

Cathy Fung
Nominee to Serve as Judge on the United States Tax Court
Responses to Questions for the Record

Senator Warren

Question 1

The tax code and its implementation have a significant impact on marginalized communities, for better and for worse. While families from marginalized groups may benefit from the Earned Income Tax Credit (EITC) and Child Tax Credit, less than 10% of the benefits of tax expenditure on deductions and preferential rates for capital gains, qualified dividends, and passthroughs are distributed to families of color.¹ Meanwhile the IRS is working to improve racial equity in auditing.²

At the same time, the tax bar is the least diverse or among the least diverse across sexual orientation, gender, ethnicity, and race, according to a 2022 report by the American Bar Association³, making it more difficult to increase equity in the tax code and tax administration.

How have you worked to increase racial equity in the tax bar to date, and how would you do so as a tax court judge, if confirmed?

Equity and diversity are very important to me. From 2009 to 2016, I was the Chair/Vice-Chair of the American Bar Association, Section of Taxation (ABA) Diversity Committee and a Council Director for the Diversity Committee from 2019-2023. The Committee's goal is to increase diversity in the tax bar through increased involvement by diverse individuals, for example, through speaking opportunities. Through the ABA, I have also mentored many individuals toward their career aspirations. If confirmed, I would continue my outreach efforts as allowed by U.S. laws and regulations and join the Tax Court in its efforts to foster meaningful change in this area.

Senator Blackburn

Question 1-3

If confirmed, you would serve in the role of Tax Court Judge for 15 years. Such a position requires experience with the courts, be it through serving as a judge in some other capacity or through direct experience with our judicial system. Taxpayers coming before the court certainly deserve judges who are well-versed in procedure, case law, and of course the intricacies of the Internal Revenue Code.

Could you please describe your judicial background, be it previous experience with the U.S. Tax Court or another court?

¹ U.S. Department of the Treasury, "Advancing Equity through Tax Reform: Effects of the Administration's Fiscal Year 2025 Revenue Proposals on Racial Wealth Inequality", March 11, 2024, p. 1.

<https://home.treasury.gov/system/files/131/Advancing-Equity-through-Tax-Reform-FY2025.pdf>

² Response from Commissioner Werfel, May 15, 2023, <https://www.irs.gov/pub/newsroom/werfel-letter-on-audit-selection.pdf>.

³ American Bar Association "Goal III Report 2022: The Demographic Diversity of the ABA's Leadership and Members", 2022, <https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/aba-goal-3-report-2022.pdf>.

My first legal position was an attorney-advisor to the Honorable Robert A. Wherry, Jr., a now retired United States Tax Court judge. During my two-year clerkship, I drafted opinions for Judge Wherry and discussed his docket of cases. I witnessed his lessons of fairness and justice in determining the right answer.

Could you also describe your experience with litigation? Have you ever had a case go to trial?

As a Deputy Area Counsel for the IRS Office of Chief Counsel, I manage attorneys in litigation before the Tax Court. During my time at the IRS, I have managed litigation teams and have represented the IRS before the Tax Court. In private practice, I generally represented businesses clients but also participated in *pro bono* representation of individuals who would otherwise be unrepresented. If confirmed, my experience in representing taxpayers in private and public practice will provide a valuable perspective.

Many of the taxpayers that come before the tax court are not well-versed in tax law and are self-represented. Could you explain how you intend to work with them to ensure they understand the process and their rights?

Taxpayers deserve a fair and impartial opportunity to be heard. Information about the process of a Tax Court cases is very important to presenting a case effectively. If confirmed, I would communicate with taxpayers in advance of trial to ensure they understand the process and available resources. If the taxpayer is self-represented, I would inform them of taxpayer clinics available to assist them with their case before trial and at trial. If a self-represented taxpayer chose to engage with a clinic volunteer, I would be patient in allowing the taxpayer and the volunteer time to develop the facts at trial to ensure that each party has the best opportunity to present their case in a neutral forum.

