

Responses of Stephanie Thacker
Nominee to be United States Circuit Judge for the Fourth Circuit
to the Written Questions of Senator Chuck Grassley

- 1. While your Senate Questionnaire indicates litigation experience, there is less evidence of your experience in appellate practice. Could you please describe your appellate experience for the Committee? In doing so, please inform the Committee how many cases you have argued at the appellate level and how many appellate briefs you have written.**

Response: Given the nature of the practice at the United States Attorney's Office for the Southern District of West Virginia as well as the nature of private practice with my law firm, appellate work has been part and parcel of nearly the entire breadth of my 21 year litigation career. While with the United States Attorney's Office for the Southern District of West Virginia, I was in the General Criminal Division. There was not a separate appellate section in that office. Therefore, as an Assistant United States Attorney, I was responsible for each case I handled from the investigation stage through appeal. As a result, I wrote a number of appellate briefs during my tenure with that office and also argued an appeal before the Fourth Circuit Court of Appeals. While with the Department of Justice Child Exploitation and Obscenity Section, I also assisted in appellate brief writing in a number of prosecutions I handled around the country. Additionally, part of my role with the Child Exploitation and Obscenity Section included review and analysis of the *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and *United States v. Booker*, 543 U.S. 220 (2005) Supreme Court decisions in order to help draft appellate and prosecution guidance for the United States Attorney's Offices around the country. The size and nature of my firm is also such that we do not have a separate appellate section within the firm, but, rather, each handle our cases through discovery, trial, and appeal. Therefore, I have drafted a number of appellate briefs in private practice as well and have argued one case before the West Virginia Supreme Court of Appeals (West Virginia's highest court). In total, I have drafted approximately 25 appellate briefs.

- 2. What additional experience do you have that leads you to believe you are prepared to be an appellate court judge?**

Response: My career has afforded me a breadth of legal experience which I believe would serve me well if confirmed. I have practiced both civil and criminal law; both prosecution and defense; both trial work and appellate work, and in both public service and private practice. While with the United States Attorney's Office and the Department of Justice, I gained experience in a wide cross section of criminal cases, including prosecutions for domestic violence, child support, coal mine safety violations, environmental violations, firearms violations, child exploitation, child pornography, human trafficking, obscenity, tax evasion, fraud, asset forfeiture, money laundering, conspiracy and RICO. While with the United States Attorney's Office, I was responsible for coordinating a number of prosecution initiatives. Likewise, with the Department of Justice Child Exploitation and Obscenity Section, I was responsible for the development and implementation of a nationwide program

of significant prosecutions. I also assisted in developing policy and litigation strategies and initiatives to ensure that the Section was effectively keeping pace with the technologies employed in child exploitation and obscenity offenses and to fill niches where areas ripe for prosecution were not being pursued otherwise. Additionally, while with the Department of Justice, I traveled both nationally and internationally providing training to law enforcement and prosecutors on the investigation and prosecution of child sexual exploitation and human trafficking crimes. For the past two years, I have served as an adjunct professor at the West Virginia University College of Law teaching classes on trial advocacy and child abuse and neglect. In my private practice work, my law firm and I are regularly called on to defend some of the country's largest companies in high-profile trials. As a result, throughout the course of my career in civil litigation, I have worked on large, complex, document intensive cases, including commercial, product liability and toxic tort litigation. I have also represented individuals and white-collar criminal defendants. I do, then, have a wealth of experience in many facets of the law, and from several perspectives that I believe has helped prepare me for the appellate bench (in addition to the appellate experience described in response to Question 1).

- 3. A key component of the ABA's criteria for evaluating appellate nominees is writing ability. As stated by the ABA Committee on the Federal Judiciary, "The ability to write clearly and persuasively, to harmonize a body of law, and to give meaningful guidance to the trial courts and the bar for future cases are particularly important skills for prospective nominees to the appellate courts." Aside from a law review article you wrote in 1989, your Senate Questionnaire provided very little in the way of examples of your legal writing and analytical skills. What further information could you provide to the Committee that would help us evaluate whether your writing skills meet the high standards expected of an appellate court judge?**

Response: The ability to write well and to analyze issues is paramount to a successful academic and legal career. In this regard, I have excelled at every level of both my academic and professional careers. I achieved success at the West Virginia University College of Law due to my ability to reason, analyze, and write. I was a member of the West Virginia Law Review, and also served as the editor for the national coal issue of the West Virginia Law Review. I graduated among the top 10% of my class Order of the Coif. Given the nature of my practice throughout the course of my career, the ability to write effectively has been critical in my representation of the United States and of my clients in state and federal courts around the country. My litigation work has required that I frequently engage in brief writing and legal analysis. I have drafted a number of appellate briefs and have been engaged in frequent and robust motions practice in the litigation in which I have been involved. I am confident that the Courts before which I have appeared would universally give me high marks for my writing ability. In fact, after conducting a background investigation, including the evaluation of my writing ability, a substantial majority of the members of the American Bar Association Committee on the Federal Judiciary gave me their highest rating of "well qualified."

- 4. How would you describe your judicial philosophy?**

Response: My judicial philosophy would be characterized first and foremost by impartiality and respect for the law and binding legal precedent. My judicial philosophy would also include a respect for all parties that appear before the Court.

