

**Senator Grassley
Questions for the Record**

**Karen Gren Scholer,
Nominee, U.S. District Judge for the Eastern District of Texas**

- 1. As amended on December 1, 2015, Federal Rule of Civil Procedure 26(b)(1) defines the “scope of discovery” in litigation matters as “any nonprivileged matter that is relevant to any party’s claim or defense *and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.*”**

Chief Justice Roberts explained in his 2015 Year-End report that these amendments “make a significant change, for both lawyers and judges.”

- a. What is the effect of this amendment to Rule 26(b)(1)?**

Response: The effect of this amendment to Rule 26(b)(1) is to ensure that proportionality be an integral part of the scope of discovery in every case. The judge and the parties now share a responsibility to develop a discovery plan that reasonably controls costs, taking into account the particular needs of the case and incorporating the proportionality factors listed.

- b. If confirmed, how would you assess whether a discovery request is “proportional to the needs of the case”?**

Response: If confirmed, I would engage in hands-on, active case management throughout the course of the litigation. At the outset, I would initiate a dialogue with the parties regarding the reasonable amount and extent of discovery needed to fairly and efficiently resolve the case, specifically addressing the proportionality factors. I would consider the input of all parties and utilize all relevant information provided to determine the appropriate scope of discovery “to secure the just, speedy and inexpensive determination of every action and proceeding,” as set forth in Fed. R. Civ. P. 1 (as amended December 1, 2015).

- c. How, if at all, would your assessment of whether a discovery request is “proportional to the needs of the case” differ from your view of the scope of discovery under the prior version of the rule?**

Response: The prior version of the rule allowed discovery of any matter “reasonably calculated to lead to the discovery of admissible evidence.” This previous standard often emboldened parties to engage in unnecessary, burdensome and otherwise overbroad discovery without any significant consideration of the amount in controversy, the significance of the discovery requested to the issues involved in the

case, and whether the burden or expense of the proposed discovery truly outweighed its likely benefit. The “reasonably calculated” words have been eliminated. With their deletion and the positioning of the proportionality factors within the definition of the scope of discovery under Rule 26(b)(1), it is now clear: the proportionality factors must be considered in determining the appropriate scope of discovery, individualized to every case.

2. **The Chief Justice’s 2015 Year-End report also noted reports from litigants that “[a] judge who is available for prompt resolution of pretrial disputes saves parties time and money.”**

As amended on December 1, 2015, Rule 16 requires a district judge to issue a scheduling order within “the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.” This amendment shortened both applicable deadlines by 30 days.

- a. **Please explain the approach you will take to case management and the tools you will use to manage cases in a just and efficient manner if you are confirmed.**

Response: If confirmed, I would engage in early and active case management. I would require the parties to propose a reasonable scheduling order, considering the specific needs of the case, and I would hold them to the ordered deadlines, barring good cause to extend them. I would also utilize magistrate judges and encourage early alternative dispute resolution if appropriate for the case. During the eight years I served as a state district judge, I was personally available for the prompt resolution of discovery and other pretrial disputes. If confirmed, I intend to continue that practice.

- b. **Please explain and describe any effect the 2015 amendments to the Federal Rules of Civil Procedure will have on your approach to case management if confirmed.**

Response: If confirmed, I would engage in early and ongoing dialogue with the parties regarding discovery, specifically addressing the proportionality factors. I would use all management tools available to me to ensure the fair and efficient development of the case, so that as the case proceeds to trial, it is doing so in the most cost-effective and reasonable manner possible.

3. **As you know, parties frequently propose protective orders for the approval of the district judge during the course of discovery. The 2015 amendments to the Federal Rules of Civil Procedure included a change to Rule 26(c)(1)(B) adding “allocation of expenses” to the list of items that may be included in a protective order.**

- a. **How would you evaluate cost-allocation mechanisms included in proposed protective orders, if confirmed?**

Response: To the extent possible, I would defer to the parties as to the appropriate allocation of expenses in protective orders. In my eight years as a civil district judge, this was rarely the source of contention. If agreement could not be reached and cost allocation was requested, I would consider cost allocation “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c)(1).

b. Under what circumstances, if any, would you consider ordering allocation of expenses pursuant to Rule 26(c)(1)(B) absent suggestion of the parties?

Response: Absent a motion by a party, I generally would not consider ordering allocation of expenses under Rule 26(c)(1)(B). I would consider an exception to this general rule, however, to be if a party has demonstrated a significant history of abuse in the litigation – either in pursuing improper unreasonable discovery or in failing to respond to proper reasonable discovery.

c. Do you understand the 2015 amendment to Rule 26(c)(1)(B) to confer upon the district court a new authority or obligation to manage discovery costs through cost allocation?

