

Responses of Brian J. Davis
Nominee to be United States District Judge for the Middle District of Florida
to the Written Questions of Senator Chuck Grassley

1. In your confirmation hearing, Senator Lee asked several questions about a speech you gave in 1995. In particular, Senator Lee noted that you said:

“Dr. Jocelyn Elders, Surgeon General of the United States, is asked by the President to resign after being misinterpreted about student sex education, reminding us, lest we forget, that politically correct is spelled with capital letters for melanin impregnated females.” And,

“President Clinton nominates Dr. Henry W. Foster, Jr., former chair of the department of obstetrics and gynecology at Mary Medical College as surgeon general, but the Senate filibustered so as not to confirm the doctor because of a controversy over the number of abortions the doctor performed early in his career, reminding us, again, lest we forget, that politically correct is also spelled with capital letters for melanin impregnated males.”

Before answering his question, you said you had reviewed the materials you submitted. You said, “The speeches -- the comments that you refer to, *as well as some others* and sprinkled through other speeches that I’ve given over some 30 years of -- since my graduation from law school, have been part of a body of work, speeches that have been designed primarily to engage people in the community in which I live around issues concerning matters of race.” And again, “I have come to the conclusion, in looking at those specific remarks *and others*, that despite my use of rhetoric and hyperbole and exaggeration as a means of persuading and motivating people to be involved, that some of the comments -- and the tools that I just identified are tools trial lawyers learn to motivate and persuade people -- that despite that, I have found that some of the comments were inappropriate.” (emphasis added)

- a. To what other statements are you referring?**

Response: The remarks referenced later in the hearing by Senator Lee and identified in your questions are other examples of inappropriate statements. Both the context and audience to whom the referenced remarks were directed, however, are important in considering their impact. The purpose of the remarks and speeches was to motivate people already committed to work against racial injustice to continue to do so to the improvement of the entire community. Nonetheless, I now recognize that a number of my statements could be misunderstood – that I was maintaining or was advocating a racial or other bias. Such misconstruction is best avoided by my fashioning remarks that do not permit such inferences in any context. That will be my intention in the future.

- b. Please identify the comments and speeches you have made that you now find inappropriate.**

Response: Any speech I have made containing any comment which easily permits a misconstruction of racial or other bias when viewed out of its intended context would be considered inappropriate. The comments and speeches of which I am aware that fall into this category include my comments and speeches concerning Dr. Elders, Dr. Foster, Supreme Court Justice Thomas and my use of the word “bias” in a speech to the Jacksonville Department of Juvenile Justice annual conference.

2. **In answering Senator Lee’s question, you said, “The ones that you mention were inappropriate for the reason that an impression could be gotten from them that somehow the court maintained a racial prejudice.” However, your comments about Dr. Foster, for instance, were as follows: “President Clinton nominates Dr. Henry W. Foster, Jr., former chair of the department of obstetrics and gynecology at Meharry Medical College as surgeon general, but the Senate filibustered so as not to confirm the doctor because of a controversy over the number of abortions the doctor performed early in his career, reminding us, again, lest we forget, that politically correct is also spelled with capital letters for melanin impregnated males.”**

- a. **What is your understanding of why Republicans opposed Dr. Foster’s nomination?**

Response: I am not sure what motivated the Republican opposition to Dr. Foster’s nomination. The purpose of the remark was to note concerns raised in the African American community and to encourage the listener to examine the motivation.

- b. **Do you believe your comments were inappropriate because you assigned a racial motivation to Republican opposition, or because, as you said at your hearing, your comments suggested a racial bias?**

Response: The comments were inappropriate in that they could be interpreted as assigning a racial motivation to Republican opposition to Dr. Foster and therefore that I lacked impartiality.

3. **Senator Lee also asked you about comments regarding Justice Thomas. In your speech, you said: “400 people protest outside the home of Supreme Court Justice Clarence Thomas because of his opinions in rulings affecting affirmative action and voting rights, reminding us, lest we forget, how easy it is for some of us to forget history.” Based on your response, it remains unclear whether you believed Justice Thomas had forgotten history, or the protestors outside his house had done so. Please clarify.**

Response: It was the position of the protestors that Justice Thomas had forgotten history. I referenced the protestors’ sentiment in the remark for the purposes of reminding the audience of the importance of remembering our country’s racial history. Nevertheless, I acknowledge that my comment might have been interpreted as an inappropriate criticism of a Supreme Court Justice by a sitting judge. I did not intend such a criticism and regret that I did not speak more clearly.

4. **Just to clarify a few more questions regarding your 1995 speech. You stated that Dr. Jocelyn Elders was asked to resign by President Clinton “after being misinterpreted about student sex education.” Your comments refer to a statement Dr. Elders made before the United Nations on AIDS awareness day. Following the speech, Dr. Elders was asked whether she would consider promoting teaching masturbation to students. To which she replied, “With regard to masturbation, I think that it is something that is a part of human sexuality and part of something that should perhaps be taught.”**

- a. **What part of that controversial statement was misunderstood?**

Response: I believe some people thought Dr. Elders was advocating teaching children how to perform a sexual act. I think that impression was a misunderstanding.

- b. **Is it your view that race was a factor in Dr. Elder’s resignation?**

Response: I do not know if race was a factor in Dr. Elders’ resignation.

5. **In a speech you gave at an Interfaith Thanksgiving Service, you said that “Universal education is necessary and the elimination of the extremes of wealth and poverty of our world is a good to be sought.” Please explain what you meant by this statement. How would you propose accomplishing the elimination of “extreme wealth?”**

Response: My intention in making this statement was to focus on the relative disparity between the very rich and the very poor and advocate for the elimination of that disparity by improving the lives of those in poverty through education.

