

**Responses of Denzil Price Marshall Jr.
Nominee to the U.S. District Court for the Eastern District of Arkansas
To the Written Questions of Senator Jeff Sessions**

1. In a 1990 law review article, you wrote:

“changes to our Constitutional structure—the New Deal and its commerce clause jurisprudence, the Warren Court’s federalization and expansion of individual rights and the erosion of state sovereignty—have all occurred without taking the constitutional road to the decision of the people mapped out in Article V.”

- a. Do you believe that the Constitution should be altered without a duly ratified amendment? Please explain your answer.**

Response: No. In this quotation I was describing part of our nation’s constitutional history and some scholars’ interpretation of that history. I do not believe that the Constitution should be altered without a duly ratified amendment. Article V prescribes the two ways of amending the Constitution. And because the Constitution is the supreme law of the land, those two ways are exclusive.

- b. Do you believe that the Constitution has a fixed meaning, set out by the framers and embodied within the text of the document, or do you believe that there is a “living constitution?” Please explain your answer.**

Response: I believe that the Constitution has a fixed meaning, set out by the framers and ratifiers and embodied within the text of the document. The meaning embodied in the Constitution’s text does not change, but applies to modern situations unforeseen by those who wrote and adopted the text. I do not believe that the Constitution is a “living,” ever-changing reflection of citizens’ or judges’ views at any particular moment.

- c. Regardless of your personal views on a particular issue, if confirmed to the district court, you will be bound by Supreme Court and Circuit Court precedent. Are you prepared to follow that precedent, even though you may not believe that precedent reflects the current desires of the American people?**

Response: Yes. One of a judge’s most important obligations is to follow the law—including precedent---without regard to what the polls, the newspapers, or the neighbors say.

2. In some of your published writings, you cited Professor Cass Sunstein. Professor Sunstein has argued that “[t]he Constitution does not set out the instructions for its own interpretation. A theory of interpretation has to be defended, rather than

asserted, and the defense must speak candidly in terms of the system of Constitutional law that it will yield.” In other words, Professor Sunstein believes that a judge must defend his method of constitutional interpretation based on the results that will be reached by that method, not based on whether his methods represent the proper role of a judge. Do you agree with Professor Sunstein? Please explain your answer.

Response: I disagree with a results-oriented standard for evaluating methods of constitutional interpretation. Instead of focusing on results, a judge must set aside personal opinions, follow precedent, stay within jurisdictional lines, respect other branches of government directly accountable to the people, reason to a decision and explain that reasoning, and uphold the Constitution.

- 3. In *Bedsole v. State*, 290 S.W.3d 607 (Ark. Ct. App. 2009), you held that an illegal seizure occurred where a police officer asked a driver – who he had pulled over and issued a warning citation – whether there were any drugs or weapons in the car. In that case, you were primarily applying the Arkansas Rules of Criminal Procedure and Arkansas state precedent. You reasoned that, because the police officer asked his question immediately after handing the driver the citation but before telling the driver he was free to go, a reasonable person would not feel free to ignore the question.**

- a. Please explain why you determined the trial court’s conclusion about whether a reasonable person would have felt free to ignore the question was a finding of law, which your court could review *de novo*, rather than a question of fact, which your court could only review for clear error.**

Response: The Court of Appeals panel for which I wrote in the *Bedsole* case followed the closest Arkansas precedent governing the standard of review for the issue presented. The panel reviewed the trial court’s decision on the motion to suppress *de novo* based on the totality of the circumstances, while deferring to the trial court’s findings of fact and credibility determinations. *Lilley v. State*, 362 Ark. 436, 440, 208 S.W. 3d 785, 788 (2005); *Bumgardner v. State*, 98 Ark. App. 156, 158-59, 253 S.W. 3d 1, 3 (2007).

- b. How does this holding reflect your view of the respective roles of trial and appellate courts and the restraint to be exercised by judges in each?**

Response: The opinion that I wrote for the Court of Appeals panel in *Bedsole* reflects in several ways my views of the respective roles of trial and appellate judges and the restraint that judges in each court should exercise. First, the panel--as part of an intermediate appellate court bound by prior decisions of the Arkansas Supreme Court and the Arkansas Court of Appeals---followed binding precedent. Every judge, trial and appellate, must do this. Second, the panel’s decision resolved a disputed question of law that the appellant had preserved in the trial court and argued on appeal. This is the usual and proper role of an

appellate court. Third, the panel deferred to the trial court's findings of fact and credibility determinations. Those decisions are best made by the fact-finder (often the trial judge) who saw and heard the witnesses.

4. **As you may know, President Obama has described the types of judges that he will nominate to the federal bench as follows:**

“We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old. And that’s the criteria by which I’m going to be selecting my judges.”

- a. **Without commenting on what President Obama may or may not have meant by this statement, do you believe that you fit President Obama’s criteria for federal judges, as described in his quote?**

Response: I believe that empathy---in the sense of being able to put yourself in another person’s shoes---is an admirable personal quality, one that I strive for without complete success.

- b. **During her confirmation hearing, Justice Sotomayor rejected this so-called “empathy standard” stating, “We apply the law to facts. We don’t apply feelings to facts.” Do you agree with Justice Sotomayor?**

Response: Yes.

- c. **What role do you believe empathy should play in a judge’s consideration of a case? Please explain your answer.**

Response: As I understand the meaning of empathy, it has no role to play in a judge’s consideration of a case. The judge must impartially apply the governing law to the facts.

- d. **Do you think that it’s ever proper for judges to indulge their own subjective sense of empathy in determining what the law means?**

Response: No.

- i. **If so, under what circumstances?**

Response: None.

- ii. **Please identify any cases in which you’ve done so.**

Response: None insofar as I know.

- iii. If not, please discuss an example of a case where you have had to set aside your own subjective sense of empathy and rule based solely on the law.**

Response: The Arkansas Court of Appeals considers many cases in which the trial court has terminated parental rights and the parent has appealed. All these cases are heartrending in one way or another. But my job in them is to put my emotions aside and evaluate the trial court's decision for reversible error pursuant to the governing statutes and precedent.

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

Response: The Department of Justice e-mailed me these questions. I reviewed them, reflected on them, did some legal research, and drafted my answers. I conferred with DOJ lawyers about my drafts. I continued to think about my responses and tinker with my drafts. I sent my final responses to DOJ for forwarding to the Committee on the Judiciary.

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

Response: Yes.