

**Responses of Ellen Lipton Hollander
Nominee to be United States District Judge for the District of Maryland
to the Written Questions of Senator Jeff Sessions**

1. In 1996 remarks at Goucher College, you stated that if judges “necessarily enact into law parts of a system of social philosophy,” then “it is certainly appropriate that the judicial law makers reflect the composition and diversity of this great nation.”

a. In your view, how do judges “enact into law parts of a system of social philosophy”? Please explain your answer.

Response: In my speech to the Goucher College students, I used quotes from President Theodore Roosevelt’s 1908 State of the Union address in an attempt to underscore the important role of judges in our democratic society. In that same speech by President Roosevelt, he expressly recognized that legislators are “chosen to represent the people in enacting and administering the laws.” I fully recognize and abide by the principle that it is the legislature’s responsibility to enact the laws, and the duty of the judges to interpret them.

b. Do you think it is ever appropriate for a judge to indulge in their own policy preferences or values in determining what the law means?

Response: No.

c. What did you mean by the term “judicial law makers”?

Response: When I used this term in my speech, I was quoting President Theodore Roosevelt. I believe that he used the term to explain a judge’s role in interpreting the laws enacted by Congress.

d. How do you define the role of a judge?

Response: The rule of law is the cornerstone of our democracy. It is the responsibility of a judge to decide cases by ascertaining the applicable law, under principles of *stare decisis*, and applying that law to the particular facts of the case. A judge must do so fairly and impartially, without bias, prejudice, or sympathy for or against any party. In addition, the judge must treat all who appear before the court with courtesy and respect.

e. Why do you think it is important for the judiciary to reflect diversity?

Response: An independent and well respected judiciary is central to a robust democracy. Therefore, it is important to maintain public confidence in the

judiciary. In my view, the composition of the judiciary affects the public perception of the third branch of government.

i. What role, if any, do you think diversity should play in the composition of the judiciary?

Response: I believe that a diverse bench helps to inspire public confidence in the judiciary, and public confidence is essential to the authority of the court. Nevertheless, judges should be selected on the basis of their intellect, ability, integrity, work ethic, and experience.

ii. How can litigants know that they are being treated fairly if a judge's background, rather than the application of the law to the facts, affects legal decisions?

Response: A judge's background, such as race, gender, and ethnicity, must never influence his or her legal decisions. Judges must adhere to the rule of law, i.e., controlling legal precedent, and decide all cases by applying the applicable law to the facts of the case.

2. The Maryland Court of Appeals reversed your decision in a relatively non-controversial divorce proceeding, noting that you "did not rule on any of the four issues raised," but rather chose to rule on other issues not presented to the court.

a. Why did you believe it was proper to go outside of the record and determine issues not on appeal?

Response: It is not appropriate for any court to rule on matters outside the record. I believe your question refers to *Garg v. Garg*, 163 Md. App. 546 (2005), *rev'd*, 393 Md. 225 (2006), a complex international custody dispute for which I wrote the opinion for the Maryland Court of Special Appeals. In that opinion, I attempted to address all of the issues that the parties presented on appeal. For example, on behalf of the Court, I determined that the underlying divorce action could proceed in Maryland, and I addressed issues concerning jurisdiction and attorney's fees, all issues that were presented by the parties on appeal. The Maryland Court of Special Appeals was faulted by the Maryland Court of Appeals for addressing, *sua sponte*, the mother's request at trial for the appointment of an attorney for the child. The Court of Special Appeals considered that issue based on principles of equity law governing domestic cases in Maryland as well as state statutory law. I accept the criticism of the Maryland Court of Appeals for undertaking that analysis.

- b. **Part of your holding in that case was based on “fundamental fairness.” Why did you believe that you could ignore the applicable statute and impose your personal standard of fairness?**

Response: The Court of Special Appeals believed that the gravity and complexity of the case warranted appointment of an attorney for the child, which was permissible under Maryland statutory law. In writing the opinion for the Court of Special Appeals, I did not ignore applicable statutes, although I accept the Court of Appeals’ determination that I should not have reached the issue.

