

Response of Beth Labson Freeman
Nominee to be United States District Judge for the Northern District of California
To the Written Questions of Senator Chuck Grassley

- 1. You have been a judge on a court of general jurisdiction. Federal District Courts are courts of more limited jurisdiction. How will you make this transition and what guidance will you follow with respect to federal jurisdiction?**

Response: If confirmed to serve as a federal court judge, I will be guided by the Constitution, federal statutes and Supreme Court precedent in my effort to identify the bounds of federal court jurisdiction. The Constitution “authorizes Congress... to determine the scope of federal courts’ jurisdiction within constitutional limits.” *Hertz Corp. v. Friend*, 559 U.S. 77, 84 (2010). Recognizing that it is the duty of the federal court to determine whether it has personal and subject matter jurisdiction in a particular case, I believe that I can transition to this role by adopting a practice of reviewing federal jurisdiction in each case at an early stage of the proceedings to ensure that the case is properly before the court.

- 2. 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 what sources of information you look for guidance.**

Response: As a state trial court judge I have presided over hundreds of bench trials. I listen to all of the evidence admitted at trial and determine what the facts are. I review the claims made by the parties in order to identify the issues that I must decide. I review the law as presented by the parties in their arguments to the court and I do my own additional legal research. I look to state statutes and decisional law from the California Supreme Court and Courts of Appeal. When a constitutional issue arises, I review the state and federal constitutions and precedent from the U.S. Supreme Court. Once I determine the applicable law, I apply that law to the facts as I have found them in order to render a decision.

- 3. At times judges are faced with cases of first impression. What principles guide you, or what methods do you employ, in deciding cases of first impression?**

Response: During my tenure as a state trial court judge, when deciding cases of first impression regarding interpretation of a statute, I have been guided by the following principles: First, I am guided by the text of the statute. I interpret the provision according to its plain meaning. Second, if I find ambiguity, I attempt to resolve that ambiguity by consideration of the statute as a whole, applying well-established principles of statutory construction. Finally, I look to analogous precedent from higher courts.

4. How would you define the term judicial activism? What would indicate to you that a judge is an activist judge?

Response: I would define “judicial activism” as substitution of personal beliefs for the rule of law and binding precedent. Judicial activism would be indicated by a judge’s failure to appreciate the proper role of the judiciary in our Constitutional system.

5. How will you use the Sentencing Guidelines to guide you in criminal matters?

Response: If confirmed, I will give substantial deference to the Sentencing Guidelines. In my view, the Sentencing Guidelines enhance fairness and consistency in sentencing across the nation and are a significant factor in reducing bias in sentencing.

6. Some have contended that a judge should have empathy for those who appear before them. My concern is that when someone suggests a judge should have empathy, they are really suggesting the judge should place their thumb on the scales of justices to tilt in the favor of the proverbial little guy. In your personal opinion, is it ever the role of a judge to favor one party over another?

Response: No.

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

Response: I believe adherence to the rule of law and precedent is the most important attribute of a judge. Respect for litigants, fairness, and an open-minded review of the evidence presented in each case is also fundamental. A judge should always set aside personal views and fairly and impartially apply the law to the facts presented in the case. I believe that I possess these attributes and that I have diligently applied them throughout my 12 years as a state trial court judge.

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: In my view, judges must possess appropriate judicial temperament in order to insure the fair administration of justice. Parties and witnesses must feel that they are able to present evidence and legal arguments to a judge who is open-minded, willing to listen and able to thoughtfully consider all evidence and arguments in reaching a fair and correct judicial decision. The appropriate temperament of a judge includes courtesy, patience, hard work, fairness and decisiveness. I believe that I possess these attributes and, if confirmed, I will work hard to maintain this high standard of proper judicial temperament.

- 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. 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.

- 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 as a district court judge and faced with a case of first impression involving the interpretation of a statute, I would be guided by the text of that statute or provision and would interpret the statute according to its plain meaning. If additional sources were required to interpret an ambiguous portion of the statute, I would look at the statute as a whole and apply well-established principles of statutory construction to resolve the ambiguities. I would also look at analogous precedent from higher courts.

- 11. 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 follow the Supreme Court or Court of Appeals without regard to my personal opinion.

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

Response: A federal court should always begin its analysis of a federal statute with the presumption that federal statutes are constitutional. Courts should also seek to resolve cases without reaching a constitutional question when possible. In cases where the court is required to rule directly on the constitutionality of a federal statute, the court should declare a statute unconstitutional “only upon a plain showing that Congress has exceeded its constitutional bounds.” *United States v. Morrison*, 529 U.S. 598, 607 (2000).

- 13. What assurances or evidence can you give this Committee that, if confirmed, your decisions will be grounded in precedent and the text of the law rather than any underlying political ideology or motivation?**

Response: Political ideology and motivation have no place in judicial decision-making. If confirmed, my decisions will always be based on application of the law and Supreme

Court precedent. Based on my 12-year tenure on the state trial bench, where I have always applied the law without regard to other motivations, I can assure you that, if confirmed, I will continue to uphold the law and make certain that my decisions are grounded in precedent and the text of the law.

14. 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: If confirmed, I would always set aside my personal views and be fair to all litigants who appear before me. Over the past 12 years that I have served as a state court trial judge I have worked diligently to set aside any personal views I might have, to be fair and to demonstrate to litigants that I am open-minded to their arguments and committed to applying the law to their case. I believe that I have been successful in this regard over the past 12 years and would continue to do so if confirmed as a district court judge.

