

Response of Jennifer A. Dorsey
Nominee to be United States District Court Judge for the District of Nevada
to the Written Questions of Senator Amy Klobuchar

- 1. If you had to describe it, how would you characterize your judicial philosophy? How do you see the role of the judge in our constitutional system?**

Response: I believe that judges should be fair, impartial, and respectful to the litigants, hard working, and always well prepared. A judge should remain mindful of the judiciary's limited role in our Constitutional system to apply the well-researched law to the facts of each particular case and serve as a check and balance on the other branches of government.

- 2. What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their political beliefs or whether they are rich or poor, defendant or plaintiff?**

Response: During my career, I have represented plaintiffs and defendants, varying from large corporations to indigent, pro bono clients. And I have given each case and client my full effort and attention. If I am fortunate enough to be confirmed, I intend to give the same respect and attention to every litigant and treat them fairly regardless of political beliefs, their economic status or financial means, or their posture in the case.

- 3. In your opinion, how strongly should judges bind themselves to the doctrine of *stare decisis*? How does the commitment to *stare decisis* vary depending on the court?**

Response: *Stare decisis* – the commitment to and faithful application of binding precedent – is the foundation of predictability and consistency in our legal system. Although the United States Supreme Court and Circuit Courts may reconsider their own precedent in limited circumstances, district court judges are bound by the principles of *stare decisis*.

**Response of Jennifer A. Dorsey
Nominee to be United States District Court Judge for the District of Nevada
to the Written Questions of Senator Chuck Grassley**

- 1. I have some concerns regarding several political contributions you and other members of your law firm made during the approximate time frame when you were being considered for this nomination. There is nothing wrong with donating to political campaigns. However, the timing of these contributions raises some questions that I would like to clarify.**

According to public records, you contributed \$2,500 to a U.S. Senate campaign on March 31, 2012. This money was then returned to you on April 30, 2012. This donation coincided, roughly, with the consideration of your nomination.

- a. Did you attend a campaign function in connection with that contribution?**

Response: Yes.

- b. What were the circumstances surrounding your initial contribution?**

Response: I attended a campaign function on March 30, 2012, which included a concert by Carole King. To the best of my recollection, the suggested donation amount for attending the event was \$2,500, and I made my donation before entering the event.

- c. At the time, were you aware that your law partner Will Kemp also made a \$2,500 contribution to the same U.S. Senate campaign that same day? If so, when did you become aware of it and what were the circumstances of your knowledge?**

Response: No. I was aware he attended this event, but I was not aware of whether or when he had made a contribution or for what amount.

- d. Your March 31, 2012 contribution was returned to you one month later on April 30, 2012. What were the circumstances surrounding your donation's return? Were you given an explanation as to why it was returned to you? If so, please describe fully.**

Response: In or about mid-April, 2012, I was informed by the campaign that my donation was being returned to me because Senator Reid's office was going to begin

to consider whether I might be an appropriate candidate for a district court nomination.

2. The day after your donation was returned to you, Mr. Kemp donated \$100,000 to a Democratic Senate Political Action Committee (PAC).

- a. Were you aware that Mr. Kemp intended to make a contribution to the PAC before it was transmitted on May 1, 2012?**

Response: No.

- b. When did you become aware Mr. Kemp intended to make a donation to the PAC? What were the circumstances and context? Please describe fully.**

Response: I was not aware that Mr. Kemp intended to make a donation to the PAC.

- c. Did Mr. Kemp ever communicate to you the reasons motivating his decision to make the donation? If so, what did Mr. Kemp communicate to you?**

Response: No.

3. Two weeks later, a different law partner, Mr. Jones, donated \$50,000 to the same Democratic Senate Political Action Committee.

- a. Were you aware that Mr. Jones intended to make a contribution to the PAC before it was transmitted?**

Response: No.

- b. When did you become aware Mr. Jones intended to make a contribution to the PAC? What were the circumstances and context? Please describe fully.**

Response: I was not aware that Mr. Jones intended to make a contribution to the PAC.

- c. Did Mr. Jones ever communicate to you the reasons motivating his decision to make the contribution? If so, what did Mr. Jones communicate to you?**

Response: No.

