

**Senator Grassley  
Questions for the Record**

**Elizabeth Drake  
Nominee, Judge for the United States Court of International Trade**

- 1. On February 21, 2014 before the U.S.-China Economic and Security Review Commission, you testified, “The U.S. should ensure its trade remedy laws are accessible and effective...Congress should explore giving standing to bring trade cases to other domestic entities with an interest in fair trade enforcement such as states and localities.” Do you believe that Congress should grant standing to domestic entities, such as states and localities, to bring trade cases? How would such an action by Congress affect the Court of International Trade?**

Response: As stated in my testimony, I believe that Congress should explore the issue of giving standing to bring trade cases to domestic entities that do not currently have such standing, such as states and localities. If confirmed, I would apply the existing statutory provisions regarding standing and relevant precedent to the facts of each case without regard to past positions I have taken. If Congress did amend the statutory provisions on standing, additional types of litigants may have the right to appeal administrative determinations to the Court of International Trade. The applicable substantive provisions of the statute and standard of review in such cases would remain the same, regardless of the parties involved.

- 2. Does the Department of Commerce currently have the authority to treat currency undervaluation as a countervailable subsidy? If so, does it use this authority to bring enforcement actions?**

Response: The Department of Commerce currently has the authority to countervail a subsidy program if the facts establish that the subsidy program satisfies each of the requirements of the statute: (1) there is a financial contribution; (2) the subsidy is specific; and (3) the subsidy confers a benefit. In recent cases that I am aware of where petitioners have alleged that currency undervaluation is a countervailable subsidy, the Department of Commerce has found that the facts presented did not demonstrate that the alleged subsidy was specific, and thus the Department has not countervailed the alleged subsidy program in those cases.

- 3. Please describe factors you will take into account as you consider the appropriate level of deference the Court of International Trade (CIT) should give to the U.S. International Trade Commission (ITC) on questions of statutory interpretation, particularly in appeals of determinations in antidumping and countervailing duty cases.**

Response: If confirmed, I would follow *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al.*, 467 U.S. 837 (1984) in reviewing statutory interpretation by the International Trade Commission in appeals from antidumping and countervailing duty

cases. If the language of the statute was clear, I would apply the plain meaning of the statute as enacted by Congress without deference to the agency. If the statute was ambiguous, I would defer to the agency's statutory interpretation as long as that interpretation was reasonable. The agency's reasonable interpretation would be entitled to deference even if there were other plausible interpretations of the statute.

- 4. Please describe your view on the appropriate level of deference the CIT should give to the ITC on questions of fact when presented with "Substantial Evidence" questions and challenges. What will be your approach to such challenges, and what factors would you consider in such cases?**

Response: On questions of fact, I would defer to the International Trade Commission where its decision is based on substantial evidence. In accordance with the precedent of the Supreme Court and Court of Appeals for the Federal Circuit, I would consider whether the agency determination was based on relevant evidence that a reasonable mind would accept as adequate to support a conclusion. While substantial evidence must be "more than a mere scintilla," a preponderance of the evidence is not required.

- 5. Do you agree with the Federal Circuit's decision in *SFK USA, Inc. v. U.S. Customs and Border Protection*, 556 F.3d 1337 (2009) regarding the constitutionality of the Byrd Amendment to the Continued Dumping and Subsidy Offset Act (CDSOA) of 2000? What will be your approach in cases regulating commercial speech?**

Response: My firm, Stewart and Stewart, represented Timken U.S. Corporation, a defendant-appellant in the *SKF* case, and I was listed of counsel in the case. The Federal Circuit's decision in *SKF* is binding precedent on the Court of International Trade, and, as such, I would follow that precedent if confirmed. In cases regarding commercial speech, my approach would be to follow Supreme Court precedent, such as *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), and all other precedent of the Supreme Court and the Court of Appeals.

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

Response: The most important attribute of a judge is fidelity to the rule of law. A judge's consistent and faithful application of binding precedent is essential to the functioning of the American legal system. I possess this attribute.

- 7. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?**

Response: A judge should treat all who come before the court with courtesy and respect. A judge should interact with others with patience, seriousness, and clarity so that parties can understand and respect the basis for the court's decisions. I believe I meet this standard.

- 8. In general, Supreme Court precedents are binding on all lower federal courts, and Federal Circuit precedents are binding on the Court of International Trade. 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 will faithfully follow the precedents of higher courts and give them full force and effect in all cases.

- 9. 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: In a case of first impression, I would first look to the plain language of the statute or measure at issue to determine its meaning. If the meaning were not clear from the text, I would be guided by the canons of construction and any binding precedent. If there were no binding precedent directly on point, I would consider analogous precedent. In the review of an agency decision, I would also apply the applicable standard of review.

- 10. 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 best judgment of the merits to decide the case?**

Response: If confirmed, I would faithfully apply the precedent set by the Supreme Court and the Court of Appeals for the Federal Circuit in all cases.

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

Response: Under the doctrine of constitutional avoidance, a court should avoid a constitutional question if it can. If a court cannot avoid a constitutional question, it should only declare a statute enacted by Congress unconstitutional if its enactment clearly exceeded Congress's constitutional authority or if the statute clearly violates a provision of the Constitution.

- 12. In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community", in determining the meaning of the Constitution? Please explain.**

Response: No. It is never proper for a judge to rely on foreign law or the views of the "world community" in determining the meaning of the Constitution. Federal judges should rely only on United States law and binding legal precedent in determining the meaning of the Constitution.

- 13. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?**

Response: I can assure the Committee that, if confirmed, my decisions would be strictly based solely on the text of the law, binding legal precedent, and the facts of each case. Any political ideology or motivation would play no role in my decision-making if I am confirmed.

- 14. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?**

Response: If confirmed, I would treat all litigants fairly. I would set aside any personal views I may have and treat all parties with an open mind, with respect, and with due consideration of their views without distinction.

- 15. If confirmed, how do you intend to manage your caseload?**

Response: If confirmed, I would actively manage my caseload consistent with the case management procedures of the Court of International Trade. I would review cases as soon as they are docketed and schedule early conferences with counsel. I would set an appropriate schedule for resolving the dispute efficiently, expeditiously, and fairly. I would only grant exceptions to the schedule in exceptional circumstances. I would require counsel to provide periodic status reports and encourage them to identify and narrow issues where appropriate. I would also resolve motions and issue orders and final decisions promptly. Finally, I would seek advice from judicial colleagues regarding their case management practices.

- 16. 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: Judges have a responsibility to control the pace and conduct of litigation. If confirmed, I would use the methods described above to effectively and efficiently move cases towards final resolution. Prompt adjudication of disputes is essential to maintaining public confidence in the court and to administering justice to the parties.

- 17. You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?**

Response: If confirmed, my role as a judge would be completely different than the role of an advocate. In reaching decisions in cases that come before me, I would be guided solely by the applicable legal provisions, binding precedent, and the facts of each case, as well as the appropriate standard of review. My prior experience as an advocate would play no role

in my decision-making. I would be neutral, objective, and fair to those who appear before me. While I am aware that the transition would be a significant one, I am confident that I can achieve it. I expect the most difficult part of the transition would be leaving the law firm where I have worked closely with a small group of close colleagues for the past ten years.

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

Response: I received these questions on February 3, 2016. I drafted responses and provided them to the Office of Legal Policy of the Department of Justice on February 4, 2016. Following a discussion with a representative from the Office of Legal Policy, I finalized my responses and submitted them.

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

Response: Yes.