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.

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

1. **If you had to describe it, how would you characterize your judicial philosophy? How do you see the role of the judge in our constitutional system?**

   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. A judge's role in our constitutional system is as a neutral arbiter of the law.

2. **What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their political beliefs or whether they are rich or poor, defendant or plaintiff?**

   Response: Judicial fairness and impartiality are paramount in our legal system. I have a deep and abiding respect for the legal process and the importance of judicial impartiality. My legal career thus far has afforded me the opportunity to see all sides of the courtroom; civil and criminal, prosecution and defense, trial and appeal. In particular, my role as a prosecutor was also one in which impartiality and a fair assessment of the evidence was critical. I feel confident that those with whom I have worked during the course of my career—whether colleagues or opposing counsel, criminal defendants, or other parties against whom I have been engaged in litigation, or judges before whom I have appeared—would assess me as fair, professional and above-board.

3. **In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? How does the commitment to stare decisis vary depending on the court?**

   Response: The doctrine of stare decisis is a bedrock principle and one to which I would strongly adhere if confirmed. I would follow binding precedent of the United States Supreme Court and of the Fourth Circuit Court of Appeals.

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

1. Do you believe that the Second Amendment is an individual right or a collective right? Please explain your answer.

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 keep and bear arms.

a. 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 fundamental constitutional right to keep and bear arms. Therefore, a heightened level of scrutiny should be applied in such circumstances.

2. What is your view of the role of a judge?

Response: The role of a judge is to exercise restraint, impartiality, and fairness in reviewing the legal issues that come before the Court, and to rule promptly within the confines of controlling legal precedent.

3. Do you think it is ever proper for judges to indulge their own values in determining what the law means? If so, under what circumstances?

Response: No.

4. Do you think it is ever proper for judges to indulge their own policy preferences in determining what the law means? If so, under what circumstances?

Response: No.

5. As you may know, President Obama has described the types of judges that he will nominate to the federal bench as follows:

"We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges."

a. Do you believe that you fit President Obama's criteria for federal judges, as described in his quote?

Response: While I would exhibit respect for all parties who come before the court, I do not believe that empathy for any particular party or issue should play any role in judicial decision making. Rather, the role of a judge is to hear and decide cases based upon an impartial application of the law to the facts, and not based on empathy. Empathy would not play a role in my decision making process if I am confirmed.

b. During her confirmation hearing, Justice Sotomayor rejected this so-called "empathy standard" stating, "We apply the law to facts. We don't apply feelings to facts." Do you agree with Justice Sotomayor?

Response: Yes.

c. What role do you believe that empathy should play in a judge's consideration of a case?

Response: I do not believe that empathy should play any role in a judge's consideration of a case.

d. Do you think that it is proper for judges to consider their own subjective sense of empathy in determining what the law means?

Response: No.

i. If so, under what circumstances?

Response: Not applicable.

ii. Please provide an example of a case in which you have considered your own subjective sense of empathy in determining what the law means.

Response: I do not have any example of a case where I have used such a standard to determine what the law means. I have not done so.

iii. Please provide an example of a case where you have had to set aside your own subjective sense of empathy and rule based solely on the law.

Response: Since I have not previously served as a judge, and, therefore, have not issued rulings, I cannot identify any such examples.

6. Under the Supreme Court's decision in *United States v. Booker*, the federal sentencing guidelines are advisory, rather than mandatory. It seems to me that as long as the sentencing judge (1) correctly calculates the guidelines, and (2) appropriately considers factors set forth therein, the judge may impose any sentence ranging from probation to the statutory maximum. Following the Supreme Court's decision in *Gall v. United States*, appellate courts must apply the highly deferential "abuse of discretion" standard when reviewing these sentencing decisions. As a result, district court judges may impose virtually any sentence, and as long as the decision is procedurally sound, there is virtually no substantive review on appeal.

a. Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?

Response: Yes. I agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw.

b. Under what circumstances do you believe it appropriate for a district court judge to depart downward from the sentencing guidelines?

Response: Although the Sentencing Guidelines are now advisory rather than mandatory, they should be accorded deference and are an important component to achieving fairness, uniformity, and justice in sentencing. The Guidelines themselves provide the standards applicable for various grounds for departure. Typically, these grounds are limited in nature and include factual scenarios that are well outside the norm for a given offense. There is also a body of Fourth Circuit precedent applying the various limited grounds for departure to a variety of factual scenarios. Additionally, a judge must also take into account the sentencing factors set forth in 18 USC 3553(a).

7. Do you believe it is ever appropriate for American judges to rely on foreign law when interpreting the U.S. Constitution? If so, under what circumstances?

Response: No. 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.

8. Do you believe that the death penalty constitutes cruel and unusual punishment under the Constitution?

Response: The Supreme Court has ruled that the death penalty is constitutional and does not constitute cruel and unusual punishment. I would follow Supreme Court precedent in this regard, if confirmed.

a. Do you hold any personal views that would not permit you to enforce the death penalty?

