

Responses of Gershwin A. Drain
Nominee to be United States District Judge for the Eastern District of Michigan
to the Written Responses of Senator Chuck Grassley

1. During the hearing I asked you if you agreed that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw. You whole heartedly agreed with this statement. I then asked if you were willing to sentence an elderly person and a young person to the same amount of time and you paused and said “probably.” I would like you to clarify your position on this issue.

- a. All other factors being equal, would you sentence an elderly individual differently than a young individual, if each committed the same offense? Why or why not?

Response: As a general matter, no. Age is an extremely rare sentencing consideration, but there might be some cases in which the defendant’s age would be relevant to the appropriate sentence under the applicable statutes and sentencing guidelines.

2. Do you believe the fact that taxpayers pay for a defendant’s incarceration is a relevant factor when deciding on an appropriate sentence?

Response: No.

3. Senator Lee asked you about some of the articles you have written regarding the death penalty. You said that you have changed your positions on the death penalty over the years.

- a. Is there any doubt in your mind that the death penalty is constitutional?

Response: No. The Supreme Court has made clear that the death penalty is constitutional.

- b. Would you be able to apply the death penalty, if confirmed?

Response: Yes.

4. You told Senator Lee that you would be able to follow the precedent established in *Heller* and *McDonald* regarding Second Amendment and the rights it affords.

- a. You wrote that you “envision a day when the National Rifle Association with its lobby will not be feared, and that legislators and congressmen will stand up strong against them instead of bowing to them.” Do you still hold this view?

Response: No. My statement almost 20 years ago was based on an erroneous perception of the NRA's influence. In addition, I was using an exaggerated metaphor to make a rhetorical point, but on reflection I should have chosen my words more carefully.

- b. Considering you have made statements like these, do you believe you will be able to impartially handle any case that comes before you where the NRA or any of its supporters are involved?**

Response: Yes. My personal beliefs, both past and present, have no bearing on the decisions I make in court.

- 5. I asked you a question about applying a sentence required by law even when you did not personally agree with it. You responded, "The fact that I wrote some side comments about it, about my personal feelings, which really, really shouldn't have anything to do with my decision-making, is really kind of irrelevant or unimportant to me." Can you please explain what you meant by this statement?**

Response: My personal feelings about sentencing in a particular case should have no bearing on the sentence to be imposed. I am committed to following the law that governs sentencing whether there is a mandatory sentence, a mandatory minimum, or a guidelines system.

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

Response: I believe that impartiality is the most important attribute of a judge. A judge must apply the law impartially and treat everyone equally regardless of their status and situation in life. When people see a judge acting impartially they feel that the system is fair and they have confidence in the process and in having their day in court.

- 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: Having a good judicial temperament is essential to being a good judge. A judge must be calm, patient and exercise self-control. The judge must be a good listener. A judge should be humble, respectful, courteous, diligent, decisive and prepared. A judge should always operate with integrity and impartiality. Essentially, judges should treat people the way they want to be treated. Judges should not lose their temper in the courtroom and they should not make fun of the parties or lawyers, nor demean or denigrate people. I believe that I meet the standard and I always try to maintain good courtroom demeanor.

8. **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: Yes.

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: If I was faced with a case of first impression and there were neither Supreme Court precedent nor Sixth Circuit precedent, I would first look to the other Circuits to see if there was a decision on point. If I still found none, I would look at the other District Courts to see if any had encountered the issue. If nothing could be found on point in a published opinion, I would look for federal unpublished cases. If I found nothing on point I would look for cases addressing analogous situations, starting with the Supreme Court. If faced with a question of first impression of statutory interpretation, I would begin with the plain meaning of the text, the structure of the statute as a whole and the applicable canons of statutory construction.

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: I would apply all prior decisions made by the Supreme Court or the Court of Appeals even if I thought they had eroded.

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

Response: Courts are to give great deference to laws enacted by legislators. It should be an extremely rare occasion for a court to declare a law unconstitutional. In addition to that, if there is any binding precedent on the issue it must be followed.

12. **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 have a docket of over 900 civil cases. Shortly after a case is filed, I have a status conference where the case is put on one of three tracks,

depending on its complexity. Each track has a deadline for filing a witness list, for concluding discovery and for setting a month for case evaluation. Case evaluation is a stage where three lawyers evaluate a case and put a value on the case. Roughly six weeks after that I hold a settlement conference. If the case does not settle after exhaustive discussions I set a trial date on the case. If I were to become a District Judge I would seek to use a similar procedure, as adopted for the federal system. I would also consult with my colleagues and with other federal judges to identify ways to further improve my case management. One of the most important elements in docket management is having firm trial dates and sticking to those dates.

- 13. 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 play the most important part in controlling the pace and conduct of litigation. Judges must meet with the parties early and often to keep cases moving forward toward resolution. I would employ the procedure mentioned in response to question 12 in addition to fully utilizing the resources available to federal judges, like the law clerks and magistrates.

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

Response: I prepared my own answers and discussed them with the Department of Justice staff and then submitted them.

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

Response: Yes.