- 4. Do you have any reason to believe or suspect that these substantial contributions were made in an effort to assist you in obtaining a nomination to the federal bench? Please fully explain your response.**

Response: No.

- 5. What assurances can you give this committee that, should you be confirmed, you will be able to eliminate any potential biases and influences, and that your courtroom decisions will not be affected by any political, economic, or philosophical influences?**

Response: I fully recognize that biases and influences have no place in judicial decision-making, and that courtroom decisions should not be affected by political, economic, or philosophical influences. If confirmed, I would faithfully apply the controlling law to the facts without regard for, or consideration of, any bias or influence—political, economic, philosophical, or otherwise.

- 6. In your response to Senate Questionnaire Question 24, you stated you would recuse yourself “from all cases involving my law firm for a significant period of time.”**

- a. Can you please describe your anticipated recusal policy towards your current law firm with greater specificity?**

Response: If confirmed, I would recuse myself from all matters in which my law firm represents a party for at least several years. And even after this period, in any matter involving my law firm, I would consult the Code of Conduct for United States Judges, the Ethics Office of the Administrative Office of the U.S. Courts, and any applicable recusal statutes, and I would recuse myself whenever necessary to avoid even the appearance of a conflict of interest.

- b. In light of these substantial contributions made during your selection and vetting process, will you adopt a different recusal policy with respect to Mr. Kemp and Mr. Jones than the recusal policy you will take with respect to your law firm? If not, please explain. If so, please describe the difference with specificity.**

Response: No. Any recusal policy I adopt for the firm will apply to Mr. Kemp and Mr. Jones.

- 7. Your questionnaire says that you have been sole counsel in one trial, but in your hearing you said that you have tried several cases on your own. Will you please clarify this discrepancy?**

Response: Thank you for the opportunity to clarify my response. What I meant to say was that I had tried or arbitrated several cases on my own, and I have consistently had sole or primary responsibility for various phases of the complex litigation matters that I work on. I apologize for any confusion.

8. You indicated to the Committee during your hearing that you would, if confirmed, faithfully apply precedent to any cases that came before you. You also told Senator Lee that you “cannot count myself as a scholar of judicial precedent”.

a. Will you please explain to the Committee how you will apply precedent to the cases before you?

Response: My statement was intended to directly respond to Senator Lee’s inquiry into which federal judge I consider to be a role model. The “precedent” I was (inartfully) referencing was the judicial philosophy of particular federal judges—a topic in which I do not consider myself a scholar—not legal precedent. If confirmed, all legal issues before me will be carefully and thoroughly researched to ensure that my decisions are based on the faithful application of legal precedent.

b. How will you determine which precedent to apply?

Response: I intend to determine which precedent to apply by reviewing the submissions of the parties and conducting thorough, independent legal research after obtaining a full understanding of the facts of each particular case.

9. In your hearing, you told Senator Hirono that your federal criminal law experience is extremely limited and that you would need to “refamiliarize myself with the Federal rules of criminal procedure”.

a. Please provide the dates you participated in the California Pro Bono Project and the extent of your duties.

Response: I was a law clerk for the law firm of Totaro & Shanahan during my last two years of law school, from approximately January 1996 through February 1997. Totaro & Shanahan served as counsel through the California Appellate Project, which provides court-appointed appellate attorneys for indigent defendants. Under the supervision of Totaro & Shanahan attorneys, I evaluated trial records for appellate issues and drafted appellate briefs.

b. Please explain the duties you performed while at the Ventura County District Attorney's Office during the summer of 1995, after your first year of law school.

Response: As an extern at the Ventura County District Attorney's Office, I had the opportunity to research, draft, and prepare draft responses to a variety of criminal pretrial motions, observe hearings and trials, and assist attorneys in the preparation of cases for hearing and trial.

c. How will you prepare yourself to handle the criminal cases that would come before you? Please be specific with regard to each phase of the criminal justice system.

