

**Response of Susan P. Watters
Nominee to be U.S. District Judge for the District of Montana
to the Written Questions of Senator Chuck Grassley**

1. In *State v. Steglich*, the Montana Supreme Court reversed your holding and was critical of how you reached your conclusion of unconstitutionality. It stated that you used the wrong standard and engaged in speculation about hypothetical situations that potentially render the statute void.

a. Do you think the Montana Supreme Court's analysis of your decision was correct?

Response: Yes. I respect the court's analysis and resulting opinion.

b. Is there anything you learned from this decision that changed your approach to deciding cases?

Response: My approach to deciding cases is an approach utilized by most judges, I believe. I review all of the documents on file; consider any oral argument, testimony or documentary evidence presented, if a hearing has been held; and review the authority relied on by the parties in support of their positions. I also conduct additional research. If the matter has been tried before me as a bench trial without a jury, I consider the evidence presented along with the applicable law and apply that law to the facts to reach a decision. I followed this approach in *Steglich*; however, the court arrived at a different conclusion based on its analysis and I respect its decision.

2. During your time as a Montana District Judge, the Montana Supreme Court overturned many of your denials of motions to suppress evidence on the basis of illegal searches from your court. In one reversal, the Supreme Court found that the state had not met the high burden of proving the exigent circumstances required to justify the warrantless search. Another reversal involved your determination that the discovery of evidence was inevitable and the evidence should not be excluded.

a. Although the specific facts in search and seizure cases are determinative, can you comment generally on the principles that guide you in these cases?

Response: When deciding a search and seizure issue related to a motion to suppress evidence, I hold a hearing and receive evidence. I determine the relevant facts based upon the evidence presented and apply the applicable statutes and the precedent set by the Montana Supreme Court and the United States Supreme Court to those facts to reach a decision.

b. Why did the application of those principles lead you to rulings that the Montana Supreme Court disagreed with in many of your cases?

Response: My response to question 13(f) of my Senate Questionnaire, lists all of the cases wherein I have been reversed or reversed in part by the Montana Supreme Court. In my fifteen years on the state court bench, I have been reversed in only two cases involving search and seizure questions, and I appreciate the opportunity to explain these cases.

In the first case mentioned above, the defendant was arrested by police after they learned that a “must appear” warrant had been issued for her. The police conducted a search incident to arrest, finding three cigarette packages on her person. One of the cigarette packages, located in the defendant’s sock, contained a bindle and a baggie, the contents of which later tested positive for methamphetamine. The defendant was then taken to the Yellowstone County Detention Facility (YCDF). At trial, the defendant moved to suppress the evidence against her. I concluded that the police had exceeded the scope of a search incident to arrest when they searched the inside of the cigarette package, but that under the “inevitable discovery” exception to the exclusionary rule, the evidence did not have to be suppressed. I concluded that the inevitable discovery exception applied because the police testified that they always took people arrested on “must appear” warrants to either the YCDF or the Laurel Police Department (LPD), and that because jail personnel at YCDF are allowed to perform routine inventory searches, the contraband would have been discovered at YCDF. The Montana Supreme Court determined that in the particular fact scenario before me, it did not follow “as certainly as night follows day” – the standard set by Montana Supreme Court precedent - that the contraband would have been discovered because the defendant could have posted bond immediately at YCDF before a complete inventory search was conducted. In the alternative, had the defendant been taken to the LPD for booking, she might not have been subject to a complete inventory search because the LPD no longer has a jail. Given these facts, the Montana Supreme Court held that the inevitable discovery exception to the exclusionary rule did not apply. I respect the court’s opinion.

In the second case mentioned above, I concluded that the automobile exception, requiring probable cause and exigent circumstances, applied to the search and denied the motion to suppress. The Montana Supreme Court, in a different case decided after my ruling, but prior to the appeal, held there was no longer an automobile exception to the search warrant requirement, but that an analysis of probable cause and exigent circumstances still applied. The Montana Supreme Court determined in my case that because the officer could have obtained a search warrant, exigent circumstances did not exist to justify the warrantless search. Once again, I respect the court’s opinion. With respect to these cases and any others, I would have no difficulty following or applying precedent that reversed a decision I had made as a trial court judge.

- 3. As a state court judge for the past 15 years, your work has naturally focused on issues of Montana state law. If confirmed, how do you expect the federal bench to be different, and how do you plan to prepare for those differences, such as federal jurisdictional issues?**

Response: The most significant difference between the state and federal courts is subject matter jurisdiction. In order to prepare for the transition from the state court bench to the federal court bench, I have begun studying the materials provided by the Federal Judicial Center, including the Benchbook for U.S. District Court Judges, Fourth Edition and the many other resource materials the Federal Judicial Center has provided to me. I will study the Federal Rules of Criminal and Civil Procedure and the Federal Rules of Evidence. I would also reach out to the Chief Judge and the several senior judges in the District of Montana for assistance.

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

Response: I believe there are three important attributes that a judge should possess. A judge should be a student of the law and apply that law fairly and impartially. A judge's integrity should be beyond reproach. A judge should have a strong work ethic to handle the demands of a heavy caseload. I believe I have demonstrated these attributes during my tenure as a state 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 be patient and allow all parties an opportunity to be heard. A judge should be courteous and respectful to those who appear before her. I believe I meet this standard.

- 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 am fully committed to following the precedent of the Ninth Circuit Court of Appeals and the United States Supreme Court faithfully and giving them full force and effect. In order for the judicial system to be fair and consistent, a judge must follow precedent. My personal views have no place in my judicial decision-making.