- c. **What role does fairness play in your judicial decisions?**

Response: Fairness comes into play in the way in which I treat the litigants and lawyers – fairly and impartially, with dignity and respect.

3. **Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit.**

- a. **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.

- b. **How would you rule if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision of your own best judgment of the merits?**

Response: If confirmed, I would faithfully apply the decisions of the United States Supreme Court and the Court of Appeals for the Fourth Circuit, without regard to my personal beliefs.

4. **As you know, following the Supreme Court’s decision in *United States v. Booker*, the federal sentencing guidelines are advisory, rather than mandatory.**

- a. **If confirmed, how much deference will you afford the Sentencing Guidelines?**

Response: I will give the Federal Sentencing Guidelines great deference.

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

Response: Yes.

- c. **Under what circumstances do you believe it appropriate for a district court judge to depart downward from the Sentencing Guidelines?**

Response: Only in rare circumstances, such as when part of a plea agreement includes a recommendation by the Government for a downward departure in exchange for the defendant's substantial cooperation.

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

Response: I received the Questions for the Record from the Department of Justice on May 20, 2010, by electronic transmission. I drafted my answers to the questions, and then consulted with representatives of the Justice Department. Thereafter, I finalized my answers and transmitted them to the Justice Department, with the understanding that the Justice Department would forward them to the Committee.

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

Response: Yes.

**Responses of Ellen Lipton Hollander
Nominee to be United States District Judge for the District of Maryland
to the Written Questions of Senator Grassley**

- 1. During the 2008 presidential campaign, President Obama described the kind of judge that he would 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 the President’s criteria for federal judges, as described in this quote?**

Response: Because President Obama has nominated me, I believe that I fit his criteria for federal judges.

- 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: I agree with Justice Sotomayor that judges must apply law to facts and not feelings to facts.

- c. Do you believe that it is ever appropriate for judges to indulge their own subjective sense of empathy in determining what the Constitution and the laws mean? If so, under what circumstances?**

Response: No.

- d. Do you believe that it is ever appropriate for judges to indulge their empathy for particular groups or certain people? For example, do you believe that it is appropriate for judges to favor those who are poor? Do you believe that it is appropriate for judges to disfavor corporations?**

Response: No.

- e. After Justice Stevens announced his retirement, President Obama stated that he would select a Supreme Court nominee with “a keen understanding of how the law affects the daily lives of the American people.” Do you believe that judges should base their decisions on a desired outcome?**

Response: No.

2. What, in your view, is the role of a judge? Please describe your judicial philosophy.

Response: It is the responsibility of the trial judge to resolve cases and controversies by ascertaining the applicable law, under principles of *stare decisis*. The judge must then scrupulously apply that law to the particular facts – fairly and impartially, without bias, prejudice, or sympathy for or against any party. In addition, the judge should value and pursue legal scholarship, possess a keen work ethic, and treat those who appear before the court with dignity and respect.

3. How do you define “judicial activism”?

Response: This is not a term that I use. As I understand the common usage of the term, however, it refers to a judge who disregards established legal precedent that is applicable to the particular matter in order to achieve a desired result, based on personal or policy considerations. The phrase is sometimes used to imply that a judge has made law, rather than interpreted the law.

4. Could you identify three recent Supreme Court cases that you believe are examples of “judicial activism”? Please explain why you believe these cases are examples of “judicial activism”.

Response: I cannot characterize recent decisions of the United States Supreme Court. Trial judges are bound by the decisions of the United States Supreme Court.

5. How do you define “judicial restraint”?

Response: Although this is not a term that I use, I believe it is commonly used to refer to the principle that judges should not permit their personal beliefs to influence or dictate the outcome of any case.

6. Could you identify three recent Supreme Court cases that you believe are examples of “judicial restraint”? Please explain why you believe these cases are examples of “judicial restraint”.

Response: I cannot characterize recent decisions of the United States Supreme Court. Trial judges must adhere to the decisions of the United States Supreme Court.

