

**Responses of Joseph A. Greenaway, Jr.
Nominee to the U.S. Court of Appeals for the Third Circuit
to the Written Questions of Senator Jeff Sessions**

1. Some people refer to the Constitution as a “living” document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?

Response: I do not have a view as to whether the Constitution is a “living” document. In my judgment, there are varying interpretations of what the term “living” document entails. I have not applied any of the various iterations of this phrase or doctrine in any of my opinions which addressed constitutional issues. I believe that in any question of constitutional interpretation that arises for resolution, I must begin my analysis with the text. In certain cases, I believe it may be appropriate to discern what the Framers and later Congress contemplated and discussed in their consideration of a particular constitutional provision.

2. Do you think it is ever proper for judges to indulge their own values in determining what the law means?

Response: In employing the term “values,” I interpret the question to be asking whether I, as a sitting federal district court judge, apply my own morality, i.e., my own sense of right and wrong, in deciding what the law is. This premise does not describe my judicial decision-making. I interpret the law based on a detailed and thorough analysis of the facts and law, applying the principle of stare decisis. My values or morality cannot inform my decision-making. I cannot allow myself to rule based on my values.

a. If so, under what circumstances?

Response: See above.

b. Please identify any cases in which you have done so.

Response: I have not indulged my values in determining what the law is or what the law means in any cases that I have ruled upon while sitting as a federal district court judge.

c. If not, please discuss an example of a case where you have had to set aside your own values and rule based solely on the law.

Response: If I were to indulge in decision-making based on my values or morality, I surely would have come to a different set of decisions in Iwanowa v. Ford, 67 F. Supp. 2d 424 (D.N.J. 1999). In that case, persons (both Jewish and non-Jewish) who

were forced to engage in slave labor to aid the Nazis' cause in World War II sued Ford Motor Company and Ford Werke (Ford's German subsidiary). Based on several theories of recovery, Plaintiffs sought damages for the forced labor demanded by the Third Reich under horrific conditions. If I were to apply my own sense of morality or values to this case, I would have concluded that some recovery was warranted for Plaintiffs. However, the law controlled my analysis and the lengthy opinion I penned allowed no recovery and dismissed all claims.

3. Do you think that it is ever proper for judges to indulge their own policy preferences in determining what the law means?

Response: I do not believe it is ever proper for judges to indulge their own policy preferences in determining what the law means. Frankly, I cannot think of an instance when employing that method of analysis is appropriate for a federal judge.

a. If so, under what circumstances?

Response: See above.

b. Please identify any cases in which you have done so.

Response: There are no cases that I can identify in which I indulged my own policy preferences in determining what the law means.

c. If not, please discuss an example of a case where you have had to set aside your own values and rule based solely on the law.

Response: The best example of setting aside my values and ruling based on the law appears in section 2.c. above.

4. At your hearing, I asked for your views on President Obama's statement regarding the types of judges that he will nominate to the federal bench: "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." You answered:

"I'm not in the President's position with regard to what makes a good judge. The only thing I can tell you is that in my years of experience I've tried to be fair to folks. I've tried to treat them with the utmost respect and to . . . address their cases as best I could, applying the facts to the law."

I appreciate your answer and have a few more questions with regard to President Obama's statement.

a. Do you agree with President Obama's quote?

Response: I view President Obama's quote as alluding to a desire to populate the bench with judges from diverse backgrounds and experiences. I agree with such a sentiment. All Americans benefit from seeing and experiencing the unbiased administration of law and justice by individuals of different religious, socioeconomic, ethnic, gender, and racial backgrounds. I do not interpret the President's quote to mean that heart and empathy are express values or qualities to be employed by judges in their judicial decision-making.

b. Do you believe that you fit President Obama's criteria for federal judges, as described in his quote?

Response: As I have interpreted President Obama's quote, I believe I do. I am an immigrant. I came to this country at 2 years of age with my parents and my then-infant sister. We immigrated to become Americans. We have embraced the American dream. Our family worked hard. We earned degrees from excellent schools and we are productive contributors to society. We are proud to be African-Americans.

Our family's story is not unique; indeed, it exemplifies the American dream. To the extent that the President seeks to appoint to the federal bench, among others, those who appreciate coming from modest means, who understand struggle, and who know the plight of those less fortunate, I believe I fall into that category.

c. What role do you believe that empathy should play in a judge's consideration of a case?

Response: Empathy cannot play a role in a judge's consideration of a case or in determining what the law means. I have told lawyers who appear before me that as a human being, I may have empathy for their client, but as a judge I have none because that is not my job. The pure exercise of empathy in decision-making would lead to unsound and inconsistent decisions.

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

Response: No, I do not believe that my own subjective sense of empathy may be used in determining what the law means.

i. If so, under what circumstances?

Response: See above.

ii. Please identify any cases in which you have done so.

Response: I have not employed this manner of decision-making in any of my cases.

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: In addition to my response to 2.c. above, I, like most judges, have experienced at some point in time a sense of empathy at sentencing. There are times that a victim, the victim's family, a defendant, the defendant's family, or the facts of the case induce a sense of empathy. Of course, when a sentence of incarceration is meted out, there is no room for a subjective sense of empathy. The sentencing guidelines, albeit advisory, do not permit the unfettered exercise of discretion based on a subjective sense of empathy. I have not, and would not, use this paradigm as a basis for my decision-making. My job requires me to rule dispassionately and that is what I have done.