issue.

4. **Since *United States v. Booker*, the Federal Sentencing Guidelines have been advisory rather than mandatory. If confirmed, how much deference would you afford the Guidelines?**

Response: If confirmed, I would give significant deference to the Sentencing Guidelines. The Sentencing Guidelines reflect the integration of many of the sentencing factors that a judge must consider under 18 U.S.C. § 3553(a), as well as the collective experiences of the Sentencing Commission and judges across the country. Deference to the Sentencing Guidelines ensures uniformity, consistency, predictability and fairness in the federal criminal justice system.

- a. **Under what circumstances would you be willing to depart from the Guidelines?**

Response: If confirmed, I would only depart from the Sentencing Guidelines in cases where there exist unusual and compelling aggravating or mitigating facts or circumstances that are not accounted for in the Sentencing Guidelines.

- b. **Under what circumstances do you believe it is appropriate for a district court judge to depart downward from the Sentencing Guidelines?**

Response: Please see my response to Question 4.a.

5. **Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw? Please explain how you would apply this, if confirmed.**

Response: I strongly agree that the sentence a defendant receives should not depend on the judge he or she draws. If confirmed as a district court judge, I would apply this tenet by giving strong deference to the Sentencing Guidelines in all cases, unless there exist unusual and compelling aggravating or mitigating facts or circumstances that are not accounted for in the Sentencing Guidelines.

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

Response: If confirmed as a district court judge, I would decide cases based solely on the application of the relevant law to all of the facts before me that are sufficiently established under the applicable standard of proof. With regard to the law, I would look to all relevant legal authority, including the Constitution, statutes and controlling precedent for guidance.

With regard to the facts, I would rely on all admissible evidence that is presented to the court to make the appropriate factual findings. I anticipate that the most difficult part of transitioning from advocate to judge would be the breadth of subject matters with which a judge must become knowledgeable.

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

Response: I believe that the most important attributes of a judge are an unwavering faithfulness to the rule of law, integrity, fairness, objectivity, open-mindedness, independence, decisiveness, even temperament and a commitment to showing respect for all parties. I believe I possess these attributes.

8. 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: I believe that the most important elements of judicial temperament are treating all parties and individuals appearing before the court with dignity, respect and patience, and seeking to ensure that all parties feel that they have been given a full and fair opportunity to be heard. It is also important for a judge to be firm and decisive and to ensure that order and civility are observed in the courtroom. Lastly, it is critical that a judge rule timely and with transparency. I believe that, if confirmed, I would meet these standards.

9. 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 as a district court judge, I would be bound by and would apply Supreme Court and Second Circuit precedent, regardless of any personal views about the correctness of these decisions.

10. 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 and faced with a case of first impression, I would first look at the language of the statute at issue. If the statute is ambiguous and there is no controlling

precedent regarding its interpretation, I would look for Supreme Court and Second Circuit precedent regarding an analogous provision or similar issue, as well as directly relevant but non-controlling precedent in another Circuit.

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

Response: Yes, the Supreme Court has held that the death penalty is an acceptable form of punishment and has upheld the constitutionality of the death penalty.

12. 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: If confirmed as a district court judge, I would follow all controlling precedent of the United States Supreme Court and Second Circuit Court of Appeals, regardless of any personal views regarding the correctness of any decision.

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

Response: A statute is presumed to be constitutional. Therefore, it is only appropriate for a court to find a statute unconstitutional “upon a plain showing that Congress has exceeded its constitutional bounds,” *United States v. Morrison*, 529 U.S. 598, 607 (2000), or where a statute violates a provision of the Constitution. In making these determinations, the court should look to Supreme Court and Circuit Court precedent.

14. 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.

15. 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: If confirmed, I would manage my caseload by setting and enforcing firm deadlines for motions and discovery, rule promptly and decisively, and use electronic docket management tools to monitor the progress of cases. With respect to civil cases, I would also work with the magistrates and parties to facilitate and encourage prompt settlement whenever possible and appropriate.

16. 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 district court judges, working with magistrate judges, not only have a role, but an obligation, to ensure that litigation is conducted fairly and expeditiously. If confirmed, I would seek to control my docket by setting and enforcing clear deadlines, ruling promptly and decisively, guarding against wasteful or intentionally vexatious litigation, and encouraging, where appropriate, prompt settlement of cases.

17. You have spent your entire legal career as an advocate for your clients, primarily representing the United States of America. 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 district court judge, I would decide cases based solely on the application of the relevant law to the facts that are sufficiently established under the applicable standard of proof. With regard to the law, I would look to all relevant legal authority, including the Constitution, statutes and controlling precedent for guidance. With regard to the facts, I would rely on all admissible evidence that is presented to the court to make the appropriate factual findings. I anticipate that the most difficult part of transitioning from advocate to judge would be the breadth of subject matters with which a judge must become knowledgeable.

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

Response: I received the questions on Wednesday, September 26, 2012. I completed a draft of my responses on Monday, October 1, 2012. I thereafter discussed my responses with an official from the Department of Justice, after which I finalized them. I later forwarded my responses to the Department of Justice for submission to the Senate Judiciary Committee.

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

Response: Yes.