Response: No.

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

Response: The Supreme Court has ruled that the death penalty is an acceptable form of punishment and I would follow Supreme Court precedent in this regard, if confirmed.

9. Given the greater availability of legislative history in the federal system, do you think it is proper for federal judges to look to legislative history when construing an otherwise unambiguous statute?

Response: If a statute is clear and unambiguous, then the language of the statute controls without regard to the legislative history.

a. Would it ever be proper for a court to determine that the meaning of a seemingly unambiguous statute is ambiguous based on the legislative history of that statute?

Response: No.

b. To what extent do you think a court should look to legislative history when a statute is ambiguous on its face?

Response: If a statute is ambiguous, a court should turn first to available analogous Supreme Court and appellate court precedent in order to seek guidance in interpreting the statute. However, on occasion, when there is no other controlling court authority, courts may look to other sources, including official legislative history.

10. 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? Please explain your answer.

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

Responses of Stephanie Thacker
Nominee to be United States Circuit Judge for the Fourth Circuit
to the Written Questions of Senator Tom Coburn, M.D.

1. **Justice William Brennan once said: "Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized." Do you agree with him that constitutional interpretation today must take into account this supposed transformative purpose of the Constitution?**

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

2. **Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

   Response: I do not. Such policy considerations are reserved to the province of the legislature to the extent the legislature wishes to consider them, and are not to be entered into by the judiciary unless instructed to do so by binding Supreme Court precedent.

3. **Is any transaction involving the exchange of money subject to Congress's Commerce Clause power?**

   Response: No. That would be an overly broad interpretation of the limited powers enumerated via the Commerce Clause. Such a broad interpretation would not be consistent with binding Supreme Court precedent found in *United v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000).

4. **The U.S. Supreme Court held in *District of Columbia v. Heller,* 554 U.S. 570 (2008), that the Second Amendment of the United States Constitution "protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." As Justice Scalia's opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Leaving aside the *McDonald v. Chicago* decision, do you personally believe the right to bear arms is a fundamental right?**

   Response: I respect and would adhere to the individual right to bear arms as set forth in *Heller*. I would follow binding Supreme Court precedent in this regard.

   a. **Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.**

Response: Yes. The Supreme Court has held in *McDonald* v. *City of Chicago* that certain of the rights guaranteed in the Bill of Rights are, in fact, fundamental having been "deeply rooted in this Nation's history and tradition." I respect and would adhere to Supreme Court precedent with regard to these fundamental rights, including their application against the States.

b. Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.

Response: Please see response to Question 4a above.

c. The *Heller* Court further stated that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." Do you believe that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.

Response: If confirmed, I would follow Supreme Court precedent that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.

5. Some have criticized the Supreme Court's decision in *Heller* saying it "discovered a constitutional right to own guns that the Court had not previously noticed in 220 years." Do you believe that *Heller* "discovered" a new right, or merely applied a fair reading of the plain text of the Second Amendment?

Response: The *Heller* decision itself indicates that it was based upon the plain text of the Second Amendment. If confirmed, I would follow this binding Supreme Court precedent.

a. Similarly, during his State of the Union address, the President said the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. ___ (2010), "reversed a century of law" and others have stated that it abandoned "100 years of precedent." Do you agree that the Court reversed a century of law or 100 years of precedent in the *Citizens United* decision? Please explain why or why not.

Response: If confirmed, I would faithfully follow the rule of law as set forth by the Supreme Court in *Citizens United.* Otherwise, I do not have an opinion on this issue.

6. What limitations remain on the individual Second Amendment right now that it has been incorporated against the States?

Response: As recognized by the Supreme Court, there are limitations placed on the individual right to bear arms in the context of certain criminal statutes (18 U.S.C. 922(g)), for example. Otherwise, although the *Heller* and *McDonald* opinions recognize that there are limitations on the constitutional right to individual gun possession, the Supreme Court

did not fully resolve the extent or legality of any such limitations. If confirmed, I would follow binding Supreme Court precedent in this regard.

a. In *McDonald v. Chicago*, the majority wrote: "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.'"

What if a state passed a law imposing a $2,000 registration fee as a condition for the commercial sale of a firearm? Without stating how you would rule in such a case, please explain how you would conduct your analysis to determine whether the fee violated the Second Amendment right to keep arms?

Response: If I am confirmed, I would confront this issue in the same manner in which I would confront any issue that came before the Court. I would review the text of the statute as well as the text of the Second Amendment and the binding Supreme Court precedent set forth in *Heller* and *McDonald* as well as any other binding Supreme Court or Fourth Circuit precedent that may exist at the time. I would then make a decision consistent with such precedent.

i. To what cases or authorities would you refer? Please be specific.

