Responses of Mary Geiger Lewis
Nominee to be United States District Judge for the District of South Carolina
to the Written Responses of Senator Chuck Grassley

1. **In 1986, I authored amendments to the False Claims Act that empowered individual citizens to act on behalf of the federal government and recover taxpayer dollars lost to fraud and abuse of government programs. I also sponsored legislation to update the False Claims Act in 2009. Since the passage of the 1986 amendments, this important law has helped recover over $30 billion for American taxpayers from those who seek to defraud the federal government.**

   One of the cases of interest to me is your representation of a Hospital chain that was found to have violated the Stark law, which prohibits financial arrangements between hospitals and doctors that rely upon referrals of patients. This case also had a False Claims Act component. It appears that part of the defense strategy put forth was to attack the whistleblower who filed the *qui tam* case.

   Specifically, one of the briefs for the defendants stated that the whistleblower who filed the case was "a malcontent physician with a long history of disruptive behavior and an economic motive to hurt [the Hospital chain]". That same brief argued that the Government "made an ill-advised decision to intervene, apparently based on its view that its own crabbed and incorrect view of the law is more important than Tuomey's health care mission."

   As an advocate of whistleblowers, I have long found the strategy of attacking a whistleblower as, to use the words in your brief, "ill-advised". Ultimately, a jury found against the Hospital in this case and the judge awarded the federal government over $44 million.

   a. **What is your personal view of whistleblowers?**

      Response: Whistleblowers play a very powerful, important and successful role in deterring fraud and abuse in government programs. My law firm currently represents three whistleblowers in two separate qui tam actions.

   b. **Based upon your past involvement in a strategy to discredit a whistleblower, what assurance can you give the Committee that you will protect the rights of whistleblowers in the courtroom, should you be confirmed?**

      Response: An advocate has a responsibility to test the credibility of an opposing witness by pointing out the witness's biases, prejudices and motives, even if that witness is a whistleblower. Should I be confirmed, my role would be to apply the law fairly and impartially to all of the parties who came before me. Federal law protects whistleblowers, and if confirmed, I would faithfully apply that law.

c. Part of your defense of the Hospital included the argument that the Government's enforcement of the Stark statute was "contrary to the Express Provisions and Purpose of the Medicare Statute." The brief you filed supporting this argument claims that because the goal of Medicare is to ensure adequate medical care for the aged throughout the country, any attempt to enforce the Stark law would prohibit the hospital from carrying out that mission.

Response: Our brief on behalf of Tuomey Healthcare System did not argue that the government may never enforce the Stark law or that any attempt to enforce the law would prevent hospitals from providing adequate medical care. Rather, our position was that a particular interpretation of the Stark law advanced by the government in the Tuomey case should be rejected.

One of our arguments was that the government's interpretation of the Stark law was inconsistent with 42 U.S.C. § 1395, which provides that "nothing in this subchapter [which includes the Stark law] shall be construed to authorize any Federal officer or employee to exercise any supervision or control over . . . the manner in which medical services are provided, or over the selection, tenure, or compensation of any officer or employee of any institution, agency, or person providing health services…." We argued the government's interpretation of the Stark law in *Tuomey* was inconsistent with this provision because it would have allowed the government to exercise supervision or control over the operation of Tuomey and other hospitals and the compensation of their employees.

We also argued that the government's interpretation of the Stark law in *Tuomey* was inconsistent with implementing regulations of the Center for Medicare and Medical Services – the agency responsible for promulgating and interpreting the regulations. We argued that the government's interpretation should be rejected because the guidance provided by CMS is entitled to controlling weight under well-established precedents.

d. The Stark law is an amendment to Medicare. This means that a condition of participation is that prohibited financial arrangements based upon self-referrals will not be reimbursed by the program. Based upon your argument, it appears you believe that the Government cannot enforce any condition that limits how a Medicare provider operates. Do you still believe that providers have a legal right to Medicare payments without any conditions set forth by Congress? How do you square this argument with the Supreme Court's decision in <u>South Dakota v. Dole</u>, where the Supreme Court held that Congress can attach conditions on the receipt of federal funds?

Response: Providers do not have a legal right to Medicare payments without complying with legal conditions set forth by Congress. Our argument in the *Tuomey* case was not that the government can never enforce the Stark law.