7. Do you believe that it is ever appropriate for judges to indulge their own values and/or policy preferences in determining what the Constitution and the laws mean? If so, under what circumstances?

Response: No.

8. Should the courts, rather than the elected branches of government, ever take the lead in creating a more “just” society?

Response: No. In our democratic system of government, it is the role of the legislative branch to make the laws and the role of the courts to interpret the laws.

9. In your opinion, what is the proper role of foreign law in U.S. court decisions, and is citation to or reliance on foreign law ever appropriate when interpreting the U.S. Constitution and statutes?

Response: There is no proper role for foreign laws in interpreting the United States Constitution or statutes, unless directed to do so by the United States Supreme Court or the United States Court of Appeals for the Fourth Circuit.

10. Does the silence of the U.S. Constitution on a legal issue allow a federal court to use foreign law as an authority for judicial decision-making? When is it not appropriate to look to foreign law for legal guidance or legal authority?

Response: I do not believe that the silence of the United States Constitution with respect to a legal issue permits a federal court to turn to foreign law as authority for resolution of a dispute.

11. I would like to get a better understanding of how you would interpret statutes and what your judicial method would be if you were confirmed to be a judge on the District Court of Maryland.

a. In cases involving a close question of law, what would you look to when determining which way to rule?

Response: At the outset, I would review the plain text of the statute and look to applicable cases decided by the United States Supreme Court or the United States Court of Appeals for the Fourth Circuit.

b. Would you agree that the meaning of a statute is to be ascertained according to the understanding of the law when it was enacted?

Response: In the course of my judicial career, I have consistently endeavored to ascertain the meaning of various statutes by reference to well-honed principles of statutory construction. The primary goal is to reference the statutory text, ascribing to the words their plain meaning.

c. How would you use legislative history when interpreting a statute? What kind of weight would you give legislative history, if any, when interpreting a statute?

Response: In the ordinary course, I do not refer to legislative history to interpret a statute. Rather, I apply the well-settled principles of statutory construction, according the words of the statute their plain meaning. However, in the event of ambiguity in regard to the meaning of a statute, or some portion of the statute, it may be helpful to look to the legislative history, with a view to determining legislative intent.

**Responses of Ellen Lipton Hollander
Nominee to be United States District Judge for the District of Maryland
to the Written Questions of Senator Tom Coburn, M.D.**

- 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: No. Its text is fixed, and judges may not alter the terms of the text with the times.

- 2. Since at least the 1930s, the Supreme Court has expansively interpreted Congress’ power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power.**

- a. Do you believe *Lopez* and *Morrison* are consistent with the Supreme Court’s earlier Commerce Clause decisions?**

Response: Yes.

- b. Why or why not?**

Response: In *Lopez* and *Morrison*, and more recently in *Gonzales v. Raich*, 545 U.S. 1, 23-25 (2005), the United States Supreme Court stated that its decisions in these cases were consistent with its earlier Commerce Clause decisions.

- 3. In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the “evolving standards of decency” to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy’s analysis?**

Response: If confirmed by the Senate, I would be bound by the decisions of the United States Supreme Court, including *Roper*.

- a. How would you determine what the evolving standards of decency are?**

Response: If confirmed, I would abide by all applicable decisions of the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit in ascertaining the meaning of the concept “evolving standards of decency.”

- b. Do you think that a judge could ever find that the “evolving standards of decency” dictated that the death penalty is unconstitutional in all cases?**

Response: No. The United States Supreme Court has foreclosed any contention that the death penalty is unconstitutional in all cases.

c. What factors do you believe would be relevant to the judge's analysis?

Response: For a federal trial judge, the factors relevant to the judge's analysis are those articulated by the United States Supreme Court and the particular appellate court that reviews the rulings of the trial court.

4. In your view, is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution?

Response: No, unless directed to do so at some point in the future by the United States Supreme Court or the United States Court of Appeals for the Fourth Circuit.

a. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: Only when binding precedent requires me to do so.

b. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: No.

c. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: No, unless directed to do so at some point in the future by the United States Supreme Court or the United States Court of Appeals for the Fourth Circuit.