Response: Please see response to Question 6a above.

b. What if a state outlawed the carrying and possession of firearms on the grounds of hospitals that have psychiatric wards, regardless of whether they are private? Without stating how you would rule in such a case, please explain how you would conduct your analysis to determine whether that regulation complied with the Second Amendment's guarantee of the right to bear arms.

Response: Please see response to Question 6a above.

i. Could a hospital qualify as a "sensitive place?"

Response: This is not something I have heretofore considered, and on which I do not have an opinion without a full and thorough analysis of the context and the law.

ii. To what cases or authorities would you refer? Please be specific.

Response: Please see response to Question 6a above.

c. Is the Second Amendment limited only to possession of a handgun for self-defense in the home, since both *Heller* and *McDonald* involved cases of handgun possession for self-defense in the home?

Response: Per the Supreme Court decisions in *Heller* and *McDonald*, there is an individual and fundamental constitutional right to keep and bear arms. Although the Supreme Court recognized there are limits to this right, it has not specifically addressed the issue raised by this question. However, if confirmed, I would review and follow binding Supreme Court and Fourth Circuit precedent in this regard.

7. In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the "evolving standards of decency" to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy's analysis?

Response: The decision of the Supreme Court in *Roper*, and the analysis therein, is binding precedent, and I would follow it, if confirmed.

a. Do you agree that the Constitution's prohibition on cruel and unusual punishment "embodies a principle whose application is appropriately informed by our society's understanding of cruelty and by what punishments have become unusual?"

Response: If confirmed, I would be required to follow binding Supreme Court precedent in this regard, and I would do so.

b. How would you determine what the evolving standards of decency are?

Response: I would follow the analytic framework of binding Supreme Court decisions.

c. Do you think that a judge could ever find that the "evolving standards of decency" dictated that the death penalty is unconstitutional in all cases?

Response: If confirmed, I would follow binding Supreme Court precedent. In this instance, the Supreme Court has ruled that the death penalty is constitutional except in limited circumstances. I would follow such precedent.

d. What factors do you believe would be relevant to the judge's analysis?

Response: The factors relevant to a judicial analysis on this issue are the same factors which are to be applied in judicial analysis of any issue, that is, a review of Supreme Court precedent. In this instance, Supreme Court precedence is clear. The death penalty is constitutional except in limited circumstances.

e. When determining what the "evolving standards of decency" are, justices have looked to different standards. Some justices have justified their decision by looking to the laws of various American states,[1] in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries.[2] Do you believe either standard has merit when interpreting the text of the Constitution?

Response: Both standards have some merit, but only to the extent directed by, and limited by, the Supreme Court. Specifically, with respect to the Eighth Amendment, the Supreme Court has held that both state laws and foreign laws are relevant in determining "evolving standards of decency." *Roper* v. *Simmons*, 543 U.S. 551 (2005), at 564, 575. Foreign laws are not controlling, however, in interpreting the Constitution. *Roper* at 575. If confirmed, I would not consider state laws or foreign law in interpreting the Constitution unless directed to do so by the Supreme Court.

i. If so, do you believe one standard more meritorious than the other? Please explain why or why not.

Response: Please see my response to Question 7e.

8. In your view, is it ever proper for judges to rely on foreign or international laws or decisions in determining the meaning of the Constitution?

Response: No. It is not proper to rely on foreign or international laws or decisions in determining the meaning of the Constitution, unless directed by the Supreme Court to do so. First and foremost, the interpretation of the Constitution should be based upon the text of the Constitution itself.

a. Is it appropriate for judges to look for foreign countries for "wise solutions" and "good ideas" to legal and constitutional problems?

Response: No.

b. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: I do not believe it is appropriate to consider foreign law when interpreting the United States Constitution, unless directed by the Supreme Court to do so.

c. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

[1] *Roper v. Simmons*, 543 U.S. 551, 564-65.
[2] *Graham v. Florida*, 130 S.Ct. 2011, 2033-34.

Response: I do not believe it is appropriate to consider foreign law when interpreting the United States Constitution, unless directed by the Supreme Court to do so. The narrow circumstances when the Supreme Court may so direct may include treaty obligations.

d. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: No, unless I was required by binding Supreme Court precedent to do so.

9. You have spent much of your career fighting child pornography and child sexual exploitation. Under current law, what factors can a judge consider to support his or her decision to depart downward from the sentencing guidelines when issuing a sentence?

Response: Although the Sentencing Guidelines are now advisory rather than mandatory, they should be accorded deference and are an important component to achieving fairness, uniformity, and justice in sentencing. The Guidelines themselves provide the standards applicable for various grounds for departure. Typically, these grounds are limited in nature and include factual scenarios that are well outside the norm for a given offense. There is also a body of Fourth Circuit precedent applying the various limited grounds for departure to a variety of factual scenarios. Additionally, a judge must also take into account the sentencing factors set forth in 18 USC 3553(a).