Response: I have begun to observe criminal proceedings at the federal district court and have spoken to some of our federal district court judges regarding their procedures and resources for criminal matters. I have started studying the written materials available through the Federal Judicial Center and, if confirmed, I intend to take advantage of the educational programs that the Center offers to the judiciary and utilize the criminal-law-and-procedure knowledge base and experience of mentors on the bench as appropriate. I will make arrangements to observe initial appearances before other judges including bail proceedings and detention hearings, as well as arraignments, plea proceedings, other pretrial hearings, trials, and sentencing. I will also immediately familiarize myself with the body of criminal statutes, including but not limited to the Speedy Trial Act, the Crime Victims' Rights Act, and the U.S. Sentencing Guidelines. I recognize that my criminal experience is lacking, and studying hard to become proficient in criminal law and procedure would be my immediate priority. I believe that my exposure to criminal law and procedure described above, although limited, and my career of complex civil litigation and appeals experience have given me a solid base on which to build. The same rules of evidence apply to both civil and criminal cases, and the same research, writing, and legal-analysis skills that I have been working to hone throughout my career will be essential to deciding every case, regardless of its nature.

d. What factors will you consider when sentencing a criminal defendant?

Response: When sentencing a criminal defendant I will consider all relevant factors required by the laws of the United States and binding precedent, specifically including those identified in 18 U.S.C. § 3553.

e. Please describe your familiarity and experience with Sentencing Guidelines. How will you use them, if confirmed?

Response: As my practice has been focused on complex civil litigation and appeals, I have not had the opportunity to work with the Sentencing Guidelines. However, I intend to immediately familiarize myself with the Sentencing Guidelines and give them substantial deference in sentencing decisions. Even though I understand that they are no longer mandatory, the Sentencing Guidelines serve a valuable purpose in promoting uniformity and predictability in criminal sentencing.

10. Do you believe the death penalty is an appropriate form of punishment? If called upon to do so, would you have any personal objection to imposing this sentence? Please explain your response.

Response: The United States Supreme Court has held that the death penalty is an appropriate form of punishment, with limited exceptions. If confirmed as a district court judge, I would faithfully apply that precedent, as I would any precedent.

11. During your hearing, I asked you about the law review article you wrote in law school and I still have some follow-up questions regarding that article. First, I asked you what your current view of physician-assisted suicide was. You said your “experience as a litigator has given me a completely different perspective than many of those that I think I have articulated in that piece”. This did not clearly answer my question. What are your current views on physician-assisted suicide—are they the same ones you held when you wrote your law review article or have they changed? If they have changed, please elaborate.

Response: I wrote that article approximately 17 years ago while I was a law student and shortly after the United States Supreme Court granted certiorari to review the Ninth Circuit and Second Circuit decisions in *Compassion in Dying v. State of Washington*, 79 F.3d 790 (1996), and *Quill v. Vacco*, 80 F.3d 716 (1996), respectively. The intent of the article was not to express any particular view on physician-assisted suicide, but to analyze the then-current state of the law on the subject and to address the potential rationales for, and some ramifications of, the United States Supreme Court’s ultimate ruling. My view on physician-assisted suicide at the time I drafted my article was that it was a timely and topical subject on which relatively little had been written.

I have not studied these issues since writing the article, and I do not have a current view on physician-assisted suicide except that the United States Supreme Court held in *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997), that there is no fundamental liberty interest in physician-assisted suicide, which is binding precedent on the lower courts. If I were confirmed as a district court judge and presented with a case involving physician-assisted

suicide or any other issue, I would base my decision on the law, regardless of my personal views, if any.

12. Do you believe the right to assisted-suicide should be limited to those who are terminally ill?

Response: It is the role of the legislature, not the judiciary, to decide policy and make laws. If confirmed as a district court judge and presented with an issue regarding physician-assisted suicide, I would faithfully apply the controlling law and judicial precedent, without regard to my personal views, if any.

a. If not, please explain to who else it should extend.

Response: Please see my response above.

b. If so, please explain why it should not be extended to other suffering individuals.

Response: Please see my response above.

13. In your conversation with Senator Lee regarding substantive due process rights, you said you “would apply that precedent.” Please elaborate – What is your understanding of the substantive due process rights recognized by the Supreme Court of the United States?

Response: The United States Supreme Court has recognized substantive due process rights for those personal activities and decisions “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, 721 & 727 (1997) (internal citations and quotation marks omitted). The Supreme Court has established an analytical framework for evaluating whether a right is a fundamental liberty interest protected by the Due Process Clause. If confirmed, I will follow that framework and all controlling substantive-due-process precedent from the United States Supreme Court and the Circuit Court.