Response: Though not conferring a new authority, I understand the amendment to make more explicit a judge’s obligation to incorporate proportionality in determining the appropriate scope of discovery and mindfully manage discovery costs.

d. How, if at all, do you understand the cost-allocation provisions of Rule 26(c)(1)(B) to relate to those found in Rule 37?

Response: Rule 37 motions should take into account the proportionality factors when seeking to compel or resist discovery. While Rule 37 does not contain the specific cost-allocation provisions of Rule 26(c)(1)(B), it does provide guidance on the types of sanctions available for improper discovery-related behavior.

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

Response: In my opinion, the most important attribute of a judge is the strict adherence to the rule of law, faithfully following the doctrines of *stare decisis* and judicial restraint. A judge should fairly and impartially consider the facts of every case and apply binding precedent, without regard to any personal views. I believe I do possess this attribute as evidenced by my record from eight years of service as a state district court judge.

5. 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 all litigants who appear in his or her court with courtesy, dignity and respect. A judge should also keep an open mind and listen with patience.

During my tenure on the bench as a state district judge, I believe I have met that standard, and if confirmed, I will continue to do so.

- 6. 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: I will faithfully follow the binding precedents of the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit, irrespective of any personal beliefs.

- 7. 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 presented with a case of first impression requiring statutory interpretation, I would first examine the plain language of the text of the statute or provision in question. If the language was clear and unambiguous, I would apply the plain meaning of the text. If the language was ambiguous, I would refer to canons of statutory interpretation recognized by the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit for guidance on interpretation. I would also look to Supreme Court and Fifth Circuit opinions in which those courts interpreted similar or analogous language, and if none are available, I would look to other federal circuit and district court opinions.

- 8. 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 federal district judge, I would faithfully follow the binding precedent of the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit without regard to any personal beliefs.

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

Response: Only under very rare circumstances would it be appropriate for a federal court to declare a statute enacted by Congress unconstitutional. Statutes enacted by Congress are presumed to be constitutional, unless Congress has clearly exceeded its authority under the Constitution in enacting the statute or the statute violates a constitutional provision. Where a reasonable interpretation can be given to a statute to avoid declaring it unconstitutional, that interpretation should be employed.

- 10. 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. I do not believe it would be proper for judges to rely on foreign law or the world community in determining the meaning of the Constitution.

- 11. 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 was a state district court judge for eight years. My record evidences my commitment to ensure that, if confirmed, all of my decisions will be grounded in precedent and the text of the law, strictly following the doctrines of *stare decisis* and judicial restraint. I will faithfully follow the binding precedent of the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit without regard to any personal beliefs.

- 12. 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: My record as a state district court judge for eight years demonstrates that I would follow the rule of law, without regard to any personal views, if confirmed. I am committed to rule fairly and impartially, as would be required by my solemn oath of office.

- 13. If confirmed, how do you intend to manage your caseload?**

Response: If confirmed, it would be my intention “to secure the just, speedy and inexpensive determination of every action and proceeding,” as set forth in Fed. R. Civ. P. 1 (as amended December 1, 2015). I would engage in early and active case management. I would require the parties to propose a reasonable scheduling order, considering the specific needs of the case, and I would hold them to the ordered deadlines, barring good cause to extend them. I would also utilize magistrate judges and encourage early alternative dispute resolution if appropriate for the case. I would use all management tools available to me to ensure the fair and efficient development of the case, so that as the case proceeds to trial, it is doing so in the most cost-effective and reasonable manner possible.

- 14. 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 do believe that judges have an important role in controlling the pace and conduct of litigation. If confirmed, I would utilize all management tools available to me to ensure the fair and efficient development of the case, including those set forth in my previous answer. In addition, I would work very hard, be well prepared and exercise timely and good judgment.

- 15. As a judge, you have experience deciding cases and writing opinions. Please describe how you reach a decision in cases that come before you and to what sources of information you look for guidance.**

Response: When presiding as a state district trial judge, I would conduct a thorough and impartial evaluation of the facts, carefully reviewing all of the admissible evidence. I would study the briefing submitted by the parties, as well as all binding authority. I would then apply the relevant law to the facts of the case to reach a decision, without regard to personal views or any agenda. I would then communicate my decision to the litigants in a timely and clear manner.