15. In your view, is it ever proper for judges to rely on foreign law, or views of the “world community,” in determining the meaning of the Constitution? Please explain.

Response: No.

16. If confirmed, how do you intend to manage your caseload?

Response: It is my understanding that the workload of the Northern District of California is quite heavy. If confirmed, I would actively manage my caseload. I would require the parties to develop efficient and appropriate timelines for their cases so that resolution of the dispute could be accomplished in a reasonable period of time. I would require litigants to adhere to that schedule. I would schedule significant motions and hearings and decide those matters promptly. I would encourage and facilitate mediation and settlement where appropriate and set firm trial dates to encourage the efficient resolution of cases.

17. 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. Our justice system depends on the fair, prompt and efficient resolution of matters brought before the court. If confirmed, I would actively manage my docket. I would work with the parties to develop appropriate case schedules. I would encourage settlement where possible and insure an appropriate trial date where necessary. I would

decide motions promptly so that the parties can be assured that they will obtain judicial rulings necessary to the fair resolution of their case.

18. 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 what sources of information you look for guidance.

Response: As a state trial court judge I have presided over hundreds of bench trials. I listen to all of the evidence admitted at trial and determine what the facts are. I review the claims made by the parties in order to identify the issues that I must decide. I review the law as presented by the parties in their arguments to the court and I do my own additional legal research. I look to state statutes and decisional law from the California Supreme Court and Courts of Appeal. When a constitutional issue arises, I review the state and federal constitutions and precedent from the U.S. Supreme Court. Once I determine the applicable law, I apply that law to the facts as I have found them in order to render a decision.

19. According to the website of American Association for Justice (AAJ), it has established a Judicial Task Force, with the stated goals including the following: “To increase the number of pro-civil justice federal judges, increase the level of professional diversity of federal judicial nominees, identify nominees that may have an anti-civil justice bias, increase the number of trial lawyers serving on individual Senator’s judicial selection committees”.

- a. Have you had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding your nomination? If yes, please detail what individuals you had contact with, the dates of the contacts, and the subject matter of the communications.**

Response: No.

- b. Are you aware of any endorsements or promised endorsements by AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ made to the White House or the Department of Justice regarding your nomination? If yes, please detail what individuals or groups made the endorsements, when the endorsements were made, and to whom the endorsements were made.**

Response: No.

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

Response: I received the questions on September 18, 2013. After reviewing the questions I prepared my responses that day and the following day. On September 22, 2013, I discussed my responses with a representative of the Department of Justice and I authorized the Department of Justice to transmit my responses to the Committee.

21. Do your answers reflect your true and personal views?

Response: Yes.

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To the Written Questions of Senator Ted Cruz

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

Response: My judicial philosophy, over the past 12 years that I have served as a state trial court judge, has been grounded in my commitment to the impartial adherence to the rule of law and binding precedent. I treat all litigants with fairness and respect. This means that I exercise judicial restraint in all matters by deciding only those issues in controversy and applying applicable precedent. I have not studied the judicial philosophies of the Justices of the Supreme Court and thus, I am unable to identify a Justice whose judicial philosophy is analogous to my own.

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

Response: If I am confirmed to be a district court judge and I am faced with a Constitutional question, my obligation would be to determine whether there is binding precedent from the Supreme Court or the Court of Appeals for my circuit and to apply that precedent. One example of a binding precedent where the Supreme Court has interpreted the Constitution using originalism is *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: If I am confirmed as a district court judge, I will be bound by controlling precedent and I would 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: *Garcia v. San Antonio Metro Transit Auth.* is binding precedent. If confirmed as a district court judge, I would be bound by and would follow the Supreme Court’s decision in *Garcia v. San Antonio Metro Transit Auth.*

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

Response: The Supreme Court, in *United States v. Lopez*, 514 U.S. 549, 558-559 (1995), identified three general categories of activity that Congress may regulate under its Commerce Clause power: (1) the use of channels of interstate commerce, (2) instrumentalities of interstate commerce and persons or things in interstate commerce, and (3) activities that substantially affect interstate commerce. In *United States v. Lopez*, *supra*, and *United States v. Morrison*, 529 U.S. 598 (2000) the Supreme Court has also articulated limitations to the reach of the Commerce Clause to certain non-economic activities. If confirmed as a district court judge and presented with a challenge to the constitutionality of a statute on the grounds that it impermissibly extended to non-economic activity, I would research the issue thoroughly and apply controlling precedent in making my ruling.

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

Response: The Supreme Court has recognized that a President's authority to issue executive orders or executive actions must "stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). If I were to be confirmed and confronted with such an issue, I would review all applicable precedent from the Supreme Court and apply it to the case before me.

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

Response: The Supreme Court has recognized certain rights as "fundamental" for purposes of the substantive due process doctrine when they 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 (1997) (citations omitted). If I were to be confirmed as a district court judge, I would look to Supreme Court precedent to determine if the right in question had been deemed to be fundamental. If the Supreme Court had not addressed the issue, I would look to the Ninth Circuit Court of Appeals and I would apply binding precedent.

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

Response: According to Supreme Court precedent, a classification should be subjected to heightened scrutiny under the Equal Protection Clause when it differentiates based on race, alienage, national origin, or gender. Additionally, heightened scrutiny should be

applied when a classification burdens a right the Court has identified as “fundamental,” such as the right to vote, *e.g.*, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

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: If confirmed, I would be bound by *Grutter* and all other Supreme Court precedents on the issue of racial preferences in public higher education, including *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013), regardless of any personal views I might have.