

Responses of Gershwin A. Drain
Nominee to be United States District Judge for the Eastern District of Michigan
To the Written Questions of Senator Mike Lee

- 1. During the hearing, in response to my question regarding your published statement that “the death penalty is primitive punishment that is brutal and barbaric,” you said that your “views about the death penalty have been evolving and changing.” Could you please articulate what your current views on the death penalty are?**

Response: My current views on the death penalty are that it is acceptable and appropriate and the United States Supreme Court has so held. If confirmed, I will apply the death penalty in appropriate cases consistent with this precedent.

- 2. During the hearing, I asked about some negative statements you made about Justice Clarence Thomas in a 1998 Michigan Chronicle article. In response, you suggested that you met Justice Thomas “some time” after writing the article, when he came to present the Devitt Award to Judge Keith, and that this meeting helped you gain a good deal of respect for him. In the Michigan Chronicle article, however, you specifically mention that meeting between Judge Keith and Justice Thomas, suggesting that the article was actually written *after* you had met Justice Thomas.**

- a. Did the personal meeting you mentioned in your testimony occur before you wrote the article in the Michigan Chronicle?**

Response: Yes. After looking back, I realized that the meeting did take place before I wrote the article. These events took place 14 years ago and were not fresh in my mind at the time of the hearing. I apologize for this mistake, and my intention was not to misconstrue the events.

- b. If so, would you please explain why, after a meeting in which you claim to have gained such respect for the Justice, you would then write inappropriate remarks about him in a public forum?**

Response: I regret my poor choice of words and I apologize for comments made about Justice Thomas. In hindsight, they were inappropriate. In meeting Justice Thomas I did gain tremendous respect for him personally. Justice Thomas is truly an American success story. He pulled himself up from very humble beginnings to become a United States Supreme Court Justice, which is an inspiration to anyone. At the time I wrote the article, my thoughts about some of his civil rights views clouded my judgment which led to those inappropriate comments. Notwithstanding any view I might have about any Supreme Court Justices, I would faithfully apply all Supreme Court precedent if I were confirmed to be a District Court Judge.

- 3. How would you describe your judicial philosophy?**

Response: As a trial judge my judicial philosophy is to closely follow and apply the law that is set forth in statutes, and to follow the case law found in precedents pronounced by higher courts. My role is not to try to enforce the law or create, modify or change it. Those are things that are reserved for the executive and legislative branches.

a. To what sources would you look in deciding a case that turned on interpretation of a federal statute?

Response: In deciding a case that turned on the interpretation of a federal statute, I would first do a thorough review of the statute and try to decide what the language of the statute says and means. I would then look at cases that had previously dealt with the statute both at the Supreme Court level and the Sixth Circuit Court of Appeals. If I needed to, I would then look to see if another Circuit Court of Appeals or District Court had interpreted the statute. If there was nothing on point then I would look for analogous cases.

b. To what sources would you look in deciding a case that turned on interpretation of a constitutional provision?

Response: In deciding a case that turned on the interpretation of a constitutional provision, I would first do a thorough review of the constitutional provision and try to decide what the language of the provision meant. I would then follow the procedure outlined in question 3a.

4. In your view, what are the constitutional requirements for standing and how robustly should those requirements be applied to novel assertions of standing?

Response: The Constitutional requirements for standing are injury, causation and redressability, *Allen v. Wright*, 468 U.S. 737 (1984). The Supreme Court has made clear that these requirements should be robustly applied in all cases.

5. What role do the text and original meaning of a constitutional provision play in interpreting the Constitution?

Response: The text and original meaning of a Constitutional provision play perhaps the most important role in interpreting the Constitution. They are the starting point for any analysis of a Constitutional issue.

6. Do you believe that Congress has implied powers beyond those enumerated in the Constitution?

Response: No, although the Constitution grants Congress powers to pass unspecified laws that are “necessary and proper” for the exercise of its expressed powers, Article I, Section 8, Clause 18.

- a. **If so, which ones? And which provisions of the Constitution account for these implicit rights?**

Response: Please see previous answer.

- b. **If not, how would you approach the multitude of legislation that Congress has enacted without reference to an appropriate authorizing provision of the Constitution?**

Response: In any case in which Congress's power to enact a law was challenged, I would carefully review the relevant provisions of the Constitution and the applicable precedents from the Supreme Court and the Sixth Circuit to determine whether the law was within an appropriate authorizing provision of the Constitution.

- i. **Would you strike down laws not properly authorized by the Constitution?**

Response: Yes.

7. **Do you believe that the Constitution protects rights not specified in the Constitution?**

Response: No.

- a. **Do you believe that the Constitution provides for a right of privacy?**

Response: The Supreme Court has so held in a line of cases, including *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Supreme Court has also held that the Fourth Amendment protects certain privacy interests in cases including *Katz v. United States*, 389 U.S. 347 (1967).

- b. **If so, which provision of the Constitution provides for that right?**

Response: In *Katz* the Supreme Court held that the Fourth Amendment protects certain privacy interests. In *Griswold* and other cases the Court held that the right of privacy is in one of the liberty interests protected by the Due Process Clause of the Fifth and Fourteenth Amendments.