14. As has become much more common in the legal profession, many of your cases settled before going to trial. It’s no secret that attorneys use the pre-trial litigation stage as leverage to pressure parties towards settlement. I am not necessarily criticizing this approach. My question for you is how will you transition from a law practice where you settled almost all of your cases to presiding as a judge where you will need to

oversee the process as a neutral arbiter? In my mind those are two very different mindsets.

Response: The roles and mindsets of judges and attorneys are very different: an attorney's job is to be an advocate, while a judge's role is to be a neutral arbiter who faithfully applies the law to the facts of each individual case. I am completely cognizant of this distinction and am confident in my ability to remain constantly mindful of it if confirmed.

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

Response: A good judge requires many attributes, including the commitment to study and fairly apply the law to the facts of each case without bias or preconception, and a deep and abiding respect for the unique and limited role of the judiciary in our Constitutional system. I possess these attributes.

16. 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 must be even-tempered, exceedingly hard working, and treat everyone with dignity and respect. Yes, I believe I meet these standards.

17. 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.

18. 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 statutory interpretation case of first impression, I would look first to the express language of the provision and give the text its plain and ordinary meaning. If ambiguity remains, I would examine the statute's context and purpose, and the use, meaning, and application of the same language in other statutory provisions within the same act. I would then consider decisions from other circuits and district courts.

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

Response: A statute enacted by Congress is presumed constitutional. A statute should only be invalidated when it can be determined that Congress clearly exceeded its powers or violated a Constitutional provision.

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? Please explain.

Response: No, unless directed by the legal precedent of the United States Supreme Court or the applicable circuit court.

21. 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: In my career as a litigator, I have represented plaintiffs and defendants varying from large corporations to indigent, pro bono clients. And I have given each case and client my full effort and attention, regardless of my personal views. If I am fortunate enough to be confirmed, I would give the same respect and attention to every litigant and party and decide cases without regard to any personal view that I might hold because a judge must be fair and impartial to all who appear before the court.

22. What is your understanding of the workload in the District of Nevada? If confirmed, how do you intend to manage your caseload?

Response: It is my understanding that the district court judges in Nevada have a significant caseload. Throughout my practice, I have always had a heavy caseload and the responsibility for multiple complex litigation matters in various stages of the legal process. If fortunate enough to be confirmed, I would rely on that experience and employ the same strategies with respect to managing my docket. I would also consult with fellow judges to learn their best practices.

23. 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 judges play a key role in controlling the pace and conduct of litigation. If confirmed, I would enforce rules and deadlines, work with the magistrate

judges, hold status conferences as necessary, strive to make prompt rulings on motions, and use all other tools and resources at my disposal.

24. 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 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, I recognize the role of the judge is very different than that of an advocate, but the skills I have developed throughout my career, nonetheless, will be essential: diligent preparation, exhaustive research, and careful thought. For guidance, I will look to binding precedent from the United States Supreme Court and the Ninth Circuit Court of Appeals, and all applicable laws and rules of procedure.

I expect that the most difficult part of this transition will be the need to immediately handle a substantial docket that includes criminal matters. I will need to become quickly familiar with the cases on my docket and develop procedures and a process for managing that caseload. I intend to use other judges and court staff as the first resource for guidance on developing such procedures and processes.

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

Response: I received these questions on May 1, 2013, and prepared my answers over the next several days. I reviewed them with an official from the Department of Justice before submitting them to the Committee.

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

Response: Yes.

**Response of Jennifer Dorsey
Nominee to be United States District Court Judge for the District of Nevada
to the Written Questions of Senator Ted Cruz**

Describe how you would characterize your judicial philosophy, and identify which US Supreme Court Justice’s judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.

Response: I believe that judges should be fair, impartial, and respectful to the litigants, hardworking, and always well prepared. A judge should remain mindful of the judiciary’s limited role in our Constitutional system to apply the well-researched law to the facts of each particular case. I have not studied Supreme Court history with an eye toward the judicial philosophies of the Justices, so I cannot analogize my beliefs to those of any one jurist.

Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?

