

Responses of Jon S. Tigar
Nominee to be United States District Judge for the Northern District of California
to the Written Questions of Senator Chuck Grassley

- 1. At your hearing, I asked you a series of questions related to your membership in the American Constitution Society. In responding to those questions, you indicated that your role in the organization was that you occasionally spoke at events. Of course, many prominent lawyers and judges speak at events hosted by the American Constitution Society without feeling the need to become members.**

- a. What about the American Constitution Society led you to join the organization?**

Response: I joined the American Constitution Society because I hoped it would provide the opportunity to hear discussions concerning some of the important legal questions of the day.

- b. At your hearing, I specifically asked you about statements made by ACS Chair, Peter Edelman expressing his views in support of a “progressive” constitution. You generally declined to answer asserting you were unfamiliar with Peter Edelman’s statements. However, as a member of the organization you should be familiar with the goals of the organization. One of the goals, according to the chair of the ACS Board of Directors is “countering right-wing distortions of our Constitution.” Do you agree with this goal, and if so can you please identify what “right-wing distortions of the Constitution” you are concerned about or feel need to be countered? If you disagree with this goal of the organization, what have you done to distance yourself from this goal?**

Response: I do not know Mr. Edelman. I was unaware of Mr. Edelman’s statements and do not know to what alleged “right-wing distortions” his statements refer. Mr. Edelman’s statements do not accurately reflect any goal of my membership in the American Constitution Society.

- c. On the ACS website, it states that the organization seeks to shape the debate in America by bringing together “the country’s best legal minds to articulate a progressive vision of our Constitution and our laws.” In your view, what does it mean to have a progressive vision of the Constitution and our laws?**

Response: I do not know what ACS means by its use of the phrase “progressive vision of the Constitution and our laws.” I have never held any leadership position in ACS and have not participated in the formulation of ACS policy or goals. As a state court judge for the last ten years, I have faithfully applied the Constitution, statutes, and decisional authority as written. If confirmed to the federal bench, I would continue to do the same.

- d. If confirmed, will your interpretation of the Constitution and our laws be guided by a “progressive vision”? Please explain.**

Response: No. If confirmed to the federal bench, my interpretation of the Constitution and federal law will be guided solely by the text of the Constitution, the text of applicable federal statutes, and controlling decisional authority.

2. **At your hearing, I asked you about your criticism of Supreme Court cases imposing limits on punitive damage awards. You appeared to be unsure of the statement to which I was referring, so allow me to clarify. On September 13, 2010, you gave a speech on punitive damages in Cologne Germany. In this speech you discussed four Supreme Court cases limiting punitive damages ending with its decision *Exxon Shipping Co v. Baker*, 128 S.Ct. 2605 (2008). You then noted several “problems with the Supreme Court’s analysis,” including saying there is “no basis in precedents” for their decision and that the “Court is making up.”**

Given your statements, what might we expect should you be confirmed and assigned a case dealing with punitive damages? Would you apply the Supreme Court precedents you discussed in your speech? Would you feel any obligation to recuse yourself?

Response: My comments were intended to be historical observations about American law to an audience unfamiliar with the topic of punitive damages. As I noted in my speech, it was not surprising that the Supreme Court has imposed limits on punitive damages, or that state courts and legislatures have also done so. I will apply the Supreme Court’s precedents concerning punitive damages faithfully and without exception, as I would with all Supreme Court precedents and as I believe my decade of judicial service demonstrates. If I am confirmed, I will scrupulously adhere to the relevant recusal statutes and the Code of Conduct for federal judges. Because I will faithfully apply the law in this area, I cannot currently think of a circumstance in which recusal would be appropriate solely because a case involved punitive damages. But in all cases, I would carefully follow the applicable recusal standards, and I would not hesitate to recuse myself in any case in which it was appropriate.

3. **Though not listed on your Questionnaire, court documents indicate you partnered with the American Civil Liberties Union in the case of *Rodriguez v. California Highway Patrol*. According to the ACLU, this case resulted in a “landmark” settlement. Could you please discuss your role in this case?**

Response: I participated briefly in the very early stages of the *Rodriguez* case as one of several lawyers at my law firm. My involvement ceased shortly after the filing of the complaint, when I left that case to work on the *City of Hope v. Genentech* case, which is discussed in my Questionnaire. I played no substantive role in the *Rodriguez* litigation and did not participate further after I left the case.

- a. **I understand the settlement was more restrictive than what the Supreme Court allowed in *Whren v. United States*, and that the settlement even precluded waivers and voluntary searches. Could you explain your understanding of the**

current state of the law in California as when a traffic stop is valid? Have you ruled in such cases, as a Judge?

Response: Because I left the case when it was in its very early stages, I did not participate in the negotiation or drafting of the settlement in the *Rodriguez* case, and to this day am unaware of its terms. In California, a traffic stop is valid “under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in the light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.” *People v. Souza*, 9 Cal. 4th 224, 231 (1994); see also *People v. Letner*, 50 Cal. 4th 99, 149 (2010) (applying the same standard). I have ruled on motions to suppress as a judge, but have not ruled in any case where an officer’s motivation was at issue.

