Responses of Stephen A. Higginson
Nominee to be United States Circuit Judge for the Fifth Circuit
to the Written Questions of Senator Chuck Grassley

1. **At a speech in 2005, Justice Scalia said, "I think it is up to the judge to say what the Constitution provided, even if what it provided is not the best answer, even if you think it should be amended. If that's what it says, that's what it says." Do you agree with Justice Scalia?**

   Response: I am unfamiliar with this 2005 speech, and therefore with its context and the meaning intended by Justice Scalia by his statement. I do believe that the personal viewpoint of a judge about the text of the Constitution, or about Supreme Court precedent applying that text, is not relevant. A judge's personal viewpoint about the wisdom of possible amendments to the Constitution similarly is not relevant to the task of applying or, when necessary, interpreting the Constitution.

2. **Do you believe a judge should consider his or her own values or policy preferences in determining what the law means? If so, under what circumstances?**

   Response: No, I do not believe a judge should consider his or her own values or policy preferences in determining what the law means.

3. **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: Yes, as an Assistant United States Attorney, I have been involved with and assisted in the prosecution of persons who have been death penalty eligible. My efforts have been done at the direction and supervision of our United States Attorney here in the Eastern District of Louisiana, and as supervised and approved by the Department of Justice. I have done so in my capacity as appeals chief in the United States Attorney's Office for the Eastern District of Louisiana. To that extent, I have contributed to prosecutions in which our Office, again at the direction of our United States Attorney and in conjunction with Department of Justice supervision, has sought the death penalty.

4. **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.

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

   Response: Yes. The Supreme Court has held that except in certain discrete circumstances, the death penalty is an acceptable form of punishment. If confirmed as an intermediate appellate judge, I would faithfully follow Supreme Court precedent, as well

as precedent from the United States Court of Appeals for the Fifth Circuit, relating to the death penalty.

6. 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: I believe that the Constitution should be applied and, when necessary, interpreted with reference to its own text and applicable Supreme Court precedent, not with reliance on, or reference to, foreign law. In several Eighth Amendment cases, however, "the [Supreme] Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency." *Roper v. Simmons*, 543 U.S. 551, 604 (2005) (O'Connor, J., dissenting). Only in this limited circumstance, therefore, as directed by the Supreme Court, intermediate appellate judges may take cognizance of foreign law.

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

Response: No.

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

Response: I believe that the Second Amendment is an individual right, as announced by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010). If confirmed as an intermediate appellate judge, I would faithfully follow this Supreme Court precedent.

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

Response: It is my understanding that the Supreme Court did not specify the standard of scrutiny applicable to a federal or state law challenge in its decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010). It is my belief that because these decisions clarify that the right to keep and bear arms is fundamental, a heightened level of scrutiny would be given to any law that burdens this Second Amendment right.

10. In your academic writings you have focused on studying oral arguments before the Supreme Court as a means to better understand the legal underpinnings of their decisions and the rules announced in their Court opinions. You wrote one article regarding the Court's process of fashioning criminal rules. You suggest the Court relies heavily on "functionalism," and in doing so, the Court considers the workability of the rule they fashion. Functionalism looks very much like judges

making policy. Could you explain to me the difference between "functionalism" and legislating from the bench?

Response: Legislating from the bench is never a proper role for a judge. Policy considerations are reserved by the Constitution to Congress and the Executive, not judges. My article about criminal justice focuses, instead, on what lawyers have said during oral arguments in the Supreme Court. In that oral argument context, lawyers' positions are tested as to whether they are consistent with statutory and constitutional text and purpose. I quote and show how that testing extends to discussions about whether lawyers have thought through the consequences of the propositions they are urging. My article does not delve into or critique the soundness of the subsequent Supreme Court decisions themselves--decided after the lawyering heard at oral argument--which must be based on statutory or constitutional text and purpose, as well as applicable Supreme Court precedent.

a. If you are confirmed what role will "functionalism" play in how you interpret the Constitution or federal statutes?

Response: If confirmed as an intermediate appellate judge, "functionalism" and policy considerations will play no role in how I would interpret the Constitution and federal statutes.

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

Response: I believe that the most important attribute of a judge is the commitment impartially to apply the law and to maintain professional competence in it. I believe I have this attribute and work ethic.

12. 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: I believe that the appropriate temperament of a judge is one of unbiased judgment and respect for all participants in the judicial process. These qualities are elaborated in Canon 3(A)(3) of the Code of Conduct for United States Judges, and I believe that I have those qualities.

13. 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.

14. 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: If the matter pertained to a statutory question of first impression, I would look first and foremost to the text of the legislation itself. If no controlling precedent resolved the issue presented, I would look to prior decisions from the Supreme Court and from the United States Court of Appeals for the Fifth Circuit for persuasive guidance and reasoning; thereafter, I would also look to the decisions and principles articulated by other federal Courts of Appeals.

15. 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 apply the binding precedent from the Supreme Court or the United States Court of Appeals for the Fifth Circuit regardless of my personal views.

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

Response: A federal court should only declare a statute enacted by Congress unconstitutional if it violates a provision clearly set forth in the Constitution, or if Congress exceeded its authority as set forth in the Constitution. When considering a constitutional challenge to a statute enacted by Congress, a federal court will apply not only threshold questions of jurisdiction and justiciability, but also Supreme Court precedent pertaining to any implicated constitutional text.

17. 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: An intermediate federal appellate court may overturn precedent only by sitting en banc, as set forth in Fed. R. App. P. 35. Factors considered are whether the issue involves a question of exceptional importance and whether en banc consideration and decision, sometimes leading to overturning precedent, is necessary to securing uniformity of the appellate court's decisions. Such adjustments to precedent are rare, above all because the principle of stare decisis is important to promoting predictability and stability in the law.

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

Response: I received these questions in late afternoon, June 15, 2011. I drafted my responses upon receipt of the questions. I reviewed my responses with a representative

of the Department of Justice the next day, June 16, 2011, and I asked him to transmit my answers to the Committee.

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

Response: Yes.