Response: When interpreting the text of the Constitution, a district court judge should look to binding precedent from the United States Supreme Court and his or her Court of Appeals. If the answer cannot be determined from precedent or analogous cases, a judge should look to the text of the Constitution, employing the plain and ordinary meaning of its express language. If the plain meaning cannot be determined or is unclear, original intent may be helpful in ascertaining the meaning of Constitutional provisions.

If a decision is precedent today while you’re going through the confirmation process, under what circumstance would you overrule that precedent as a judge?

Response: Unless the precedent is overturned by the United States Supreme Court or the Ninth Circuit Court of Appeals, I would be bound to follow it and have no authority to overrule it.

Explain whether you agree that “State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.” *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).

Response: As a judicial nominee, I do not feel it would be appropriate for me to express a personal opinion about a precedent of the United States Supreme Court. Supreme

Court precedent is binding on district court judges. If confirmed as a district court judge, I would apply all binding legal precedent, including *Garcia*, and my personal opinion, if any, would play no role in my decision.

Do you believe that Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?

Response: The United States Supreme Court has identified three broad categories of activity that Congress may regulate under the Commerce Clause power: "(1) use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons and things in interstate commerce, and (3) activities that 'substantially affect' interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (Scalia, J., concurring in the judgment) (quoting *Perez v. U.S.*, 402 U.S. 146, 150 (1971)). In *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court articulated limitations on the reach of the Commerce Clause power to certain specific non-economic activities. If confirmed as a district court judge, I would follow all applicable Supreme Court and Circuit Court precedent in evaluating a Commerce Clause question.

What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?

Response: As the United States Supreme Court stated in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952), the President's power to issue executive orders or actions "must stem either from an act of Congress or from the Constitution itself." These limits are judicially enforceable.

When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?

Response: The Supreme Court has held that rights are "fundamental" for purposes of the substantive due process doctrine when "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, 721 & 727 (1997) (internal citations and quotation marks omitted).

When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: The Supreme Court has held that a classification should be subjected to heightened scrutiny under the Equal Protection Clause when it targets a suspect class (e.g., race, alienage, national origin, or gender) or involves a fundamental right.

Do you “expect that [15] years from now, the use of racial preferences will no longer be necessary” in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: I have no specific expectation about the future use of racial preferences in public higher education. If confirmed, I would apply *Grutter* and any other binding Supreme Court precedent.

Nominations Hearing, April 24, 2013

Questions for the Record from Senator Lee

Questions for Jennifer Dorsey

- 1. You served as a judicial extern for Judge Stephen Reinhardt on the Ninth Circuit Court of Appeals. Do you consider him a judicial role model?**

Response: My experience externing in the Ninth Circuit Court of Appeals was brief and occurred when I was still a law student. During that time, I recall that Judge Reinhardt had a tireless work ethic, a quality I personally admire, but I lacked the perspective to consider him a judicial role model. Now, having practiced and appeared before many judges over the past 16 years, my judicial role models are those I am more familiar with on a regular basis, including many Nevada judges who are well prepared, treat the attorneys and litigants in their courtrooms with dignity and respect, and diligently apply the law in articulately drafted decisions.

- 2. In a law review note you wrote in 1997, you stated that Judge Reinhardt is “often deemed the most liberal judge in the federal judiciary.” If confirmed, would you seek to likewise establish a reputation as one of the most liberal judges in the federal judiciary?**

Response: No.

- 3. In the law review note you wrote in 1997, you stated: “A refusal by the Court to legalize the practice of physician-assisted suicide will not sit well with contemporary constitutional jurisprudence—particularly the decisions in *Roe*, *Casey*, *Cruzan*, and *Romer*. In these cases, the Court was willing to forge ahead to create a just outcome without regard to the usual decisional restraints.” In your law review note, you use the term “just results” or “just outcome” a few times.**
 - a. What role do judges have in ensuring that the result or outcome of a particular decision is just, and how should judges go about determining which result is just and which is unjust?**

Response: A judge ensures that a result or decision is “just” by thoroughly knowing the facts of the individual case at bar, carefully researching the state of the law, and faithfully applying the applicable, binding legal precedent.

4. Elsewhere in your law review note, you write: “As *Roe*, *Cruzan* and *Romer* illustrate, when public policy and sentiment dictate, just results follow. In light of these decisions, the Court’s recognition of the right to die with physician assistance would be in good company.”

a. As it turns out, the position you advocated for in your law review note was rejected by the Supreme Court. Do you repudiate the reasoning you used in your law review note?