8. **Do you believe there the Constitution provides for substantive due process—that is to say, that the Constitution does not allow the government to infringe certain fundamental rights regardless of the procedural guarantees that might be afforded?**

Response: Yes. The Supreme Court has so held and I would be bound to apply that precedent.

- a. **Which do you believe are protected under substantive due process?**

Response: I have not analyzed this area of constitutional law so as to form an opinion or belief as to the extent of substantive rights that are protected under the Due Process Clause.

- b. If you believe such rights are protected, is it also your belief that *Lochner v. New York*, 198 U.S. 45 (1905) was correctly decided and should be the state of the law? *Lochner*, to paraphrase, was a case in which the Court held unconstitutional a New York statute that prohibited employment of bakery employees for more than 10 hours a day or 60 hours a week.**

Response: I do not feel it is my position to decide whether or not *Lochner v. New York* was correctly decided. If confirmed as a District Court Judge it would be my obligation to follow and apply current Supreme Court precedent.

- c. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner*, on what basis do you distinguish these types of rights for constitutional purposes?**

Response: I have not analyzed this area of constitutional law to be able to distinguish the differences between personal rights and economic rights for constitutional purposes.

- 9. In the case of the Commerce Clause, apart from circumstances present in *Lopez* and *Morrison*, what are the limits on Congress's Commerce Clause power?**

Response: One of the limits on Congress's Commerce Clause power is the Tenth Amendment, which provides for state sovereignty.

- a. Do you believe that Congress has at any time overstepped its authority under that provision since *Wickard*, other than in *Lopez* and *Morrison*?**

Response: I have not researched nor analyzed the law since *Wickard* as to whether Congress has overstepped its authority under the Commerce Clause.

- 10. How would you go about determining whether a group of persons is a "suspect class," such that laws affecting that group should receive strict scrutiny?**

Response: The Supreme Court has held that race, alienage, and national origin are suspect classifications and that laws that discriminate based on those characteristics deserve strict scrutiny. *Loving v. Virginia*, 388 U.S. 1 (1967); *City of Cleburne v. Cleburne Living Center*,

Inc., 473 U.S. 432 (1985). The Court has also held that laws that discriminate based on gender or against non-marital children are subject to heightened scrutiny.

11. Under what circumstances do you think it proper for a court to conclude that Congress has delegated legislative power to the executive branch in violation of the Article I of the Constitution?

Response: I have not analyzed or researched this area of constitutional law to determine when it's proper for a court to conclude that Congress has delegated legislative power to the executive branch in violation of Article I of the Constitution.

12. How would you describe the role that checks and balances and separation of powers play in the Constitution's structure?

Response: The Constitution established three separate branches of government, the Legislative branch, the Executive branch and the Judicial branch. The Constitution ensures that each branch serves to check the power of the other two branches of government.

a. How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?

Response: I would closely scrutinize the constitutional language and would also apply any relevant precedent from the Supreme Court and the Sixth Circuit.

b. What is your understanding of the Recess Appointments Clause?

Response: The Recess Appointments Clause of the Constitution allows the President to make temporary appointments to fill "vacancies that may happen during the recess of the Senate."

i. To what sources would you look in interpreting that clause?

Response: I would look to the same sources that I would consider in deciding any other constitutional issue, including the text of the Constitution and the applicable precedents of the Supreme Court and Sixth Circuit.

ii. Which branch should determine whether the Senate is in recess?

Response: Because there is litigation currently pending on this issue, I believe it would be inappropriate for me to express a view.

iii. In the event of a dispute, how you would you determine whether the Senate is in recess? Would you employ a functionalist approach, and if so, why?

Response: Because there is litigation currently pending on this issue, I believe it would be inappropriate for me to express a view.

13. What legal experience do you think is necessary for a person to make a good federal judge and what have you done to gain this experience?

Response: The legal experience necessary for a person to be a good United States District Court Judge is to have extensive judicial experience in both criminal and civil cases, because that's the lion's share of the work of a District Court Judge. To gain that type of experience I spent 12 years (1974-1986) at the Federal Defender's Office, where I handled probably 8-10 jury trials a year. One of those trials was a drug conspiracy trial that lasted six weeks. While in that office I also argued a number of my cases before the Sixth Circuit Court of Appeals. As a state court judge I handled criminal matters for 13 years (1987-2000) that consisted of murder, robbery, rape, drugs, assaults, thefts, weapons violations, breaking and entering, essentially the whole gamut of state crimes. In 2000 I moved from the criminal division to the civil division and have handled solely civil matters to the present. The monetary limit is \$25,000 and above. In this division I have handled personal injury cases, contract cases, cases involving property disputes, malpractice (legal and medical), civil rights cases, employment cases, and a host of other types of cases that involved money or property. Over the 25 years I have conducted hundreds of jury trials and hundreds of non-jury trials and dealt with all the issues and motions that accompany them.

14. What role should empathy play in a judge's consideration of a case?

Response: A case must be decided based on the facts and the law that applies to the case. For the last 25 years as I have handled jury trials, one of the standard jury instructions that I give is to tell the jury that they are not to decide the case based on sympathy for any of the parties. The same standard applies to judges.