

Responses of John J. Tharp, Jr.
Nominee to be United States District Judge for the Northern District of Illinois
to the Written Questions of Senator Chuck Grassley

- 1. Much of your current work as an attorney centers on assisting clients with both government and internal investigations of securities and other types of fraud. Do you think judicial and civil remedies are a more effective way of preventing and dealing with securities fraud than regulatory actions and investigations from executive branch agencies?**

Response: In my experience, I have not found private civil litigation to be a more effective way of preventing and dealing with securities fraud than regulatory actions and investigations from executive branch agencies.

- 2. In some of your writings, you discuss a current “controversial” practice of executive agencies such as the SEC in which they delegate investigatory authority to counsel of corporations potentially facing allegations of securities fraud. You state this allows the executive branch agency to offload some of their work on the private sector and, at the same time, affords the corporation the ability to “control” the investigation and possibly reach an agreement with the government not to prosecute.**

- a. Do you think this practice is effective or wise?**

Response: The practice that I have referred to does not involve any delegation of legal authority or responsibility by executive agencies to counsel for corporations. Rather, I have noted the increasing expectation of enforcement attorneys from such agencies that corporations will themselves conduct credible and thorough internal investigations of potential violations of law (whether they come to the attention of the corporation via whistleblower complaints, the corporation’s own compliance procedures and internal controls, or other means) and provide to the agencies the factual information developed through those internal investigations. In my experience, this approach has been very effective in helping agencies maximize their resources and identify and resolve securities fraud claims in a fair and efficient manner.

- b. Do you think this practice is legal?**

Response: The practice that I have referred to does not involve any delegation of legal authority or responsibility by executive agencies to counsel for corporations. I am not aware of any suggestion or argument that encouraging corporations to affirmatively and pro-actively investigate potential violations of law, and to report them to regulatory agencies, is unlawful.

- c. If you, as a judge, were presented with a case where a litigant was challenging this authority, how would you approach such a case?**

Response: I would not approach such a case differently than I would approach any other case. I would consider the evidence and legal arguments of the parties and decide the case impartially and in accordance with the applicable law.

3. You also write that the SEC and other organizations are being more aggressive than ever with securities investigations, presumably in response to the recent financial crisis and undiscovered issues such as the situation at Lehman Brothers.

a. If a case involving a civil or criminal claim relating to securities fraud came before you on the court, do you feel you would be able to be fair and impartial in adjudicating the matter?

Response: Yes. In my career, I have both prosecuted and defended securities fraud cases.

b. Can you think of any situations relating to securities fraud cases where you would need to recuse yourself?

Response: At present, I cannot think of a situation in which I would need to recuse myself from a case solely because it involved allegations of securities fraud (other factors, such as a party being represented by my current firm, could, however, prompt a recusal in a securities fraud case). In all cases, however, I would employ established processes for identifying potential conflicts and consult and follow the Code of Conduct for United States Judges.

4. You have a distinguished service career in the US Marine Corps. In the current state of the war on terror, a federal judge may have to rule on the legal status of “military detainees” captured or arrested pursuant to the president’s authority found in the current Authorization for Use of Military Force (AUMF) or new authority found in Section 1021 of the 2012 National Defense Authorization Act.

a. In his dissent in *Hamdi v. Rumsfeld*, Justice Scalia says: “The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.” Some legal scholars believe Section 1021 of the recently passed NDAA allows for just that. Do you agree with Justice Scalia?

Response: I agree that no person to whom the protections of the United States Constitution apply may be deprived of liberty without due process of law, as stated in the Fifth Amendment. As a District Judge, I would endeavor to follow legal precedent and other applicable law in resolving any matter presenting the question of whether the imprisonment of a military detainee constituted a violation of the Constitution.