Rather, we argued that the government's interpretation of the Stark law was incorrect as applied to the facts of *Tuomey*, that our client had not violated the Stark law, and that even if it had done so, it did not act with the fraudulent intent required to violate the False Claims Act.

e. Please explain your argument that the Government cannot enforce the Stark law "to prevent Tuomey from achieving this important goal" of providing Medicare services to the elderly.

Response: Please see my response to 1(c) above.

f. Do you believe that Congress is prohibited from placing conditions on Medicare providers? If so, why?

Response: No. I do not believe that Congress is prohibited from placing conditions on Medicare providers.

g. Many federal courts have found that a violation of the Stark law is a basis for False Claims Act liability. Do you continue to believe that the Stark law does not form the basis for False Claims Act liability?

Response: The particular Stark law violation alleged in *Tuomey* was not accompanied by the fraudulent intent required to establish liability under the False Claims Act. I have not previously expressed a view on whether the Stark law could form the basis for False Claims Act liability in other contexts, and do not believe it would be appropriate to give my personal view on an issue that could come before me as a judge.

2. In *Littlejohn v. South Carolina*, your law firm, along with Attorney Dick Harpootlian, who was the State Democratic Chairman, negotiated a settlement with the State Budget and Control Board. The Chair of the State Board at the time was Democrat Governor Jim Hodges. Given not only Mr. Harpootlian's relationship to Governor Hodges, but also your previous work on the Governor's transition team, can you understand why concerns were raised that the agreement may not have represented an arms-length negotiation?

Response: Particularly when public funds are involved, any settlement agreement in a class action case should be scrutinized for fairness and reasonableness. In federal court, for example, a district court may not approve a settlement that finds for the members of the class without first finding that it is "fair, reasonable and adequate." FRCP 23(e)(2). In *Littlejohn*, the South Carolina Circuit Court found the settlement to be a reasonable and adequate result for the class.

a. Canon 2 of the Code of Conduct for United States Judges calls on a Judge to avoid even the appearance of impropriety. If a Judge had ties to attorneys

similar to those between you, Mr. Harpootlian, and Governor Hodges in *Littlejohn*, do you believe Canon 2 would have been satisfied? Please explain.

Response: Canon 2 of the Code of Conduct for United States Judges requires, without exception, that a judge "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." It follows that there is no more basic principle pertaining to the judiciary than that judges should be free of personal interest or bias and free from predisposition in their decision-making.

Recusal is not required where the judge merely had a prior professional relationship with an attorney appearing before the judge. Such a relationship alone does not equate to bias when that attorney appears before the judge. Rather, the relationship between the judge and attorney must have occurred during the attorney's involvement in a case now before the judge for recusal to be required.

A decision to recuse also depends upon whether the judge feels he or she can disregard the relationship and whether others can reasonably be expected to believe that the relationship is disregarded. The test for the appearance of impropriety is whether a judge's "impartiality might reasonably be questioned." 28 USC § 455. Specific disqualification circumstances are set forth in 28 U.S.C. § 455(b).

b. If you are confirmed as a judge, how would you go about handling any potential or actual conflicts of interest or other recusal issues that might arise because of your prior activities?

Response: It is the obligation of the judge to disclose all facts that might be grounds for disqualification. I would disclose any potential disqualifying facts to the parties and their counsel. In appropriate circumstances I might ask the parties and their lawyers to consider, out of my presence, whether to waive disqualification. If all of the parties so agree, I would continue to participate in the proceeding. If all parties do not agree, I would respect their decision. It should be emphasized that the parties' agreement to waive disqualification must be on the record; otherwise, it would not be considered effective. See 28 USC § 455(e).

Even if the parties genuinely waive their objections to disqualification, if I still feel that I cannot be impartial, or if the ground for disqualification was one of those enumerated in 28 USC § 455 (b), then I would be obligated to recuse myself. A judge not only has the discretion, but the duty, to recuse himself or herself if the judge feels that he or she cannot be truly impartial. If confirmed, I would strictly adhere to all of the statutes and other applicable standards governing recusal.

