

Responses of John Daniel Tinder
Nominee to the U.S. Court of Appeals for the Seventh Circuit
to the Written Questions of Senator Patrick J. Leahy

- 1. You prosecuted four capital murder cases, all of which are listed on your Senate questionnaire as among your most significant litigation experiences. Despite your recommendation for a death sentence in all four cases, in two of those four cases the defendant was given a sentence less than death. Given your apparently aggressive pursuit of the death penalty as a prosecutor, what assurance can you give that, in capital cases, you would treat capital defendants fairly without favor to the government?"**

Response: I can assure the Committee that, if confirmed, I will treat all litigants fairly, including defendants in capital cases, and my record as a judge bears that out. It is true that as prosecutor, I advocated on behalf of victims of violent crimes for punishment of convicted defendants. During another portion of my career, as a public defender, I represented individuals accused of murders and other serious crimes, and in doing so, argued for leniency for my clients. However, my role as an advocate in litigation in seeking particular outcomes in cases ended when I became a judge in September of 1987. Since that time, I have presided over more than one thousand federal criminal cases as a judge. I strive in all cases to be fair to both sides of the litigation. Defendants in criminal cases are clothed in the presumption of innocence; no case begins with an expectation that one side or the other is likely to prevail and no favor is provided to either side. Each aspect of each case is dependent solely on the facts presented and the applicable law. The range of experience that I have had in litigation as an advocate and as a judge demonstrates that, if confirmed, I would treat capital defendants fairly without favor to the government.

- 2. You gave a speech in February 1986 before the Evening and Breakfast Exchange Clubs of Logansport, Indiana discussing the importance of criminal punishment. According to a February 10, 1986 article in the *Logansport Pharos - Tribune*, you stated in that speech that “[i]t’s time for us to be less accepting and more demanding when it comes to crime. We must be less willing to excuse and more willing to punish.” Given your speech describing how you would be “less willing to excuse and more willing to punish,” what assurances can you give that you will be fair to the rights of all litigants who come before you, including appeals from criminal defendants?**

Response: The speech referred to in the question was given when I was United States Attorney, before I was nominated to be a United States District Court Judge. As noted in the response to Question number 1, my role as an advocate in litigation ended when I became a judge. My work as a judge began after a dozen years as a litigator, which included service as both a prosecutor and a public defender, and also involved

representing both plaintiffs and defendants in civil litigation. My record of fairness as a judge to all litigants, including defendants in criminal cases, for over twenty years should provide assurance that I will be fair to the rights of all litigants if I am appointed to the Court of Appeals for the Seventh Circuit.

3. **In the confirmation hearings for Chief Justice Roberts and Justice Alito last Congress, there was extensive discussion of the amount to which judges and Justices are bound to follow previous court decisions by the doctrine of *stare decisis*. In your opinion, how strongly should judges bind themselves to the doctrine of *stare decisis*? Does the commitment to *stare decisis* vary depending on the court?**

Response: I believe that all lower courts are required to follow precedent established by the Supreme Court of the United States. The principle of *stare decisis* is critical to the predictability that is essential in American litigation. Only the Supreme Court has the authority to alter established precedent.

4. **We are at a pivotal moment in American history for the preservation of the careful balance of powers between the branches of our government, faced with a President making sweeping claims to nearly unchecked executive powers. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into lobbyist Jack Abramoff's influence on members of Congress, we make sure that we exercise our own power properly. Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?**

Response: I agree that the checks and balances of the three branches of our federal government, including Congressional oversight, have been proven over the history of this country to result in accountability in all branches of government.

5. **One of the central questions I have for any judicial nominee is whether he or she understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products* (1938). In that footnote, the Supreme Court held that : “[L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”**

Can you discuss the importance of the Supreme Court's responsibility under the

***Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?**

Response: The portion of the *Carolene Products* footnote quoted reflects a concern that even in a democracy, a majority of the electorate can impose invidious discrimination on minorities and others who have little access to the political process. This concept is not confined to a judicial footnote, but rather, is the bedrock of the Supreme Court's equal protection jurisprudence and provides the controlling precedent to be applied by the lower courts. The Court has recognized that appropriate judicial review of legislative enactments or executive actions includes heightened judicial scrutiny when fundamental rights and the rights of protected classes are implicated. This can include "strict" scrutiny for matters involving suspect classifications and an "intermediate" level of scrutiny for classifications based on sex or illegitimacy. The Court has made clear that a rational basis test is insufficient when addressing legislation having an adverse impact on such groups or rights. The Court has noted that to approach constitutional challenges with less exacting review would perpetuate discrimination, leaving the politically powerless at the mercy of a popular but discriminatory majority. The Supreme Court has viewed its responsibility to enforce equal protection, even in the face of popular legislation, as another check and balance in the fundamental structure of a government of three equal branches. Courts should approach such questions cautiously, though, to ensure that judicial review is a careful application of constitutional principles rather than the substitution of a judge's personal preference for the determination of the democratically elected legislative body.

