

Responses of Bernice B. Donald
Nominee to be United States Circuit Judge for the Sixth Circuit
to the Written Questions of Senator Chuck Grassley

- 1. In 2008, the American Bar Foundation newsletter reported on a panel you participated in regarding employment discrimination. According to the newsletter, you commented as follows:**

Judge Donald “shared with the audience how, as an African American woman sitting on an appellate court composed of white men, she had a ‘vastly different’ view of what evidence supports summary judgment, a difference she ascribed to the men having never experienced discrimination. Though judges try to ‘objectively evaluate the facts and apply the law,’ Donald said, they ‘are viewing things through the lens of culture, through their experience, and that may impact how...much weight [they] accord to different things.’”

a. Do you continue to hold that view?

Response: I have never held a vastly different view of the summary judgment standard. The statement was erroneously attributed to me.

Before my hearing, I made a good faith effort to be responsive in my answers to the Senate Judiciary Questionnaire and to provide all requested materials. After conducting a diligent search and making an exhaustive inquiry of persons and entities involved, I was advised by the American Bar Foundation (“ABF”) that there was no transcript or tape of this panel discussion. Although I did not recall making this statement because it is not something that I have ever believed, I assumed that the writer misinterpreted my remarks. It did not occur to me that the article might have misattributed another speaker’s remarks to me. Rather, I assumed that the statement must have been in reference to a specific case that I heard while sitting by designation. That is why I answered as I did during my hearing before the Senate Judiciary Committee. Then as now, I maintained that I adhere to Supreme Court and Sixth Circuit precedent in analyzing summary judgment motions in all cases.

After my hearing, in preparing my responses to subsequent written questions, I conducted a search to find any case to which I might have been referring and determined that I sat by designation in three cases involving review of summary judgment in discrimination cases: *Still v. Wilkinson*, 194 F.3d 1314 (Table), 1999 WL 801577 (6th Cir. 1999) (affirming the district court’s grant of summary judgment to defendants in a religious discrimination case); *Hatcher v. General Electric*, 208 F.3d 213 (Table), No. 98-6304, 2000 WL 245515 (6th Cir. 2000) (affirming the district court’s grant of summary judgment to defendants in an age discrimination case); and *E.E.O.C. v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006) (affirming the district court’s grant of summary judgment to defendant as to a claim under the Americans with Disabilities Act).

The week of March 24, 2011, I again contacted the ABF and requested that they explore all sources to try and find a transcript or tape. On Monday April 4, 2011, a representative of the ABF advised that, after checking with the office of the ABF Fellows, she had located a tape recording of the panel discussion as well as a transcript. After reviewing this information, the ABF representative has concluded, and I have confirmed, that the “vastly different standard” statement was made by the appellate court judge on the panel, not by me.

The misattributed quote appears on page 53 of the transcript and reads as follows:

I have to comment on one area of the summary judgments. I joined an appellate court of all white men and I have to say that our view of what evidence supports summary judgment, of what . . . what evidence is needed, was vastly different. Most . . . they hadn’t experienced discrimination, but some of these situations that came up, I mean, I felt clearly that they should go forward and it was like, no, this was not something that should be litigated at all.

This statement was made by Judge Miriam Shearing, a former justice on the Supreme Court of Nevada and the first woman to join that court. Unfortunately, the contract transcriber to whom the tape was sent misattributed the quote to me and, because the author of the article was working from the transcript, the error was perpetuated.

I am including, for the benefit of the Committee, the original tape recording of the panel discussion, a CD to which I have transferred the tape recording, and the unofficial, original transcript. Katharine Hannaford, Senior Writer and Grants Officer of the ABF, has listened to the recording and corrected the relevant pages. I have also attached the corrected pages 53 and 54 for the Committee’s benefit.

Ms. Hannaford has informed me that a correction will be posted on the *Researching Law* section of the ABF website and also printed in the next hard copy issue of *Researching Law*.

- b. Can you explain in what ways your view of a summary judgment motion could be “vastly different” based on your culture and experiences?**

Response: Not applicable.

- c. Could you give me an example of a case where your life experiences impacted your view and influenced a judicial decision?**

Response: I cannot give such an example. I try to apply existing precedent and leave my life experiences and personal views outside the courthouse door.

- i. **What about *Woodruff v. Ohman*? In that case, after a bench trial, you found the defendants were liable for gender discrimination under Title VII. But, the Sixth Circuit reversed your decision and said your opinion “wholly failed to provide a sufficient basis for its finding of gender discrimination.” Do you believe your life experiences influenced your decision in that case?**

Response: No.