3. **I am concerned about your lack of experience in criminal law matters. You mentioned in the hearing that you can quickly learn criminal law. You noted in your response that "criminal trials are very much like the civil trials that I've tried. The rules of evidence are the same." Given that federal criminal trials are governed by a different set of procedures than are civil trials, could you please explain your statement?**

   Response: I did not mean to suggest that there were no differences between the procedural rules that apply to criminal trials and those that apply in civil trials. I was attempting to convey the important fact that the same evidentiary rules apply. The introduction or exclusion of testimony and exhibits under the Federal Rules of Evidence is at the heart of a criminal trial, and I have a great deal of experience with those rules. I have also taken the opportunity to become more familiar with the rules of criminal procedure, as well as some areas of substantive criminal law with the assistance of my law partner who is a former Assistant United States Attorney and continues to focus his practice in the area of criminal law.

4. **You further responded: "I've also attended many sentencing proceedings, pleas, just the kinds of things that I would face as a district court judge. And I've even attended some seminars on the sentencing guidelines and stuff."**

   a. **What role did you play in the criminal trials, other proceedings, sentencing proceedings and pleas you referenced in your response to my question at the hearing?**

      Response: I was referring to proceedings that I attended after my nomination to further inform myself about criminal law and procedure. My role was as an observer who was allowed to discuss with the presiding judge the manner in which the proceedings were conducted, the rulings that were made and the basis for those rulings.

   b. **You further stated, "I will be completely prepared for whatever matter comes before me, be it civil or criminal." Could you please further articulate what specific steps or actions you will take beyond mere attendance at seminars to ensure you are prepared?**

      Response: I have been fortunate to have had district court judges who have allowed me to shadow them. I have spent an entire day of criminal proceedings with one district court judge who provided me with the same materials he reviewed in order to prepare to sentence criminal defendants convicted of a wide range of offenses. I was able to see how a pre-sentence report is structured and used, to observe sentencing proceedings, and to discuss the proceedings with the judge afterwards.

      I have also observed plea proceedings and had the benefit of one-on-one instruction from the presiding judge on the proper conduct of such proceedings.

I have also accepted an invitation from a well-respected district court judge to join him for an entire session of criminal proceedings where I will be allowed to join him in the courtroom and in chambers to see exactly how he approaches the criminal matters before him.

I plan to continue to take advantage of the generous offers from our district court judges to allow me to shadow them, and to study substantive criminal law, the Sentencing Guidelines and the materials I have been provided by the Administrative Office of the U.S. Courts so that, if confirmed, I will be fully prepared to assume my duties.

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

Response: The most important attribute of a judge is integrity. He or she must be committed to the fair and impartial application of the law to the facts and must treat everyone in the courtroom with dignity and respect. I possess this attribute.

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: In my view, the appropriate temperament of a judge is one of humility. The most important elements are patience, diligence and respect for everyone who comes before the court. 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 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: When faced with a matter of first impression, I would start with an analysis of the text of the provision at issue. If the plain language of the text did not provide a clear answer, I would look to the Supreme Court and the Court of Appeals for the Fourth Circuit for precedents interpreting a similar provision for guidance, as well as any persuasive authority from other federal courts.

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: I would be bound to apply that decision, as precedent from a higher court.

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

Response: Statutes enacted by Congress are presumed to be constitutional. It is appropriate for a federal court to declare a statute enacted by Congress unconstitutional only when Congress has clearly exceeded its Constitutional authority or infringed on a right protected by the Constitution.

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 manage my caseload by enforcing deadlines established by scheduling orders, by rendering prompt decisions, and by working as hard as is necessary to conduct the court's business.

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 believe that judges have a role in controlling the pace and conduct of litigation. If confirmed, I would take the steps that I describe in response to Question 11 above.

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

Response: I received these questions on February 22, 2012. I prepared my responses which were reviewed by representatives of the Department of Justice, and I subsequently finalized my responses and submitted them on February 27, 2012.

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

Response: Yes.

Responses of Mary Geiger Lewis
Nominee to be United States District Judge for the District of South Carolina
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: I believe the role of the judge is to determine the applicable law based upon precedent, to apply that law fairly and impartially to the facts before him or her, and to do so in a respectful and courteous manner.

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: Judges have an obligation to apply the law fairly and impartially in any case without regard to the political beliefs, economic status, gender, or ethnicity of those who appear before him or her. If confirmed I will do precisely that.

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 applies to all courts. If confirmed, I would strictly adhere to the doctrine.