6. **In a speech you gave at the Jacksonville Department of Juvenile Justice annual conference you said, “You might surmise from that litany that I bring a bias to the bench. I do.... I am buoyed and comforted today because despite my bias, something judges are not supposed to have, the people with whom I work share the same bias. They must.”**

- a. **Please explain what you mean by this statement. What bias do you bring to the bench?**

Response: It is important to underscore the importance of the audience and context here. My remarks were to people charged with helping to keep children out of trouble. “Bias” in retrospect was a poor choice of words. I meant that I bring a genuine concern for children to the bench, and I wanted to emphasize that the members of the audience shared that concern because of the kind of work they had chosen to do. My thought at the time was that admitting a “bias” would be an effective rhetorical device. But I don’t consider my concern for children to be a “bias” in the improper sense of that word, and in individual cases it has no impact on my ability to carry out my duty to apply the law to the facts.

- b. Given these comments, do you believe victims of crimes committed by juveniles will feel comfortable with you presiding over their case?**

Response: I am confident when viewed in context the comments, as well as my record as a prosecutor and sitting juvenile court judge, will cause victims of crimes committed by juveniles to feel comfortable with me presiding over their cases.

- 7. You indicated in your questionnaire that you have virtually no experience in federal court. How are you preparing to handle cases as a federal judge, if confirmed?**

Response: I am studying federal statutes, rules of procedure and other differences between the state and federal jurisdiction. In addition, I would bring what I believe are transferrable judicial skills developed from my 18 years of experience on the state bench. I have and, if confirmed, would continue to use the judicial education resources of the Administrative Office of the United States Courts. If confirmed, my colleagues on the federal bench would also be resources from whom I can learn.

- 8. Since *United States v. Booker*, the Federal Sentencing Guidelines have been advisory rather than mandatory. If confirmed, how much deference would you afford the Guidelines?**

Response: The goal of attaining consistency in sentencing across courts for similarly situated defendants is an important one which I support. I would therefore always consider and be guided by the Federal Sentencing Guidelines and give them substantial deference.

- a. Under what circumstances would you be willing to depart from the Guidelines?**

Response: Though advisory following *United States v. Booker*, in light of their purpose, I would give substantial deference to Federal Sentencing Guideline ranges, departing only when appropriate consistent with the policy statements and official commentary of the Sentencing Commission and the decisions of the United States Supreme Court and the 11th Circuit Court of Appeals.

- b. Under what circumstances do you believe it is appropriate for a district court judge to depart downward from the Sentencing Guidelines?**

Response: Please see my answer to question 8.a above.

- 9. Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?**

Response: I agree entirely that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw.

- 10. You have suggested that ‘the system’ has failed minority youth and have strongly advocated for systemic changes to address race relations.**

- a. What is the role of a judge in advocating for systemic changes to address these issues?**

Response: A judge's role in the justice system, subordinate to none, is to determine facts and impartially apply law. Secondly, judges also maintain an ethical obligation as reflected in both state and federal canons and codes of conduct to work to improve the administration of justice.

- b. Do you believe that an individual's race affects his or her ability to succeed as an adult?**

Response: I believe that people, practices and institutions which consider race as indicative of value can affect an individual's ability to succeed.

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

Response: The most important attribute of a judge is impartiality. The absence of that quality absolutely erodes the respect necessary to the function of our courts to civilly resolve disputes. I am confident I have and will continue to remain impartial and unbiased in my decision making.

- 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: Judges must possess qualities of patience, attentiveness, studiousness and calmness. They must be good communicators, assure fairness and engender respect. I believe engendering respect for the institution of the court to be the most important. I achieve that outcome by consistently exhibiting all of the referenced attributes and by always being respectful to parties, counsel and participants.

- 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: If confirmed I will faithfully follow and apply United States Supreme Court authority, decisions of the 11th Circuit Court of Appeals and all other binding federal authority regardless of my personal views.

- 14. 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: Regarding cases of statutory first impression the clear language of the legislation, if discernible, would control. Ambiguity might be resolved from rules of statutory construction designed to guide interpretation. Related or similar statutes and case law construing them then should be looked to and finally, with caution, a court may consider legislative history.

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 best judgment of the merits to decide the case?

Response: A district court judge's obligation is to follow and apply the decisions of the Supreme Court and Court of Appeals. If confirmed, I would follow and apply applicable precedent, regardless of my personal beliefs.

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

Response: Only a clear exceeding of constitutional limitations on congressional power or unlawful infringement of a constitutional right permit courts to consider declaring legislation unconstitutional. Duly enacted laws are presumed constitutional.

17. 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: I currently employ a differential case management model which assesses the complexity of cases early and allocates resources based thereon. If confirmed, I would continue to employ a similar model on the federal bench. I would also continue to employ case management orders and hearings to organize and allocate time around discovery issues and dispositive motions. My practice and intention would be to maximize the use of resources like the assistance of magistrates, law clerks and mediation and settlement tools when available. I do and would continue to render timely rulings to improve case flow.

18. 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: I firmly believe that organizing and management of caseloads is among a judge's most important administrative responsibilities. Through the regular use of the tools described above I would be active in controlling the pace and conduct of litigation.

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

Response: I received these questions on May 17, 2012, I privately and personally fashioned my responses on May 18, 2012, and later reviewed them with a representative of the Department of Justice. I authorized the Department of Justice to submit my responses to the Senate Judiciary Committee on May 21, 2012.

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

Response: Yes.