- b. In *Hamdi*, a Supreme Court plurality ruled that while the executive has the authority to detain enemy combatants, detainees who are US citizens are entitled to due process before a judge, explaining that this review did not have to meet the usual stringent standard applied in ordinary criminal matters. However, this was a plurality opinion and binding precedent is arguably unclear on the issue. Do you feel the government has the ability to detain non-citizen enemy combatants without trial? What about citizen detainees?

Response: Although it was a plurality opinion in the sense that no single view as to all issues in the case commanded a majority of the Supreme Court, in *Hamdi* a majority of the Court agreed that the petitioner was entitled to a meaningful opportunity to contest the factual evidence on which his detention was based. See 524 U.S. 507, 533 (plurality of four Justices so holding) and *id.* at 553 (opinion of two Justices concurring that petitioner “should at the least have the benefit” of the opportunity “to offer evidence that he is not an enemy combatant”). As a District Judge, I would apply that precedent, and any other applicable precedent and law, to resolve any question that came before me regarding whether the detention of an enemy combatant, whether a citizen or non-citizen, constituted a violation of the Constitution.

- c. In a separate *Hamdi* dissent, Justice Thomas disagrees with both Justice Scalia and the plurality. Justice Thomas argues the executive has vast power in certain circumstances to detain citizen enemy combatants without judicial review, stating: "Because a decision to bomb a particular target might extinguish life interests, the plurality's analysis seems to require notice to potential targets." Do you find this view persuasive?

Response: Justice Thomas' dissent in *Hamdi* did not garner the support of other members of the Court. As a District Judge, I would not apply the rationale of that dissent in resolving a question of whether the detention of an enemy combatant constituted a violation of the Constitution.

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

Response: I would cite integrity as the most important attribute of a judge because it is a quality that encompasses many characteristics that a judge should possess, such as honesty, impartiality, humility and respect for the rule of law. I believe I possess these qualities.

6. 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's temperament should promote confidence in the integrity of the judge and, by extension, of the judicial system. A judge must therefore be respectful, even-tempered and patient with all litigants. I believe I meet this standard.

7. **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.

8. **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 the absence of binding precedent, if the issue presented was one of constitutional, statutory or regulatory interpretation, I would look first to the text of the provision in question; if that text was unambiguous, I would apply it as written. If ambiguous, I would consider whether there was precedent from the Supreme Court, the Seventh Circuit, and other Circuit and District courts (in that order) interpreting analogous provisions and whether there was legislative history relevant to the provision at issue. If the issue was not one of textual interpretation, I would look to precedent in the Supreme Court, the Seventh Circuit, and other Circuit and District courts (in that order) relating to analogous issues.

9. **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: As a District Judge in the Northern District of Illinois, I would apply binding precedent from the Supreme Court and the United States Court of Appeals for the Seventh Circuit, even if I did not agree with it.

10. **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 when (i) a claim cannot be decided on a non-constitutional ground; (ii) the statute at issue violates the Constitution or Congress exceeded its authority in enacting the statute; and (iii) there is no binding authority affirming the constitutionality of the statute.

- 11. 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 endeavor to ensure that cases move forward expeditiously and efficiently, as overcrowded dockets can diminish the quality of justice available to all. To do so, I would pro-actively manage cases on my docket with frequent status hearings, firm deadlines and flexible procedures tailored to the specific needs and circumstances of different types of cases. I would seek to resolve discovery disputes, dispositive motions, and other motions promptly with rulings and opinions that are narrowly focused on the issues presented by the litigants.

- 12. 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 do believe that judges play a role in controlling the pace and conduct of litigation. A judge must balance the needs of individual litigants against the needs of the public as a whole; if individual cases do not move through the judicial system in an efficient manner, the availability of that system, and the quality of justice it provides, may be compromised for all litigants. Please see my response to question 11 above as to the specific steps I would take to control my docket if confirmed as a District Judge.

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

Response: I reviewed the questions and prepared my responses after receiving these questions on February 2, 2012. My responses were reviewed by representatives of the Department of Justice and I subsequently finalized my responses before submitting them on February 6, 2012.

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

Response: Yes.