- ii. **In that same case, you ordered the defendant to issue a written apology. The Sixth Circuit found that you had exceeded your equitable power when you issued that order. The Sixth Circuit wrote: “As the Ninth Circuit noted when faced with a similar situation, ‘we are not commissioned to run around getting apologies.’” On what basis did you believe you had the authority to order the defendant to issue a written apology?**

Response: That was an error on my part. At the time, I believed it to be an appropriate equitable remedy. It has been my experience that, in mediation, an apology can sometimes be an effective tool to resolve cases.

2. **At your hearing for your nomination to the District Court, then Chairman Hatch asked you about your view of the role of a judge. You responded, “[a]s a trial judge, I believe that the role of a judge, of course, is to apply and interpret the law, being bound by precedent interpreting statutes to apply to the facts that come before them.” Do you believe you have faithfully lived up to your prior testimony regarding the role of a judge?**

Response: I believe that I have faithfully adhered to the role of a judge as I described it in 1995. That continues to be my view of the appropriate role of a judge today.

- a. **How does your statement at your first hearing square with your comments that you have a “vastly different” view of summary judgment motions based on your personal experiences?**

Response: Not applicable.

- b. **Is there an example you can share with us where you reached a difficult decision based on the law and facts, even though that decision conflicted with your personal views?**

Response: No, there is not.

3. **In *Robinson v. Shelby County Board of Education*, all of the parties filed a joint motion to grant the school system unitary status and end decades of court supervised desegregation orders. You denied the motion even though the**

Department of Justice supported it. You implied that school children are constitutionally entitled to “educational guidance which includes teachers of the student’s own race.” You wrote this was the “unarticulated principal” behind past Supreme Court decisions emphasizing faculty integration. When the Department of Justice appealed your order, it argued your reasoning would result in “bizarre” and “racially discriminatory hiring and firing” of faculty. A divided panel of the Sixth Circuit agreed and held that if faculty assignments were carried out as you ordered, it “would effectively turn the purpose of the desegregation remedy on its head through the discriminatory hiring and recruitment of faculty.”

- a. When you issued that order, were you strictly applying the law to the facts?

Response: I did my best to strictly apply Supreme Court law to the facts of the case to determine whether the school system was in substantial compliance with the desegregation consent decree.

- b. In a 1983 decision by the Sixth Circuit, *Oliver v. Kalamazoo Board of Education*, the Court struck down a similar faculty hiring plan. The Circuit held, “students ... do not have a constitutional right to attend a school with a teaching staff of any particular racial composition.” How was your reasoning concerning faculty composition consistent with the Sixth Circuit’s decision in *Kalamazoo*?

Response: I relied on Supreme Court precedent and the requirements of the consent decree in deciding the issues in the case. I determined that *Oliver v. Kalamazoo Board of Education* was not applicable because it dealt with a rigid racial quota, as opposed to a flexible goal, as in the *Robinson* case.

- c. I recognize that the dissent did not agree that *Kalamazoo* controlled, but your opinion did not even address that case. Can you explain why your opinion did not even consider a case that was so similar, if not controlling?

Response: Please see answer to 3b.

4. In *Oakley v. City of Memphis*, several officers of mixed races and gender brought suit against the City of Memphis for discrimination. Each of the officers qualified for promotion to Major based on a written examination. However, the City refused to certify the exam results. The City believed the results would have a disparate impact on minority and female applicants. The plaintiffs argued that they had direct evidence of discrimination, based on statements by a city official. That official, according to the plaintiffs, had said the City cancelled the promotional process because “not enough minority officers scored well enough to be promoted.” Despite that evidence, you granted the city’s summary judgment motion, and held that the plaintiffs were unable to establish discriminatory intent.

- a. **Was this a case where your view of a Summary Judgment Motion was “vastly different” based on your experiences?**

Response: No. There is no case where I have employed a different standard for summary judgment. My decision in the above case was based on existing Supreme Court and Sixth Circuit precedent regarding “disparate impact” cases. My ruling in the *Oakley* case was unanimously affirmed by the Sixth Circuit.

- b. **The Sixth Circuit affirmed your decision. But in 2009, the Supreme Court vacated and remanded your decision when it considered and reversed the Second Circuit’s decision in *Ricci*. We discussed the *Ricci* decision at length during Justice Sotomayor’s confirmation hearings. That was the case where the City refused to certify the test results for firefighters because “too many whites and not enough minorities would be promoted.” The Supreme Court held that “[w]ithout some other justification, this express, race-based decision making violates Title VII’s command that employers cannot take adverse employment actions because of an individual’s race.” Given your comments regarding how your view of summary judgment motions is “vastly different” based on your experiences, can you understand why one might be concerned that you will not strictly apply the law to facts?**

Response: I do not apply a “vastly different” standard in deciding summary judgment motions. I applied existing Sixth Circuit precedent in this pre-*Ricci* case.

