Responses of Lorna G. Schofield
Nominee to be United States District Judge for the Southern District of New York
to the Written Questions of Senator Chuck Grassley

1. **In 1988, you represented plaintiffs as an ACLU cooperating attorney in a suit against the George Washington University Medical Center. The suit involved a number of claims relating to the decision of the Medical Center to seek a judicial declaratory order allowing them to perform a cesarean section on a terminally ill woman who was 26 weeks pregnant.**

   Please provide a summary of the case, including any facts that support the legal claims made against the George Washington University Medical Center, and a description of your role and that of the ACLU in representing the plaintiffs.

   Response: The estate of Angela Carder asserted claims against George Washington University Medical Center alleging lack of informed consent, medical malpractice, breach of warranty, false imprisonment, battery and other claims for forcing her to undergo a cesarean section pursuant to a court order obtained by the hospital. The evidence disclosed in discovery showed that the procedure had been performed without her consent, and contrary to the wishes of her husband, parents and treating physician. The evidence also showed that her physician and several of the hospital physicians refused to perform the procedure under the circumstances. The child died shortly after delivery and the mother died two days later. The evidence also showed that while Ms. Carder was an out-patient in the hospital's High Risk Pregnancy program, the hospital failed to diagnose a tumor in her lung, and eventually admitted her to the hospital for "fluid in the lung," when in fact by that time she had grapefruit-sized tumor in her lung and was terminally ill.

   The ACLU filed the Complaint in the summer of 1988, around the same time that I joined Debevoise & Plimpton (D&P) as an associate. D&P accepted the case as a pro bono matter in late 1988 or early 1989. A couple of months later, the senior associate on the matter, Terry Thornton, announced that she was leaving D&P for another firm, but wished to continue working on the case. D&P assigned me to the case to replace Ms Thornton, and to work with her and several junior D&P associates. Ms. Thornton and I, along with more junior associates, handled the day-to-day work on the case, which consisted chiefly of fact and expert discovery and some motion practice. We split the work so that Ms. Thornton's firm was primarily responsible for the medical ethical (forced cesarean section) issues, and D&P was primarily responsible for the medical malpractice (failure to diagnose) issues. The ACLU checked in from time to time, but did not play an active role during this phase of the case. The ACLU again became actively involved in the settlement phase, and the three entities – Ms. Thornton's firm, D&P and the ACLU – acted as co-counsel in settling the case. The settlement consisted of a confidential monetary settlement for the estate, as well as an agreement by the hospital to revise its policies on informed consent.

2. **In the past, as a member of the ABA and Co-Chair of the Class Actions and Derivatives Suits Committee, you have been critical of legislation aimed at curtailing lawsuit abuse, including reforms to class action lawsuits. In 1995, you wrote an article critical of legislation aimed at curtailing abuses in securities class actions. Many of these reforms were enacted into law as part of the Private Securities Litigation Reform Act.**

    a. **Having litigated cases both prior to and after the reforms in this legislation, has your opinion of the reforms changed? If so, how?**

    Response: In the referenced article I was critical of two particular proposed reforms. One was a loser-pays proposal. The other was the requirement to create a plaintiffs' steering committee. Neither was enacted as proposed. The loser-pays proposal instead became a requirement that the Court consider compliance with Rule 11 of the Federal Rules of Civil Procedure at the conclusion of a class action, and apply sanctions in the event of a violation. Rule 11 long has required a good faith factual and legal basis for claims and contentions, and provided the court with authority to sanction parties that violate the rule. The steering committee proposal was dropped, and "lead plaintiff" requirements were created to ensure by other means oversight of class counsel by an interested party with economic clout. My criticisms of the two proposed reforms do not apply to the Private Securities Litigation Reform Act as enacted. In any event, as a district court judge, I would be bound to apply the law however it is enacted.

    b. **In your article, you reasoned that many of the reforms were unnecessary because of the "broad powers courts already have for controlling the class action process." Could you provide some examples of the broad powers to which you were referring?**

    Response: Courts have various powers to control the class action process, both with regard to frivolous law suits, and oversight of class counsel – which were the focus of the two reforms that I discussed. For example, courts may consider and decide dispositive motions at any time, including prior to class certification, thus avoiding the cost and disruption of class certification proceedings in frivolous cases. Courts must apply higher pleading standards when fraud is alleged, and the claims and factual assertions must be "plausible." Discovery is automatically stayed in most federal securities cases until the motion to dismiss is decided, and courts have discretion to stay discovery pending this decision in other types of cases, thus avoiding the costs of discovery if claims are frivolous. If the parties to a class action agree to a settlement, the court must determine whether its terms are fair, including provisions for payment of class counsel, after notice has been given to class members and they have had an opportunity to object to the terms of the settlement. Because class actions involve the rights of absent parties, and because certifying a class exerts considerable settlement pressure on defendants, judges have a special responsibility to oversee putative class actions.

c. If confirmed, will you exercise your "broad powers" as a judge to control the class action process? Please explain.