- b. Let me be clear, I am not suggesting racial profiling is appropriate in any circumstance. In our post 9/11 world, with concerns about terrorism, and with the growing drug violence, do you think there is any role for profiling of any sort?**

Response: As explained above, I had only very limited involvement in the *Rodriguez* case, and I have not had other occasion to study these issues. If I were confirmed to the federal bench and presented with a case in this area, I would apply controlling authority from the Supreme Court and the Ninth Circuit, including *Whren v. United States*, 517 U.S. 806 (1996).

- 4. In 1982, you interviewed a Cuban diplomat for your student newspaper. I recognize this was probably an extraordinary opportunity for a young reporter. In your interview, the Cuban diplomat repeatedly attacked the United States for its policies towards Cuba. For instance, he called the trade embargo “an aggressive, unilateral hostile, immoral action on the part of the United States towards Cuba.”**

- a. In hindsight, do you believe it was wise to provide a representative from a communist dictatorship an uncontested stage on which to criticize the United States?**

Response: At the time of the interview, I was a 20-year-old college junior. Had I had more experience and perspective at that time, both my questions and the content of the article would have been fundamentally different.

- b. Did you or your newspaper seek to interview anyone who might represent an opposing view, to bring balance to the article or to this issue?**

Response: As the question indicates, the interview represented an extraordinary and unusual opportunity for a young college student. The *Williams Record* was a small weekly college newspaper without ready access to national or international political figures. I am sure that the *Record* would have welcomed additional content from

other perspectives regarding the subjects covered in the interview, but I do not recall that those opportunities presented themselves.

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

Response: First, I determine which evidence is properly admissible under the California Evidence Code. Second, I determine what the facts are by carefully listening to all the testimony and considering any other admissible evidence offered by the parties. Lastly, I apply the relevant statutes and case law to the facts as I have determined them to reach a conclusion.

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

Response: The most important attribute of a judge is the commitment and ability to render decisions fairly and impartially, applying the relevant law to the facts without bias or prejudice. I believe I possess this attribute.

- 7. 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 patient, even-tempered, respectful, courteous, open-minded, and decisive. I believe I meet this standard, and have earned such a reputation as a state court judge.

- 8. 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. 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.

- 9. 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: When faced with a case of first impression involving the interpretation of a statute, I would start with the plain language of the provision in question. If that text was unambiguous, I would apply it as written. If it was ambiguous, I would seek to apply precedent from the Supreme Court, the Ninth Circuit, and other Circuit and District Courts (in that order) concerning that provision or related provisions.

- 10. 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 binding Supreme Court and Court of Appeals precedent without regard to my personal judgments.

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

Response: A court may reach the constitutionality of a statute only if it first concludes that the case cannot be resolved on other grounds. Assuming that test is met, the court starts with a presumption that the statute is constitutional. The court may then declare a statute unconstitutional only if Congress has clearly exceeded its authority, or if the statute clearly violates the Constitution.

- 12. 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.

- 13. 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: As a state court judge, I currently manage a caseload of more than 560 cases. I have found a variety of techniques helpful in managing this caseload, including: working creatively with the parties to identify the issues actually in dispute and avoid unnecessary litigation practice; setting and enforcing realistic deadlines, including trial dates; resolving discovery disputes informally where possible; conducting hearings on motions that might narrow the issues in the case; ruling on matters promptly; working diligently; being thoroughly prepared in every matter; and making myself available to counsel with regard to issues that might arise in their cases. I would expect to continue these practices.

- 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: Yes. I would use all mechanisms at my disposal to control my docket, including the practices described above in response to Question Number 13.

- 15. Federal Judges hold a public trust and are responsible for being good stewards of public resources made available to them. In this regard, I have publicly expressed concern about the costs of a planned Ninth Circuit Judicial Conference planned for Maui, Hawaii in August 2012.**

- a. Have you attended Ninth Circuit Judicial Conferences in the past and do you plan to attend this Conference or similar conferences in the future?**

Response: I have not attended the Ninth Circuit Judicial Conference in the past and have no plans to attend this year's Conference and have not considered whether I will attend similar conferences in the future.

- b. Given the fiscal crisis facing our nation, do you think it is appropriate that this conference go forward as planned?**

Response: I am not familiar with the circumstances surrounding the Ninth Circuit's 2012 Judicial Conference and do not have a view concerning the propriety of that conference proceeding as scheduled.

- c. If confirmed, what influence would you bring to bear on your colleagues planning future conferences to ensure that taxpayer funds are used in a prudent manner?**

Response: I would encourage my colleagues to plan future conferences in as fiscally responsible a manner as possible.

- d. As a public officer, what will be your general approach to the management of public resources?**

Response: As a long-time public servant, I have always understood that I hold the public's resources in trust. If confirmed to the federal bench, I would continue to manage the public's resources in a prudent and responsible manner.

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

Response: I received these questions on July 18, 2012. I prepared my answers on July 18 and 19, 2012. I submitted them to a representative of the Department of Justice on July 19, 2012, and worked with them to finalize the responses. When they were final, I authorized the transmittal of my answers to the Committee.

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

Response: Yes.