5. **You published an article in 2008 entitled, “*Immigrants and other Cultural Minorities as Non-Traditional Plaintiffs: Culture as a Factor in Determining Tort Damages.*” The article discussed the use of culture in determining tort damages. As I understand the argument, it is that the amount of harm a plaintiff suffers may be more severe because of deeply held religious beliefs or customs. Therefore, the plaintiff should be entitled to a larger award to compensate for the greater damages. Is my understanding accurate?**

Response: That article was written to draw attention to issues that judges will face in a complex multicultural society. I highlighted select cases to discuss the ways in which courts across the country have applied existing tort law to the measurement of damages and the determination of whether a plaintiff had stated a cause of action, when the plaintiff’s culture is raised as a factor. I do not believe that the meaning of the law varies depending on a person’s race, gender, ethnicity, religion, or culture.

- a. **Some of your statements in the article suggest you are sympathetic to this view. For instance, you wrote, to “disallow consideration of culture in tort cases would risk the denial of true justice to entire segments of a pluralistic society.” Do you believe it is appropriate for judges to consider culture when assessing damages in tort actions?**

Response: No, except as may be required by existing Supreme Court and Sixth Circuit case law.

- b. As a Judge, have you ever considered the culture of the plaintiff in determining the amount of damages awarded to a plaintiff in a civil action? If so, could you provide an example?**

Response: No. I have not.

- c. The use of cultural evidence in criminal cases has been the subject of much criticism. Many have argued that the use of cultural evidence as a defense is at odds with the American ideal that we are all equal before the law. As Duke University Law Professor Doriane Coleman put it,**

“[t]olerance of the use of immigrant cultural evidence in criminal proceedings fundamentally conflicts with the principle that the protections given by the laws of the United States shall be equal in respect to life and liberty for all persons.”

Do you agree with Professor Coleman? Why or why not?

Response: I believe that the law must be applied equally to all persons without regard to culture.

- 6. In *U.S. v. Elkin*, you suppressed certain evidence related to the search of the defendant’s commercial building that contained a marijuana growing operation. There are several aspects of that case that I find troubling, but I want to focus on one part of it. In that case, a guard led the police officers to a commercial building owned by the defendant. While standing outside of the building, the officers looked through a hole in the wall and could see marijuana inside the building. You held that the officers did not have sufficient probable cause to look through the hole in the wall, and therefore the officers violated the defendants’ reasonable expectation of privacy.**

- a. The Sixth Circuit reversed your decision because the officer made the observations from a lawful standing point, and the evidence was in plain view. The Sixth Circuit criticized your analysis as being “somewhat opaque.” Here is what I find troubling. The Plain View doctrine is well settled law. But, your opinion did not even address the issue. Can you explain why you didn’t consider the doctrine?**

Response: Yes, the Plain View doctrine is well settled law, and I have applied it in many cases. The Plain View doctrine provides that objects perceptible by an officer who is rightfully in a position to observe them, without aids, enhancements, or extra effort, may seize them without a warrant. *See Arizona v.*

Hicks, 480 U.S. 321 (1987). In this case, I determined that the officers lacked probable cause to lawfully be on the premises and therefore found that the Plain View doctrine did not apply.

This case arose from the search and seizure of hydroponic marijuana growing in several buildings owned by Defendants. I addressed two issues. I first addressed the sufficiency and validity of search warrants as to certain buildings which were based on a tip from a citizen characterized as a “confidential informant.” Next, I addressed the warrantless search of another building where the officers 1) used thermal imaging to measure the waste heat radiating from the building, 2) went onto the property, disregarding a “no trespassing” sign, and 3) looked through an inch-wide hole around a protruding PVC pipe to see into the building and observe the growing marijuana.

I found that the officers had entered into the “curtilage” of the building around which there existed a zone of privacy. Moreover, I found that the officers’ use of thermal imaging, used to gain probable cause, constituted an impermissible search in violation of the Fourth Amendment. Although the Sixth Circuit did not address this issue, the Supreme Court later agreed, ruling in *Kyllo v. United States*, 533 U.S. 27 (2001), that thermal imaging does constitute a search under the Fourth Amendment.

7. **In *U.S. v. Saucedo* (2000), the Sixth Circuit found you abused your discretion in departing downward from the Federal Sentencing Guidelines in regard to one of four defendants who was arrested on drug charges. The Sixth Circuit rejected your reasoning stating that there was nothing in the record that would remove the case outside of the “heartland” of cases contemplated by the Guidelines and that each of your stated reasons for departure were adequately discussed in the Guidelines:**

- a. **Do you agree with the Sixth Circuit’s analysis and conclusion in that case?**

Response: I agree.