Response: Yes. I believe that it is critically important for judges to be aware of and exercise their authority to manage complex cases, including class actions, in a manner that will result in adjudications that are just, speedy and as inexpensive as possible.

d. Curtailing lawsuit abuses continues to be a topic of debate, especially in the context of medical malpractice. Given your expertise in this area, I am curious as to your views on this subject. Do you believe reforms are necessary to prevent frivolous lawsuits and unreasonable awards? If so, what types of reforms do you think would be helpful?

Response: I do not have a view on, or expertise in, this particular subject. My experience in the medical malpractice area is limited and dated, as the only such case I litigated was the *Stoner* case, referenced above, which settled in 1990. Should any reforms be enacted, as a district court judge I would apply the law as written.

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

Response: The most important attribute of a judge is to be fair and impartial in applying the law. A society governed by the rule of law is one in which the laws apply equally, predictably, transparently and in the same fashion to all regardless of the identity of the litigants or the judge. I believe I have the ability to be fair and impartial.

4. 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, the most important elements of proper judicial temperament are being fair-minded and dispassionate. Decisions should be made without bias or emotion by applying the law to the facts before the court. Judges also must be unfailingly respectful, regardless of the merits of a case or argument. Judges are representatives of the justice system, and like the justice system should treat all those who deal with the courts fairly and well. I believe I meet this standard.

5. 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 precedent?

Response: Yes.

6. 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 faced with a case of first impression involving the interpretation of a statute, I would first look at the text of the relevant provision and any precedent construing that text. If the text is ambiguous, I would then look to legislative history and any precedent construing it. Even if the precedent is not binding, it may well offer analysis that is useful and sound. I would also look for analogous issues and cases, and I would look to the parties' briefs and arguments for further guidance. In any event, judges should not simply "make-up" the law according to their own predilections, as that would undermine the rule of law.

7. What would you do if you believed the Supreme Court or the Court 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: As a district court judge, I would be bound to follow, and would follow, the precedent of the Supreme Court and the Court of Appeals for the Second Circuit.

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

Response: Federal statutes are presumed to be constitutional. A federal court must declare a federal statute to be unconstitutional if the issue is properly before the court, and the statute violates a provision of the Constitution or if Congress exceeded its constitutional authority in enacting the statute.

9. 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.

10. 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: If confirmed, I would triage complex and other cases that need active judicial management and apply more judicial management in those cases; encourage the parties to narrow the issues and have more focused discovery; set reasonable but reasonably short deadlines early in the case; enforce deadlines and allow extensions only when absolutely necessary; encourage discussion and collaboration between the parties, especially regarding potentially contentious issues such as electronic discovery; set reasonable limits on the submission to the court of potentially voluminous materials; and endeavor to make prompt decisions.

11. 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 important role and responsibility to control the pace and conduct of litigation. Rule 1 of the Federal Rules of Civil Procedure directs that those rules should be "construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding." If confirmed, in addition to the steps outlined above, I would continue to educate myself about innovative ways that other judges have successfully controlled their dockets. Some methods I have encountered in my bar association work on civil procedure issues in the past few years are to: (1) provide a list of procedures that the parties should discuss and possibly agree on, for example, regarding their communications about discovery disputes, privilege logs, the number of depositions in complex cases, and the scope and conduct of electronic discovery; (2) enforce the proportionality rule (Fed. R. Civ. P. 26(b)(2)(C)) to preclude unwarranted discovery, even in the absence of a motion if appropriate; (3) impose other discovery limitations permitted by the rules (e.g. Fed. R. Civ. P. 26(b)(2)(A)); (4) impose cost shifting as appropriate; (5) consider staging the proceedings – first bringing on issues that may be dispositive or that are likely to encourage resolution; and (6) offer prompt trial dates to parties willing to expedite their cases.

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

Response: I received these questions on June 13, 2012. I personally prepared my responses on June 13 and 14, 2012 and then shared them with representatives of the Department of Justice. I subsequently finalized my responses and authorized the Department of Justice to submit my responses to the Committee on June 18.

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

Response: Yes.