6. **As the one undemocratic branch, the courts have a special responsibility to make sure they are available to those Americans most in need of the courts to protect their rights. 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: I strongly believe that all litigants in all courts, including federal courts of appeal, should be treated fairly, regardless of their political beliefs, their financial status or whether they appear as a plaintiff or defendant. My commitment to this concept is founded on my experiences as a lawyer in representing indigent individuals as well as people and corporations of more substantial means. Through experiences as a prosecutor, a public defender and an attorney in private practice, I have gained a sense of the importance of fair treatment for litigants. A prosecutor works directly with the victims of crime and their families to insure that the harms they have suffered are not overlooked. A public defender spends a great deal of time explaining the judicial system to indigent clients and their families so that they can appreciate how their case can be presented to receive a fair and just result. These are often individuals who have no place else to turn to understand what can be an intimidating process. In the private practice of law, I had the opportunity to represent both plaintiffs and defendants in civil litigation from a wide range of financial backgrounds and political beliefs, which emphasized for

me that all litigants want to know that their side of the case will receive a fair hearing. I have also had the privilege as a trial judge to work with jurors from every walk of life, and have experienced close up the effort that jurors make to provide a level scale upon which litigants place their cases for decision. All of these experiences have instilled in me an abiding sense that courts of law are no place for consideration of the financial status or political affiliations and beliefs of litigants. My record as a district judge demonstrates my fidelity to these ideals and should provide assurance to litigants that this commitment would continue if I were to be appointed to the Court of Appeals for the Seventh Circuit.

7. **Over the past decade, the Supreme Court has struck down an unprecedented number of federal statutes, most notably several designed to protect the civil rights of Americans, as beyond Congress's power under Section 5 of the Fourteenth Amendment, for example, *Flores v. City of Boerne*, 117 S. Ct. 2157 (1997), *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000), and *Board of Trustees v. Garrett*, 19 S. Ct. 2240 (1999). The Supreme Court has also recently struck down statutes as being outside the authority granted to Congress by the Commerce Clause, such as in the case of *U.S. v. Lopez*, 115 S. Ct. 1624 (1995) or *U.S. v. Morrison*, 120 S. Ct. 1740 (2000).**

I am hopeful that the Court's decision in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) signals a turn away from the diminishing of the authority of Congress to legislate to protect the American people. What is your understanding of the scope of congressional power under Article I of the Constitution, in particular, the Commerce Clause, and under Section 5 of the Fourteenth Amendment?

Response: The cited cases illustrate the scope of congressional power under the Commerce Clause of Article I of the Constitution and Section 5 of the Fourteenth Amendment: the Supreme Court recognizes that this legislative authority is very broad. This precedent guides appellate and district courts in all Commerce Clause and Section 5 cases that come before them. The Supreme Court has clearly reaffirmed the breadth of that power in *Gonzales v. Raich*, a decision which emphasized the strength of Congress' power to regulate even purely local activities that are part of an economic class of activities which have a substantial effect on interstate commerce.

8. **In December, 2005, after the McCain Amendment prohibiting cruel, inhuman, and degrading treatment of detainees by U.S. personnel under all circumstances was strongly opposed by the Administration, President Bush worked out a deal with Senator McCain and the amendment passed the Senate with overwhelming support. However, in his December 30, 2005, signing statement, President Bush ignored the public deal and wrote that the executive branch "shall construe" the McCain amendment "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will**

assist in achieving the shared objective of the Congress and the President ... of protecting the American people from further terrorist attacks.” If an alleged violation of the McCain Amendment prohibiting cruel, inhuman, and degrading conduct by American personnel, were to come before a court - and I'm not asking you to comment on the constitutionality or propriety of the law - would it be appropriate for that court to consider the President's signing statement, in addition to the law itself, and the words of those who drafted it?

Response: None of the cases that have come before me have involved the McCain Amendment or, more generally, arguments based on Presidential signing statements. It is, however, common in litigation involving federal legislation for parties to refer to the legislative history of the statute involved, including testimony presented at Congressional hearings and statements of legislators made during hearings and in debates on the legislation. It is also common for litigants to refer to rules and regulations promulgated by executive branch agencies regarding the construction and enforcement of particular legislation. When a court is required to construe a federal statute, the plain language of an unambiguous act eliminates the need to refer to the other tools of statutory construction; ambiguity requires the court to utilize both the statutory language and those tools, such as rules of statutory construction, legislative history and executive branch action to construe the meaning of the act. If a litigant referred to a Presidential signing statement of the type noted, which indicated how the executive branch intended to construe the law, such a reference would not appear to be inappropriate and it is proper for a court to consider all arguments of the parties.