- b. **Now that the sentencing guidelines are advisory, rather than mandatory, how much deference do you afford them?**

Response: I consider and analyze the Guidelines in each case and give them great deference. I also consider the required factors that Congress set forth in 18 U.S.C. § 3553.

- c. **Should you be confirmed, what will be your approach to reviewing sentencing issues in the District Courts of the Sixth Circuit?**

Response: I would follow the precedent of the Sixth Circuit and the U.S. Supreme Court.

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

Response: Yes, the judge selection/draw should be irrelevant to the sentence.

- e. How do you now, and how will you in the future, ensure consistency in your judicial rulings when different criminals commit the same offenses?**

Response: I look to the sentencing scheme set forth in the Guidelines, plus the statutory factors set forth in 18 U.S.C. § 3553. The Guidelines serve a valuable role in promoting consistency and avoiding disparity in sentencing. If I am confirmed, I will be guided by the precedents of the Sixth Circuit and the U.S. Supreme Court.

- 8. I have long been a strong proponent of allowing cameras in the federal courthouse. I believe it would open the courts to the public and bring about greater accountability. I am a sponsor of the Sunshine in the Courtroom Act, which would give judges the discretion to allow media coverage of federal court proceedings. In 1989, in the American Bar Association Journal, you argued against permitting cameras in the Supreme Court as well as at trial and appellate courts.**

- a. Have you had any firsthand experience with cameras in the courtroom either as a judge or as an attorney? If so, how do you feel it affected the courtroom environment?**

Response: As a judge in a county criminal court, I have had firsthand experience with cameras in the courtroom. I was very comfortable with cameras and thought that a useful educational service was provided to the public. There have been no adverse effects and trials have not been prolonged.

- b. What is your view on allowing television access to Federal Courts of Appeal and Federal District Courts?**

Response: I support cameras in courts. This was an expository article written for a point-counterpoint piece in the ABA Journal. I defended the position assigned to me as the Chair of the ABA's Judicial Administration Division Committee on Media and Fair Trials. The piece does not reflect my personal view.

- c. What are your thoughts on giving federal judges the discretion to allow the televising and broadcasting of cases?**

Response: I support giving federal judges such discretion.

9. Do you believe that our federal government is one of limited and enumerated powers?

Response: Yes, I believe that the powers of the federal government are limited and defined or enumerated, and the powers of the states are numerous and unlimited as set forth in the Tenth Amendment.

10. What does the concept of separation of powers mean for the federal courts? If confirmed, will this be a governing principle which you will follow?

Response: The concept espouses the genius of the framers in setting out three separate and coequal branches of the government. I will follow the guiding principle that it is the role and duty of 1) Congress to make the law; 2) the judicial branch to interpret the law; and 3) the executive branch to enforce the law.

11. Do you believe it is proper for a judge, consistent with governing precedent, to strike down an act of Congress that it deems unconstitutional? If so, under what circumstances, and applying what factors?

Response: A court should strike down an act of Congress, consistent with governing precedent, only where the act exceeds Congress's authority to act. I would examine the Constitution and Supreme Court precedent.

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

Response: I espouse the view of Socrates that "[f]our things belong to a Judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially." I believe that impartiality and fairness are the most important attributes of a judge, but a judge must also have integrity, a solid work ethic, and competence. Yes, I do possess these attributes.

13. 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 must be patient and dignified and must treat lawyers, litigants, and the public with dignity and respect. Yes, I do meet that standard.

14. 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: I am committed to following precedents of higher courts and will continue to abide by established precedent of the Supreme Court and the Sixth Circuit, if confirmed.

- 15. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded 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: I would look to any applicable statutes, legislative history, persuasive authority from other circuits, and Supreme Court or Sixth Circuit cases which might provide guidance.

- 16. 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 adhere to existing precedent. If the Supreme Court erred, Congress would have to act to correct the error legislatively. If the Sixth Circuit erred, the Supreme Court would have to address the issue. I would not substitute my judgment.

- 17. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?**

Response: If there is conflicting precedent between panels within the Circuit, the Circuit, sitting en banc, should resolve the conflict, which may mean overturning Circuit precedent. This should not be done lightly as the principle of *stare decisis* is fundamental to promoting stability and predictability in the law.

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

Response: I drafted the answers to these questions. I discussed my answers with a staff member of the U.S. Department of Justice. I prepared my final answers.

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

Response: They do.