Responses of Mary Geiger Lewis
Nominee to be United States District Judge for the District of South Carolina
to the Written Questions of Senator Tom Coburn, M.D.

1. **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: I do not agree with the reference to the Constitution as a "living" document that constantly evolves as society interprets it.

   a. **If not, please explain.**

      Response: The Constitution establishes a structure of enduring principles that can be applied to a changing society, but the text is fixed, absent amendment through the process set out in Article V.

2. **What principles of constitutional interpretation would you look to in analyzing whether a particular statute infringes upon some individual right?**

   Response: I would use an interpretation process based on an analysis of the text and history of the constitutional provision involved. I will also be bound to follow any precedent of the Supreme Court or the Fourth Circuit interpreting that provision. In the absence of such binding precedents, I would also look to decisions from other courts for guidance.

3. **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: After thoroughly analyzing this issue, the Supreme Court held in *McDonald v. Chicago* that the right to bear arms recognized in *Heller* is a "fundamental" right and thus it "applies equally to the federal government and the states." 130 S.Ct. 3020, 3050 (2010). As a prospective lower court judge I do not feel that it would be appropriate to give my personal opinion on a question that has been conclusively resolved by the Supreme Court.

   If I were confirmed as a judge, I would faithfully apply *Heller* and *McDonald*, and my personal views would play no role in my decisions on this or any other issue.

   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: According to Supreme Court precedent, not all rights guaranteed in the Bill of Rights are considered "fundamental rights." For example, the Supreme Court has never ruled that the Third Amendment protection against quartering of soldiers, the Fifth Amendment grand jury indictment requirements, the Seventh Amendment right to a jury trial in civil cases and the Eighth Amendment's prohibition on excessive fines are applicable to the states through the Fourteenth Amendment. *See McDonald v. Chicago*, 130 S. Ct. 3020, 3035 n.13 (2010).

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: Yes. According to the Supreme Court's opinion in *McDonald v. Chicago*, the question of whether a particular right guaranteed in the Bill of Rights applies to the states through the Due Process Clause of the Fourteenth Amendment turns on whether the right "is fundamental to *our* scheme of ordered liberty." *Id.* at 3036.

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: In both *Heller* and *McDonald*, 128 S.Ct. at 2066, the Supreme Court has made it clear that the Second Amendment codified a pre-existing right.

d. What limitations remain on the individual, Second Amendment rights now that the amendment has been incorporated against the States?

Response: In *Heller*, the Court identified some limitations, stating "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or 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. We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those 'in common use at the time.'" *Dist. of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008)(footnote omitted).

4. 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. 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, in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries. Do you believe either standard has merit when interpreting the text of the Constitution?

Response: I do not believe that it is appropriate for foreign laws or traditions to be used in the interpretation of the Constitution. Supreme Court precedents do, however, permit reference to the laws of individual states in determining whether a punishment is "unusual" under the Eighth Amendment.

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

Response: Please see response immediately above.

5. 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 law in determining the meaning of the Constitution.

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

Response: Please see response immediately above.

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

Response: No.

6. The Eleventh Amendment provides that "[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." That is a pretty clear textual command, but the Supreme Court, in *Hans v. Louisiana*, 134 U.S. 1 (1890), held that state sovereign immunity extends not only to suits by citizens from other states, but also to suits by citizens from the same state. Is *Hans* consistent with the plain terms of the Eleventh Amendment?

Response: As the Supreme Court has explained, *Hans* "recognized that the States' sovereign immunity is not limited to the literal terms of the Eleventh Amendment. Although the text of the Amendment refers only to suits against a State by citizens of another State, we have repeatedly held that an unconsenting State also is immune from suits by its own citizens." *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 446 (2004) (internal citation omitted).

a. If not, what justification is there for the decision?

Response: The Supreme Court has held that the *Hans* decision was based not on the text of the Eleventh Amendment, but rather on a broader principle of state sovereign immunity that is protected by the Constitution. As the Court has explained:

> Instead of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose in the text of the Eleventh Amendment only to address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisolm* [*v. Georgia*] decision [that citizens of one state could sue another state in federal court]. As a result, the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity.

Federal Maritime Safety Comm'n v. South Carolina State Ports Authority, 535 U.S. 743, 752-53 (2002) (citations and internal quotation marks omitted).