Response: I wrote that article nearly 17 years ago, as a law student. The goal of the piece was not to advocate any position but to analyze the then-current state of the law on physician-assisted suicide and to address some of the potential rationales the Supreme Court might identify in its ultimate ruling, relying heavily on the reasoning articulated by the Ninth Circuit decision in *Compassion in Dying v. State of Washington*, 79 F.3d 790 (1996). As you point out, this decision was reversed, and the Supreme Court held in *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997), that there is no fundamental liberty interest in physician-assisted suicide. When I wrote my law review note, the Supreme Court had not yet answered this question. I recognize that *Glucksberg* is now the law of the land. If confirmed as a district court judge, I would faithfully apply all binding precedent from the United States Supreme Court, including *Glucksberg*.

b. If not, would it be fair to say that although as a judge you would follow the Supreme Court’s precedent, your own personal constitutional jurisprudence is at odds with that of a majority of the Supreme Court?

Response: My law review article does not reflect my personal constitutional jurisprudence, but rather was intended to analyze circuit court decisions that have since been reversed by the Supreme Court. These Supreme Court decisions are now binding on all lower federal courts, including the court to which I have been nominated. My personal constitutional jurisprudence—as further informed by my years of practical experience as a litigator and appellate advocate—is that a judge must remain mindful of the judiciary’s limited role in our Constitutional system to apply the well-researched law to the facts of each particular case and serve as a check and balance on the other branches of government.

5. In your law review note, you discuss Justice Scalia’s approach (as embodied in statements he had made) to the issue of physician assisted suicide. You conclude that he would be unlikely to vote in favor of a ruling that struck

down state laws banning physician suicide. Your view, as expressed in the article, is that (contrary to Justice Scalia’s position) courts should in fact strike down laws banning physician assisted suicide. You characterize Justice Scalia’s position—with which you disagree—as one that finds support “in doctrines of judicial restraint and enumerated rights.” It seems plain from reading your law review note that you consider the doctrines of “judicial restraint and enumerated rights” to be subservient to “just outcomes.”

- a. Do you retract and disavow your law review note, and if not, how can we conclude that you would prioritize the judicial restraint and the constitutional doctrine of enumerated rights given your criticism of those doctrines in your law review note?**

Response: Thank you for the opportunity to further clarify my article. The piece was not intended to state an opinion on the constitutionality of physician-assisted-suicide bans beyond analyzing the circuit court opinions that held that such bans were unconstitutional. The purpose of my note also was not to criticize or advocate any position or doctrine. I do not consider the doctrines of judicial restraint and enumerated rights to be subservient to “just outcomes,” nor did I intend to espouse that belief. I fully recognize that a judge’s role in our Constitutional system is a limited one, bound by the Constitution and the principles of *stare decisis* and judicial restraint. If confirmed, I would remain faithful to those principles.

- 6. Your biography evidences little experience in the courtroom. As I understand it, your questionnaire describes your legal work as pre-litigation preparation and research, discovery, motion practice and trial or other resolution. You state that you have participated in six trials. And you have no criminal experience.**

- a. Do you have any other legal experience of which the Committee should be aware and which you believe would prepare and qualify you to be a federal judge?**

Response: During my 16-year legal career, in addition to having tried six cases in court, I have also tried private arbitration matters and been a part of the trial team in approximately nine other trials. My career in complex civil litigation has given me a broad and varied background in complicated legal issues and the complexities of the legal process in both state and federal court. Although only a small number of these matters make it to trial, most still require extensive preparation at all stages, including the investigation stage, the complaint-and-answer stage, and many rounds of discovery

coordination and pretrial motions. In each litigation matter, I am in court frequently for hearings or other conferences regardless of whether the case ultimately resolves before trial. In addition, many of the cases I have handled are class actions, which bring unique considerations (such as class certification), or involve unique procedures (like multi-district litigation or the administration of class action settlements). I have been the co-author of the Nevada chapter of the ABA's *Survey of State Class Action Law* each year since 1999.