- 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 the case involved interpretation of the United States Constitution, I would start with the text of the provision and consider the most closely analogous Supreme Court and Ninth Circuit precedent. If the case involved statutory interpretation, I would begin with the plain language of the statute. If the statute is unambiguous, I would apply the statute as written. If the statute is ambiguous, I would look to relevant canons of statutory interpretation, and Supreme Court and Ninth Circuit precedent. If these sources were still inconclusive, I would also review the legislative history.

- 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 district court judge, I would have an obligation to follow the precedent established by the Supreme Court and the Ninth Circuit. I would follow controlling precedent, regardless of any personal beliefs I might have.

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

Response: Any laws duly enacted by Congress are presumed to be constitutional. I would begin my analysis from this point. I would declare a law unconstitutional only if, after reviewing Supreme Court and Ninth Circuit precedent, I determined the law clearly and unequivocally violated a provision of the Constitution or that Congress had exceeded its constitutional authority.

- 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, foreign law or the views of the “world community” should not be relied upon 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: Political ideology or motivation should never play a role in a judge’s decision-making process. During my fifteen-year tenure as a state court judge, I have always handled and decided my cases in a fair and impartial manner, without regard to any personal views I might have. If confirmed, I would continue to do the same.

- 12. What assurances or evidence can you give this Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?**

Response: The personal views of the judge should never play a role in her decision-making process. During my fifteen-year tenure as a state court judge, I have never allowed any personal views I might have to influence my decisions. If confirmed, I

would continue to be fair to all who appear before me, without regard to any personal views I might have.

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

Response: I understand that the workload in the District of Montana – Billings Division is very demanding. I have experience working in the most demanding district in the state of Montana as a state court judge. If I am confirmed, I will actively manage my caseload. I will strictly follow the requirements for speedy trials in criminal cases. I will utilize scheduling orders setting matters for trial with deadlines for adding parties, identifying experts, exchanging discovery, conducting depositions, filing motions for summary judgment, motions in limine and other pretrial motions. I will require the parties to adhere to these deadlines, absent a showing of good cause. I will strive to make rulings in an efficient and timely manner. Where appropriate, I will encourage mediation between the parties. If I am confirmed, I would also reach out to my colleagues in the District of Montana for guidance as to the best way to manage a demanding caseload.

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 believe that judges have an essential role in controlling the pace and conduct of litigation in the courts. Some of the steps I would take to control my docket, if I were confirmed, are set forth in answer to Question 13, above.

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: I review the pleadings, motions, supporting and opposing briefs of the parties and consider any oral argument, testimony or documentary evidence presented when deciding contested motions. I also review the authority relied on by the parties in support of their arguments and conduct my own legal research as well. When the matter has been tried before me as a bench trial without a jury, I consider the evidence presented along with the applicable law and apply that law to the facts to reach a decision.

16. 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? In yes, please detail what individuals you had contact with, the dates of the contacts and the subject matter of the communications.**

Response: No, I have not had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding my nomination.

- 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, I am not 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 my nomination.

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

Response: I received these questions by email from an official at the Department of Justice. I reviewed the questions, drafted the answers and submitted the draft answers to the official at the Department of Justice, who discussed them with me. I then finalized my answers and submitted them to the Department of Justice for submission to the Committee.

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

Response: Yes.

**Response of Susan P. Watters
Nominee to be U.S. District Judge for the District of Montana
To the Written Questions of Senator Ted Cruz**

Judicial Philosophy

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 is to treat all who appear before me with courtesy and respect and to faithfully follow precedent in order to provide fairness and consistency within the judicial system. I have not studied the judicial philosophies of the justices who served on the Warren, Burger, or Rehnquist courts, so I am not able to say whose philosophy is most analogous to mine.

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: If confirmed, I would follow applicable precedent established by the Supreme Court and the Ninth Circuit to interpret the Constitution. For example, the Supreme Court has applied original meaning originalism in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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: If confirmed as a district judge, there would be no circumstance in which I would overrule precedent.

Congressional Power

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: The *Garcia* decision represents binding precedent. If confirmed as a district judge, I would be compelled to follow *Garcia*, as well as any subsequent precedent on this issue as established by the Supreme Court and the Ninth Circuit.

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

Response: According to *United State v Lopez*, 514 U.S. 549, 558-559 (1995), Congress, under the Commerce Clause, “may regulate the use of the channels of interstate commerce”, and may “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.” Congress also may “regulate those

activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.” *Id.* (citations omitted). If confirmed, I will apply the analysis set forth in *Lopez* and other applicable precedent established by the Supreme Court and the Ninth Circuit to determine whether an activity is within the scope of the Commerce Clause.

Presidential Power

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

Response: The judicially enforceable limits on the President’s ability to issue executive orders or executive actions are set forth in Justice Jackson’s concurring opinion in the Supreme Court decision, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). If confirmed, I would apply the *Youngstown* analysis to any cases involving the legality of presidential executive orders or actions.

Individual Rights

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

Response: The Supreme Court has stated that the “Due Process Clause specially protects those fundamental rights and liberties 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 (1997) (citations omitted). If confirmed, I would apply the precedent that has been set previously by the Supreme Court and the Ninth Circuit.

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

Response: Strict scrutiny under the Equal Protection Clause applies when a government action applies to suspect classifications, such as race and national origin, and an intermediate level of scrutiny applies to quasi-suspect classifications such as gender and illegitimacy. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

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: *Grutter* is binding precedent in this area of the law. As such, if confirmed, I would be bound to follow the *Grutter* case and any subsequent binding precedent, such as *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013), in the area of affirmative action in higher education, regardless of any personal expectations or opinions.