7. Have you handled any cases or do you have any experience involving discrimination law? If so, please describe the matter and your responsibilities.

Response: No, I do not have experience involving discrimination law.

8. Over the last ten years, the Supreme Court has issued a number of rulings clarifying citizens' rights under the Fourth Amendment. All of these decisions will affect the methods law enforcement use to combat crime and how the facts are developed during prosecutions and trials. Which decision(s) do you believe could have the biggest impact on federal district court judges and why?

Response: Federal district court judges are required to apply the Fourth Amendment as interpreted by the Supreme Court and the Circuit Courts of Appeals to police encounters with citizens.

During the last ten years, the Supreme Court has issued a number of decisions that clarify the scope of the Fourth Amendment as well as the application of the exclusionary rule to evidence obtained in violation of the Fourth Amendment. For example, in *Georgia v. Randolph*, 547 U.S. 103 (2006), the Court held that a warrantless search of a residence was improper where the officers obtained the consent to search from a co-occupant but another occupant was physically present and refused to consent. In *Davis v. United* States, 131 S. Ct. 2419 (2011), the Court clarified that the exclusionary rule does not apply when the police conduct a search in compliance with binding precedent that is later overruled. And in *Hudson v. Michigan*, 547 U.S. 586 (2006) the Court ruled that violations of the Fourth Amendment "knock and announce" rule do not warrant the exclusion of evidence seized in the execution of an otherwise valid search warrant.

Just last month, in *United States v.* Jones, 132 S. Ct. 945 (2012) the Supreme Court ruled that the attachment of a Global-Positioning-System (GPS) tracking device to a vehicle and subsequent use of that device to monitor a vehicle's movement on public streets was a search within the meaning of the Fourth Amendment. The *Jones* decision may have a significant influence on litigation in the lower courts because it provides guidance on the

application of the Fourth Amendment in cases involving a use of GPS devices and other advances in technology.

9. How would you determine what level of scrutiny to apply in a case alleging a Due Process violation? Please be specific as to the cases on which you would rely.

Response: The Supreme Court has held that "the due process clause specifically protects those fundamental rights and liberties which are objectively deeply rooted in this nation's history and tradition and implicit in the concepts of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks omitted). In general, a law that burdens a fundamental right protected by the due process clause is subject to strict scrutiny – that is, it must be narrowly tailored to serve a compelling state interest. Where, however, a law does not infringe on this sort of "fundamental liberty interest," then the due process clause requires only that it be "rationally related to legitimate government interests." *Glucksberg*, 521 U.S. at 728.

10. How would you determine what level of scrutiny to apply in a case alleging an Equal Protection violation? Please be specific as to the cases on which you would rely.

Response: The Supreme Court has held that "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976)(footnote omitted). The Court has held that the suspect classifications that trigger strict scrutiny are classifications based on "race, alienage, or national origin." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

The Court has also held that a form of heightened scrutiny applies to "quasi-suspect" classifications, including laws that discriminate based on gender or against non-marital children. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Cleburne Living Center*, 473 at 440-441. Such a law "fails unless it is substantially related to a sufficiently important governmental interest." *Cleburne Living Center*, 473 U.S. at 441.

All other classifications that do not fall within the previous categories are subject to the rational basis level of scrutiny, which requires that the challenged law be upheld so long as "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993).

11. In your questionnaire, you state you "presented oral arguments to appellate courts." Please list the cases in which you presented oral arguments to appellate courts and the legal issues you personally handled in those cases.

Response: *Paddock Equipment Co. v. University of South Carolina*, 289 S.C. 219, 345 S.E.2d 749 (1986). I presented the oral argument before the South Carolina Court of Appeals. I personally handled all of the issues raised by the appeal, which concerned whether a state statutory limit of the remedies available in bid challenges applied to a bid protest related to the construction of a swimming pool.

Winfield Towles v. South Carolina Medical Malpractice Liability Insurance and Joint Underwriting Association, South Carolina Supreme Court Memorandum Opinion 88-MO-054. I was primary author of the brief and presented the oral argument on behalf of Dr. Towles in this appeal to the South Carolina Supreme Court. I handled all of the legal issues involved, which related to the limits of insurance coverage for medical malpractice.