5. Can you identify for the Committee which Supreme Court Justice you would most admire, and why?

Response: I cannot identify a singular Supreme Court Justice I would most admire. Rather, my admiration is placed upon a respect for the legal process itself and for the United States Supreme Court as an institution.

6. Could you please inform me of a Supreme Court decision you believe was poorly reasoned, without regard to whether you agreed or disagreed with the outcome, and explain why?

Response: I believe *Plessy v. Ferguson*, 163 U.S. 537 (1896) was poorly reasoned in that the Fourteenth Amendment guarantees equality under the law, but separation by its very nature cannot be equal. The *Plessy* decision favored public policy and perceived public good at the time over the protections afforded by the Constitution. This is an end justifies the means type of analysis that did not, of course, withstand the test of time. *Brown v. Board of Education*, 347 U.S. 483 (1954) ultimately overruled *Plessy* holding that separate facilities were inherently unequal and, thus, denied equal protection of the law.

7. Some people refer to the Constitution as a “living” document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?

Response: No. I do not agree with this statement.

8. As an Assistant United States Attorney, did you ever prosecute someone who was death penalty eligible? If so, have you ever sought the death penalty?

Response: I did not have any case as an Assistant United States Attorney that was death penalty eligible.

a. Have you ever elected not to seek the death penalty for a defendant who was eligible? If so, please explain why you determined the death penalty was not appropriate in that instance.

Response: No. There has never been an occasion where I elected not to seek the death penalty for a defendant who was eligible.

9. Do you believe that the death penalty is an acceptable form of punishment?

Response: The death penalty is constitutional except in limited circumstances and I would follow Supreme Court precedent in that regard.

10. In *Roper v. Simmons*, the Supreme Court relied on foreign law in holding that the execution of minors violated the Eighth Amendment. Do you think it is proper to look to foreign law to determine the meaning of the Eighth Amendment to the United States Constitution?

Response: No, I do not, unless directed to do so by the Supreme Court.

11. Do you believe it ever appropriate for a judge to consult foreign law, when determining the meaning of the United States Constitution?

Response: The United States Constitution is appropriately interpreted by reference to the text of the Constitution itself and United States legal sources, specifically the United States Supreme Court. As a result, if confirmed, I would not consult foreign law in order to interpret the Constitution unless directed to do so by the Supreme Court.

12. A recent Time magazine article said that “If the Constitution was intended to limit the federal government, it sure doesn’t say so.” Do you agree with this statement? Please explain your answer.

Response: I am not familiar with the Time magazine article or its context. However, I do not agree with this statement. Pursuant to the Tenth Amendment, the federal government is one of limited and enumerated powers and the United States Supreme Court has repeatedly said so.

13. Do you believe that the Second Amendment is an individual right or a collective right?

Response: The Supreme Court has held in *District of Columbia v. Heller*, 554 U.S. 570 (2008) that the Second Amendment confers an individual right to bear arms. If confirmed, I would follow binding Supreme Court precedent in this regard.

14. What standard of scrutiny do you believe is appropriate in a Second Amendment challenge against a Federal or State gun law?

Response: If confirmed and presented with a case involving a Second Amendment challenge, I would closely review binding Supreme Court precedent in this regard, including *Heller* and *McDonald*, and would follow applicable precedent in determining the constitutionality of the particular issue presented at the time. The Supreme Court has held that there is an individual and fundamental constitutional right to keep and bear arms. Therefore, a heightened level of scrutiny should be applied in such circumstances.

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

Response: Impartiality is the most important attribute of a judge. I do believe I possess this quality and that, if confirmed, I would fairly and impartially rule.

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: The appropriate temperament of a judge is one that is respectful. A judge should exhibit respect for the law, the process, and the parties. In this regard, a judge should be well prepared, open minded, attentive, patient, impartial, fair, and prompt in decision making. Some of these qualities are also referenced in Canon 3(A)(3) of the Code of Conduct for United States Judges. I believe I do meet this standard.

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. I am committed to faithfully following all binding precedent without regard to personal views.

18. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded 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: In a matter of first impression, I would look first to the text of the statute, regulation, or other legal provision at issue. If the text is clear and unambiguous, I would apply it to the facts presented. If the text is ambiguous, I would then look to analogous Supreme Court and Fourth Circuit precedent for analytical and legal guidance. If there was no sufficient guidance to be found in those resources, I would look to analogous cases in other federal appellate courts.

19. 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 own judgment of the merits, or your best judgment of the merits?

Response: I would follow binding precedent of the Supreme Court and the Fourth Circuit Court of Appeals. I would not seek to inject my own judgment.

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

Response: It is appropriate for a federal court to declare a statute enacted by Congress unconstitutional upon a plain showing that Congress has exceeded its powers or constitutional bounds.

21. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?

Response: Only an appellate court sitting *en banc* may overturn precedent within the circuit. And, then, the court is constrained to overturn precedent only in the limited circumstance in which it is in conflict with Supreme Court precedent or with another decision within the circuit.

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

Response: I received this set of questions on the evening of October 11, 2011 from the Department of Justice. I reflected on the questions and drafted responses on October 13 and 14, 2011, which I then discussed with Department of Justice staff, and requested that my responses be forwarded to the Senate Judiciary Committee.

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

Response: Yes.