Question 4

Taxpayers expect and deserve an expeditious resolution to their tax disputes. Between 2017 and 2019, the Tax Court held an average of roughly 180 weeks of trial per year. In 2020, there were only 99 weeks of trial. Between 2021 and 2023, the average weeks of trial per year was 124. While there are fewer Tax Court Judges now, which your nominations presumably aim to resolve, the Tax Court experienced a significant uptick in new filings after the pandemic and there is still a case backlog.

If confirmed, how do you intend to reduce the case backlog and ensure that taxpayers have their cases heard swiftly?

If confirmed, I will actively and effectively manage my caseload to provide taxpayers an expeditious resolution to their cases. I will communicate with the parties early to discuss their cases, understand their issues, and ensure the case progresses toward a resolution. As part of that process, I will evaluate whether cases can be resolved on motion or resolved more quickly through hearings and virtual proceedings, if agreeable to the parties. If the case is to be resolved with a trial, I will maximize cooperation between the parties and recommend the parties engage in a robust stipulation process to conserve the court's trial

time. After trial, I will work diligently and carefully to review the facts in an equitable manner.

Senator Grassley

Question 1

In 2006, I authored important updates to the IRS whistleblower program, which included allowing whistleblowers to appeal award determinations to the Tax Court. More recently, I've introduced legislation with Chairman Wyden and Senators Wicker and Cardin to, among other provisions, beef-up anonymity protections for whistleblowers appearing before the Tax Court. Whistleblowers often take on great professional and personal risks in coming forward.

I am not asking you to comment specifically on my legislation, but in general, do you agree that protecting the anonymity of whistleblowers before the Tax Court is vital to maintaining a well-functioning IRS whistleblower program?

Whistleblowers play an important role in tax administration. It is important to balance transparency in our voluntary system of tax compliance through an open public forum with a whistleblower's anonymity. If confirmed, I would give whistleblowers the respect they deserve for their willingness to assist in our voluntary system of tax compliance. I will be open-minded and listen carefully to each whistleblower's case keeping in mind any necessary whistleblower protections.

Question 2

If you are confirmed to the Tax Court, you will hear cases involving many different types of taxpayers ranging from large corporations to small businesses and individuals.

Regardless of who might appear before you and what the issue may be, do you pledge to apply the tax code as written by Congress and to not attempt to legislate in your capacity as a Judge of the Tax Court?

Yes, I do.

Question 3

The Tax Court is important since it allows petitioners to challenge an assessed deficiency before having to pay that amount to the IRS. Many petitioners to the Tax Court have little experience working through a dispute with the IRS and may even represent themselves.

Without giving them an unfair advantage, how will you ensure that all petitioners get their day in court?

I will treat all taxpayers fairly to ensure that each party has the opportunity to present their case in an impartial forum. I will communicate early with taxpayers so that each party understands the process toward a resolution. I will provide information to taxpayers such as the resources available on the Tax Court's website and information on taxpayer clinics that service the cities in which the Tax Court hears cases. For those taxpayers who choose to use the services of a clinic volunteer, I will allow the taxpayers time with the

volunteer to develop their case. I will listen patiently and treat all taxpayers with respect so that they feel comfortable presenting their facts in a neutral judicial setting.

Question 4

Finance Committee staff disclosed to the Committee that you claimed a loss of around \$37,000 on your 2021 federal tax return stemming from rental property you owned prior to 2012 even though the statute of limitations to do so had long since expired.

My understanding is that as part of the Finance Committee vetting process you amended your 2021 tax return and paid an additional \$11,756 in tax,

Did you use the services of a paid preparer or did you self-prepare the affected returns?

My returns were self-prepared.

How did you determine or discover in 2021 that previously un-allowed passive losses from rental property you owned had in fact been converted to non-passive losses upon the sale of said property in 2012? As a professional IRS employee, did you come to this conclusion on your own or were you alerted to this rule by someone else?

After you determined or discovered you could have deducted said losses in full on your 2012 tax return, what actions or due diligence measures, if any, did you take to determine whether said losses could be claimed on your 2021 tax return and were not time barred by the statute of limitations?