Russo v. Sutton, 317 S.C. 441, 454 S.E.2d 895 (1995). I was primary author of the brief and presented the oral argument in this appeal to the South Carolina Supreme Court on behalf of the Respondent. I handled all of the issues involved in this appeal which related to the viability of a cause of action for alienation of affections and the retroactivity of a decision to eliminate that cause of action.

12. In your questionnaire, you estimated the number of cases you have tried to verdict, judgment or final decision to be 15. Can you please list these 15 cases and whether you were sole counsel, associate counsel, or something else for each case?

Response: *Hutson S. Davis, Jr., v. Deborah S. Kelley*, S. C. Court of Common Pleas, Fifth Judicial Circuit. I was sole counsel in this trial.

Russo v. Sutton, S.C. Court of Common Pleas, Fifth Judicial Circuit. I tried this case with my law partner. The trial responsibilities were divided by witness. The jury awarded my client a verdict, which was appealed. The case is reported at 422 S.E.2d 750, 310 SC 200 (1992).

Collins Entertainment Corp. v. Drews Distributing, Inc., Civil Action No. 6:96-3398-13 (D.S.C. 1996). I tried this case with my law partner. All of the trial responsibilities were divided.

Drews Distributing, Inc. v. Leisure Time Technologies, Inc., Civil Action No. 7:96-3307-13 (D.S.C. 1997). I tried this case with my law partner. All of the trial responsibilities were divided. Our clients received an award that was appealed and affirmed at 175 F.3d 849 (4th Cir. 1999).

Connie Walters v. Robert Bunch, S. C. Court of Common Pleas, Fifth Judicial Circuit. I tried this case with my law partner. I handled the direct examinations of our witnesses, and he handled cross-examination of the opposing witnesses. The other trial responsibilities were also divided.

Maynard v. Ben Arnold Heritage Co., S. C. Court of Common Pleas, Fifteenth Judicial Circuit. S.C. Supreme Court Memorandum Opinion No 88-MO-054. I was sole counsel for the defendant in this trial.

Rogers and LeBan v. Montgomery, S.C. Court of Common Pleas, Fifth Judicial Circuit. I was sole counsel for the plaintiff in this trial.

Lahicotte v. Moore, S.C. Court of Common Pleas, Fifth Judicial Circuit. I tried this case on behalf of the plaintiff with my law partner. My responsibility was direct examination of our

witnesses and his was cross-examination of the opposing witnesses. The remaining trial responsibilities were equally divided. The first trial resulted in a hung jury. We then tried the case a second time, and at that trial the responsibilities were divided similarly. *United States of America, ex rel, Michael K. Drakeford, M.D. vs. Tuomey Healthcare System, Inc.*, C/A No. 3:05-cv-2858-MJP. I tried this case with my law partner and co-counsel. Witnesses were divided by subject matter, with the remaining trial responsibilities being evenly divided.

Cunningham v. Home Health Care (S.C. Richland County Magistrate's Court). I was sole trial counsel in this case.

Dr. Winfield Towles v. South Carolina Medical Malpractice Liability Insurance and Joint Underwriting Association, S.C. Court of Common Pleas, Eighth Judicial Circuit. I tried this case on behalf of the plaintiff with my law partner. Responsibilities were divided by witness, with other trial responsibilities equally divided. The verdict was appealed, but the appellate decision is not reported.

Kaiser v. Estate of William N. Geiger, Jr., S.C. Probate Court, Fifth Judicial Circuit. I tried this case with co-counsel. We divided trial responsibilities equally.

American Amusement Co. v. Brigham, S. C. Court of Common Pleas, Second Judicial Circuit. I was sole counsel in this trial.

I have also served as associate counsel for defendants in at least two confidential attorney disciplinary trials.

a. Were any of the cases in which you were sole counsel reported?

Response: No.

13. At your hearing, Senator Coons asked you about *Lucas v. South Carolina Costal Council*, in which you contributed to the "Petition for Certiorari and the Petitioner's Brief and Reply Brief on the merits and prepared the senior partner for the oral argument." Which particular legal issues did you research and address when contributing to these two briefs?

Response: My research and contribution to these briefs were related to these issues:

(1) Whether the Constitution's Fifth Amendment guarantee against government takings should be qualified by any exception for nuisances;

(2) Whether any nuisance exception should be applicable when the regulation eliminates the worth of property;

(3) Whether the fact that a regulation is within a state's police power means that compensation can be denied under the Fifth Amendment; and,

(4) Whether the matter was ripe for adjudication.

a. Were you solely responsible for these issues?