My appellate practice has further qualified me to perform the work of a district court judge because it has allowed me to more extensively evaluate a wide range of judicial decisions on pre- and post-trial matters. I was the primary drafter of the (successful) Respondents' Brief on the Merits in *Forsyth v. Humana, Inc.*, 525 U.S. 299 (1999), an 84,000-member health-care-fraud class action, in which the Supreme Court decided a preemption issue. Since then, I have written and argued numerous appeals in the Nevada Supreme Court and the Ninth Circuit Court of Appeals.

Although my practice has been concentrated in the areas of complex civil litigation and appeals, I worked as an extern in the Ventura County District Attorney's Office in 1995, where I had the opportunity to observe criminal trials and work on numerous pretrial matters, and during my last two years of law school, I worked as a law clerk drafting dozens of criminal appeals under the supervision of court-appointed attorneys working with the California Appellate Project. Admittedly, these experiences occurred many years ago and while I was still a law student, but I am confident that federal criminal law is an area that I could learn quickly with the strong work ethic and diligence I have brought to my civil practice. I believe that all of these experiences have prepared and qualified me to be a federal district court judge.

7. What role do the text and original meaning of a constitutional provision play in interpreting the Constitution?

Response: When interpreting the text of the Constitution, a district court judge should look to binding precedent from the United States Supreme Court and his or her Court of Appeals. If the answer cannot be determined from precedent, a judge should look to the text of the Constitution, employing the plain and ordinary

meaning of its express language. If the plain meaning cannot be determined or is unclear, original intent may be helpful in ascertaining the meaning of Constitutional provisions.

8. What role does our Constitution’s federalist structure—its enumerated powers doctrine and reservation of rights to the states—play in interpreting Constitutional provisions that affect federal powers?

Response: Our Constitution’s federalist structure emphasizes the limitations on the three branches of federal government. As the Supreme Court has articulated, “[t]he limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government . . . underscore the vital role reserved to the States by the constitutional design.” *Alden v. Maine*, 527 U.S. 706, 713 (1999). The Tenth Amendment “confirms the promise implicit in the original document,” reiterating, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” *Id.* (quoting U.S. Const. amend. X). The Supreme Court has observed: “As Justice Story put it, ‘this amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution.’” *New York v. U.S.*, 505 U.S. 144, 155 (1992) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833)). The Supreme Court has emphasized the benefits of this structure when evaluating the constitutionality of federal laws. *See, e.g., Printz v. U.S.*, 521 U.S. 898 (1997); *New York v. U.S.*, 505 U.S. 144, 157 (1992) (collecting authority).

a. Are there government powers that are exclusively the province of the states, and if so, which ones?

Response: Yes. The Tenth Amendment expressly reserves certain powers in the States, and “if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.” *New York v. U.S.*, 505 U.S. at 155. Reserved rights are those traditionally left to State control, such as the police power to regulate the health, safety, and welfare of the general public.

9. How would you decide a case in which there is no precedent on point and the litigant has asserted a claim based on a novel theory of constitutional law?

Response: When deciding a case in which there is no precedent on point and the litigant has asserted a claim based on a novel theory of constitutional law, the judge must apply all applicable law to the facts. If faced with such a situation, I would look first to the text of that constitutional provision, applying its plain and

ordinary meaning. In some cases, it might also be appropriate to consider the history and original intent of the constitutional provision to determine its meaning. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). I would also look to the body of legal precedent from the United States Supreme Court and the relevant circuit court interpreting and applying the subject constitutional provision in analogous cases or cases considering same or similar theories under other constitutional provisions for guidance. If no such precedent is available, I would consider decisions by other circuit courts or district courts; though decisions by other circuit and district courts would not be binding precedent, I would consider them to the extent they contained persuasive reasoning.

a. Would you look to sources outside the text of the Constitution in deciding such a case?

Response: As a district court judge, I would only consider sources outside the text of the Constitution to the extent that binding precedent from the Supreme Court or the relevant circuit court indicated that such a source ought to be considered. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008).

10. Justice Scalia has written that, “The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated.”¹

a. Do you agree with this approach and why or why not?

I agree that the starting point of statutory interpretation is always the text of the statute itself, and I would follow precedent from the Supreme Court and the relevant circuit court with respect to statutory interpretation.

¹ *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (Scalia, J., concurring).