When did you determine you had taken the losses in error, and what steps will you take going forward to avoid improperly taking losses on your tax returns?

For the sake of clarity, I will respond to these three questions collectively. In 2012, I inadvertently failed to claim suspended passive activity losses, which would have been released as non-passive in the year of the sale of the property and therefore applied against my ordinary income for that year. In 2021, I moved out of my home and converted it to a rental property. I believed at the time I was able to apply the suspended passive activity losses for the 2021 tax year based on an incorrect reading of the section 469 rules, which govern passive activity losses. As part of this process, the Finance Committee helpfully alerted me that the losses, which were released as non-passive in 2012, should have been claimed in 2012, the year of the sale, and not in 2021. Consistent with the Finance Committee's advice, I promptly amended my 2021 tax return to back-out the applied loss and paid the additional tax and interest. Because the statute of limitations is closed for 2012, I am unable to amend that return and claim a refund.

I am grateful for the Finance Committee's advice as part of this process and now have a greater understanding of passive activity loss rules. Going forward, I will be more diligent in scrutinizing my tax returns, including engaging a competent CPA as needed.

Whether in an open tax year, or a now closed tax year, have you claimed any other losses that were improperly claimed or for which the statute of limitations had expired? If so, what was the impact, if any, on your tax liability?

No, I have not.

Senator Young

While the questions below are numerically separated by theme for clarity and convenience, some may include sub-part questions denoted alphabetically. **Please note that individual responses to each sub-question are expected** and that a single response to multiple sub-questions will be treated as unresponsive.

For the purposes of questions that clearly end in “yes or no,” answers other than “yes” or “no” will similarly be deemed unresponsive to such questions.

Question 1

The Tax Court plays a critical role in interpreting tax law and resolving disputes between the IRS and taxpayers. As a nominee for this Article I judgeship, you will be responsible for hearing a wide range of cases.

Can you elaborate on your approach to applying the law impartially and ensuring consistent application of tax code to all taxpayers, regardless of their background?

In my 20 years of tax practice, I have interacted with taxpayers of varying degrees of experience with the law with an open mind and with the goal of taxpayer certainty and effective resolution. If confirmed, I will treat all taxpayers fairly to ensure they can present their case in an impartial forum toward an expeditious resolution of their tax issues. I will engage in active communication with the parties and listen carefully and patiently to all the parties in their case presentation. Moreover, in resolving cases, I will maintain the highest ethical standards and apply the law evenly to all taxpayers, considering established judicial precedent to ensure uniformity and consistency.

Question 2

- a) *Given the tremendous backlog of cases currently facing the U.S. Tax Court, what specific strategies would you implement to expedite case resolution?*

If confirmed, I will actively and effectively manage my caseload to provide taxpayers an expeditious resolution to their cases. I will communicate with the parties early to discuss their cases, understand their issues, and ensure the case progresses toward a resolution. As part of that process, I will evaluate whether cases can be resolved on motion or resolved more quickly through hearings and virtual proceedings, if agreeable to the parties. If the case is to be resolved through a trial, I will maximize cooperation between the parties and recommend they engage in an active discovery and robust stipulation process to conserve the court’s trial time. After trial, I will work diligently and carefully to review the facts in an equitable manner.

- b) *Would you consider increasing the number of hours that the U.S. Tax Court is open to hear cases?*

In consultation with the Chief Judge and the court's personnel, I welcome recommendations on ways to make the Tax Court more efficient in hearing cases, including your suggestion on increasing the number of hours the court is open, to determine the best way to provide more taxpayer access to a public forum for case resolution. It is important to balance the courtroom time with the duties of court personnel and courtroom space in determining the most effective approach to any change in the Tax Court's public operations.

- c) *How do you envision these strategies mitigating the harmful effects that prolonged case backlogs have on taxpayers awaiting decisions?*

Taxpayers deserve certainty and efficiency in resolving their disputes in the Tax Court. Maximizing cooperation and communication between the parties will help to resolve and narrow issues in the event of a trial. In advance of trial, motions and an active stipulation process can reduce court time to give taxpayers certainty on their tax issues more quickly.