Response: No. My work was part of a team effort.

14. One case you list in your questionnaire as one of the "ten (10) most significant litigated matters which you personally handled" is *Johnson v. Collins Entm't, Inc.* For which specific legal issues were you solely responsible in this case?

Response: Neither I nor any one lawyer on our litigation team was solely responsible for any particular legal issue in this case. I was heavily involved in all aspects of the defense of claims for alleged civil RICO violations and claims for declaratory and injunctive relief. I was the primary lawyer responsible for fact discovery and development.

a. Please describe in detail what work you performed on these issues.

Response: I personally handled much of the discovery in this case, which included propounding and responding to numerous interrogatories and requests for production, taking and defending depositions and drafting numerous motions and oppositions to motions. I also argued summary judgment motions and contributed to the brief on an appeal to the Fourth Circuit. The decision appears at 199 F.3d 710 (4th Cir. 1999).

15. For all but one of the cases you list as your ten most significant, your representation terminated on or before 2002. Have you handled significant litigated matters in the last ten years?

Response: Yes, in addition to continuing to handle the litigation of *Tuomey Healthcare Systems, Inc.,* I have handled many other cases, as indicated below.

a. Please list these significant cases and the issues litigated.

Response: *Matsuura v. E.I. DuPont de Nemours & Co.,* 330 F. Supp. 2d 1101 (D. Hawaii 2004). This case concerned fraud in the inducement of a settlement in a products liability case. The fraud centered upon the defendant's failure to produce critical evidence the defendant was required by court rules to provide. This case was decided under Hawaii state law.

Florida Evergreen Foliage v. E.I. Dupont de Nemours & Co., 336 F. Supp. 2d 1239 (S.D. Fla. 2004). This case concerned fraud in the inducement of a settlement in a products liability case. The fraud centered upon the defendant's failure to produce critical evidence the defendant was required by court rules to provide. This case was decided under Florida state law.

Layman v. State of South Carolina, 376 S.C. 434,658 S.E.2d 320 (2008). This was a South Carolina Supreme Court case concerning whether a return to work statutory program (TERI) constituted a contract.

Palmetto Pharmaceuticals, LLC v. AstraZeneca, LP, United States District Court, District of South Carolina, C/A No. 2:11-cv-00807-SB-JDA. This is an ongoing patent infringement case involving Crestor®.
Harris Teeter, Inc. v. McNair Law Firm, P.A., S.C. Court of Common Pleas, Ninth Judicial Circuit, Civil Action No. 2006-CP-10-1169. This was a legal malpractice case involving the failure to cure a default of a commercial lease.

Herron, et al. v. Toyota of Greenville, et al., S.C. Court of Common Pleas, Second Judicial Circuit, Civil Action No. 2006-CP-02-1230. This is a consumer group action case against car dealers under the South Carolina Motor Vehicle Act for charging illegal fees.

Holiday Sands Ocean Front Resort v. Carolina First, S.C. Court of Common Pleas, Fifteenth Judicial Circuit, Civil Action No. 2010-CP-26-9586. This is a lender liability case.

TD Bank v. Holiday Sands, et al., S.C. Court of Common Pleas, Fifteenth Judicial Circuit, Civil Action No. 2010-CP-4707. This is a complex foreclosure action involving multiple properties.

TD Bank v. Holiday Sands, et al., S.C. Court of Common Pleas, Fifteenth Judicial Circuit, Civil Action No. 2010-CP-26-10252. This is a complex foreclosure action involving multiple properties.

Harris Teeter v. Moore & Van Allen, 390 S.C. 275, 701 S.E.2d 742 (2010). This was a legal malpractice case involving settlement advice and the lawyer judgment rule.

Richard & Barbara Hagerty v. Dixon Hughes, LLC, et al., S.C. Court of Common Pleas, Ninth Judicial Circuit, Civil Action No. 2008-CP-08-1498. This was an accountant malpractice case centering on the accountant's failure to discover a thirty million dollar Ponzi scheme.

Bodman v. State of South Carolina, et al., In the Original Jurisdiction of the South Carolina Supreme Court (filed March, 2011). This case is before the South Carolina Supreme Court involving challenges to the constitutionality of sales tax exemptions.