- 16. President Obama said that deciding the “truly difficult” cases requires applying “one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy . . . the critical ingredient is supplied by what is in the judge’s heart.” Do you agree with this statement?**

Response: I am not familiar with the full context of this quotation. I believe that a judge should follow the rule of law, deciding cases fairly and impartially, and treat all who appear in his or her court with courtesy, dignity and respect.

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

Response: On September 14, 2016, these questions were forwarded to me by the Office of Legal Policy at the Department of Justice. I reviewed the questions and prepared my answers to them. I then submitted my draft answers to the Office of Legal Policy, and thereafter, I finalized my answers and authorized the Office of Legal Policy to submit them to the Committee.

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

Response: Yes.

Senator Tillis
Questions for the Record

Karen Gren Scholer,
Nominee, U.S. District Judge for the Eastern District of Texas

- 1. Some individuals have argued that the United States Constitution is a “living document,” subject to different interpretations as society changes. Do you subscribe to this point of view?**

Response: I do not.

- 2. What role, if any, should societal pressure or popular opinion play in interpreting statutes or the United States Constitution?**

Response: None.

- 3. Please define judicial activism. Is judicial activism ever appropriate?**

Response: My understanding of judicial activism is when judges allow their personal views to guide their decisions, rather than a strict adherence to binding precedent. Judicial activism is never appropriate.

- 4. When, if ever, is it appropriate for a federal court to rule that a statute is unconstitutional?**

Response: Rarely. Statutes enacted by Congress are presumed to be constitutional, unless Congress has clearly exceeded its authority under the Constitution in enacting the statute or the statute violates a constitutional provision. Where a reasonable interpretation can be given to a statute to avoid declaring it unconstitutional, that interpretation should be employed.

- 5. What is a fundamental right? From where are these rights derived?**

Response: Fundamental rights are derived from the United States Constitution. They are rights which 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, 720-721 (1997) (internal citations omitted).

- 6. Do you believe the First Amendment or any other provision of the United States Constitution protects private citizens and businesses from being required to perform services that violate their sincerely held religious beliefs?**

Response: In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993), the Supreme Court recognized that the government may not enact laws that suppress religious belief or practice. The Supreme Court has provided guidance on the protection of the First Amendment right to free exercise of sincerely held religious beliefs, and if confirmed as a district judge, I will faithfully follow the binding precedents of the United States Supreme Court and the Fifth Circuit.

7. What level of scrutiny is constitutionally required when a statute or regulation related to firearms is challenged under the Second Amendment of the United States Constitution?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual's right to possess a firearm for traditionally lawful purposes, such as self-defense within the home. However, it did not establish a clear level of scrutiny to be applied by all courts in all cases in a challenge to a statute or regulation involving a firearm. In *Nat. Rifle Ass'n of America, Inc. v. McCraw*, 719 F.3d 338 (5th Cir. 2013), the Fifth Circuit held that the appropriate level of scrutiny to apply is dependent on the nature of the conduct being regulated and the degree to which the challenged law burdens the Second Amendment right. If confirmed as a district judge, I will faithfully follow the binding precedents of the United States Supreme Court and the Fifth Circuit.

8. Do you believe it is constitutional for states to require voters to show photo identification before being eligible to cast their vote?

Response: The United States Supreme Court in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) and the United States Court of Appeals for the Fifth Circuit in *Veasey v. Abbott*, No. 14-41127, 2016 WL 3923868 (5th Cir. July 20, 2016) have addressed the constitutionality of states requiring voters to show photo identification to vote. If confirmed as a district judge, I will faithfully follow the binding precedents of the United States Supreme Court and the Fifth Circuit.

9. One challenge you will face as a federal judge is managing a demanding caseload. If confirmed, how will you balance competing priorities of judicial efficiency and due process to all litigants involved in the cases on your docket? Will you give certain cases priority over others? If so, please describe the process you will use to make these decisions.

Response: If confirmed, it would be my intention "to secure the just, speedy and inexpensive determination of every action and proceeding," set forth in Fed. R. Civ. P. 1 (as amended December 1, 2015). I would engage in early and active case management. I would require the parties to propose a reasonable scheduling order, considering the specific needs of the case, and I would hold them to the ordered deadlines, barring good

cause to extend them. I would also utilize magistrate judges and encourage early alternative dispute resolution if appropriate for the case. I would necessarily give priority to cases that are subject to the Speedy Trial Act. I would also give priority to cases involving emergency injunctive relief.

10. Do you believe the death penalty is constitutional? Would you have a problem imposing the death penalty?

Response: The United States Supreme Court has held that the death penalty is constitutional. If confirmed, I would follow this binding precedent.