Mansfield, et al, v. Edisto Electric Cooperative, S.C. Court of Common Pleas, Second Judicial Circuit, Civil Action No. 2009-CP-05-100. This is a challenge to how and when rural electric cooperatives may pay capital credits to former customers.

The National Bank of South Carolina (now Carolina First) v. Ridgeland at the Park, et al., S. C. Court of Common Pleas, Thirteenth Judicial Circuit, Civil Action No. 2010-CP-23-2891. This was a real estate foreclosure action with counterclaims involving the bank's failure to properly administer the loan.

Lynch v. Estate of Edward Saleeby, S. C. Court of Common Pleas, Fourth Judicial Circuit, Civil Action No. 2003-CP-16-0655. This case centered on the legal rights to royalties for a large landfill.

The Estate of Jacquelin K. Stephenson, et al., v. T. Heyward Carter, Jr., et al., S.C. Court of Common Pleas, Ninth Judicial Circuit, Civil Action No. 2011-CP-10-400. This is an accountant and legal malpractice action involving the failures to inform three sisters of their two brothers' raiding a trust and their mother's estate.

Burgess, et al., v. Santee Electric Cooperative, et al., S. C. Court of Common Pleas, Third Judicial Circuit, Civil Action No. 2010-CP-45-278. This is challenge to an electric cooperative's board's powers to, inter alia, pay per diem, pay insurance, and set up retirement programs for board members.

16. In the case of *United States ex rel. Drakeford v. Tuomey Healthcare Sys., Inc.*, how many witnesses were called in the nearly month-long trial?

Response: Eighteen.

a. How many witnesses did you personally examine during the trial?

Response: Sixteen witnesses were called by the government, and two witnesses were called by Tuomey.

My responsibility at trial, in addition to jury selection, was to cross-examine the 22 contracting physicians the Government indicated it intended to call in its case-in-chief, many of whom were held under subpoena for the duration of the trial. After I cross-examined the government's first physician witness, it declined to call any of the other contracting physicians. I did not personally conduct any other examinations.

I also participated in every decision and every aspect of strategy during that trial. I prepared co-counsel to examine the witnesses assigned to them. I was also the primary author of the trial brief and its attachments which included the selection of exhibits and witnesses to be presented. I was the primary author of the closing argument.

b. For which specific legal issues were you solely responsible?

Response: With the exception of jury selection, for which I was solely responsible, the responsibilities relating to the legal issues were equally shared by me, my law partner and co-counsel.

17. Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." The Senate questionnaire you submitted asked you to describe what you have done to fulfill these responsibilities and to list specific instances and the amount of time devoted to each. You mentioned

the services you have provided as a State court-appointed representative, but you did not list the amount of time you spent on these matters.

a. To how many cases were you appointed?

Response: I have been appointed by the courts to handle pro bono matters throughout my career. I do not have computer records before 2000, but I estimate that I was so appointed once per year from 1987 to 1999. Since that time I have been appointed at least four times.

b. Approximately, how many hours per year did you spend on these cases?

Response: These matters for which I have been appointed generally involved the state's efforts to terminate parental rights. These matters require a series of periodic hearings, at least two, and ending in a final merits hearing. Each matter required me to meet with the individual or individuals whom I was appointed to represent and often some or all of the other parties and witnesses. The hearings themselves generally require at least three to five hours of my time.

I did not record my time, as it is not billed, but I estimate that over the course of my career my time spent per year to be an average of approximately 25 hours on appointed cases and 25 hours on other pro bono matters.

c. Were any of these matters criminal matters?

Response: No.

i. If so, please describe in detail.

Response: Please see response immediately above.

d. Have you represented any clients pro bono without being court appointed? If so, please describe your representation.

Response: Yes. Throughout my 27 years in private practice I have represented many individuals who were in serious need of representation but were without the means to pay for that representation. My non-court-appointed pro bono cases have included serious attorney grievance matters, consumer contract disputes, employment issues, landlord-tenant issues and others.

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

Response: I received these questions late on February 22, 2012. I prepared my responses which were reviewed by representatives of the Department of Justice, and I subsequently finalized my responses and submitted them on February 27, 2012.

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

Response: Yes.