

Responses of Mark A. Goldsmith
Nominee to the United States District Court for the Eastern District of Michigan
to the Written Questions of Senator Jeff Sessions

- 1. At your hearing, I asked you about the following remarks you delivered during your investiture. You stated that during the formative years of the American Republic,**

“[i]t was the judiciary that viewed its mission as searching for common ground. Whether the context was constitutional decision-making, statutory interpretation, or weaving the fabric of the common law, American judges have, in their finest moments, sought to divine and apply the common values of our country to the disputes before them.”

You testified that your remarks were directed at cases or questions of first impression, “where legal matters didn’t have any clear guidance from a higher court. That was the context in which I was talking about trying to find common ground to build a consensus.” You then testified: “I would look to the traditional tools that a judge should look to, which is the binding precedent of the Supreme Court, and in my case it would be the Sixth Circuit. I will try to get what the guidance is from those decisions in making up my mind, even if [it] were a case of first impression.”

- a. Given your testimony, do you still believe that judges should apply the “common values of our country to the disputes before them” in any case?**

Response: I believe that trial judges should apply scrupulously the precedents of the higher courts by which they are bound. If I am fortunate enough to be confirmed by the United States Senate, I would faithfully follow the precedents of the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit. In cases of first impression, I believe that judges should look to the decisions of higher courts for guidance. In cases of first impression, I would use traditional tools of judicial analysis: text, opinions from other circuits, and legal and legislative history.

- b. How do you define “the common values of our country”?**

The common values of our country are the legal values reflected and embodied in our Constitution, statutes and case law, as determined by the traditional tools of judicial analysis: text, court opinions, and legal and legislative history. I do not believe that a judge should import into the analysis his or her subjective sense of common values.

- c. Do you agree that a judge’s role is to apply the law to the facts of a given case?**

Yes.

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

No.

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

See above.

- ii. Please provide an example of a case in which you have done so.**

See above.

- iii. Please provide an example of a case in which you have had to set aside your own values and rule based solely on the law.**

I do not believe that I have ever had a conflict between my values and any decision that I have made as a judge.

- 2. You also said in your investiture speech that judges “have synthesized the moorings of history with the demands of modernity to identify and apply the evolving historical consensus of our wonderfully diverse country.”**

- a. Do you think that the meaning of our laws and Constitution is a product of the “moorings of history” and the “demands of modernity,” or is it the product of the plain language and original meaning of our statutes and Constitution? Please explain your answer.**

I believe a federal district judge must discern the meaning of our laws and the Constitution by looking to the text and the meaning it has been given by precedents of the United States Supreme Court and the Court of Appeals embracing his or her district. That is the approach I would follow if I am confirmed by the United States Senate. To the extent there are no precedents directly on point, a trial judge should seek guidance from decisions of higher courts addressing related or analogous circumstances. In such cases, trial judges should analyze the text, opinions from other circuits, and legal and legislative history to determine the meaning of a law and how it should be applied to contemporary circumstances not specifically contemplated by those who enacted the law. That is the sense in which I was using the terms “moorings of history” and “demands of modernity.”

- b. Is it fair to say that you agree with that concept of a “living constitution”? Please explain your answer.**

I find the term “living constitution” to be vague. To the extent the phrase is understood to mean that the Constitution is an ever-changing document, and that

judges are free to re-interpret it without reference to the text and intent of the Framers, I do not agree with such a notion.

3. **You were among a group of attorneys who authored an *amicus* brief for Governor Jennifer Granholm in support of the University of Michigan’s position that affirmative action policies did not violate the Equal Protection Clause in the cases of *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003). The brief argued that the First Amendment provides a heightened degree of protection to academic institutions.**

- a. **Is that a fair characterization of the argument set forth in your brief?**

The amicus brief did not use the term “heightened degree of protection” for academic institutions. Rather, the brief argued that the First Amendment protects academic institutions in their academic decision-making by requiring courts to show due deference to such decisions.

- b. **Is it your personal view that the First Amendment provides a heightened degree of protection to academic institutions? Please explain why or why not.**

There is a long line of precedents of the United States Supreme Court holding that courts should show appropriate deference to academic institutions in their academic decision-making. That view was confirmed in *Grutter*, where Justice O’Connor, speaking for the Court, stated: “Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.” 539 U.S. at 328.

- c. **Do you believe that the First Amendment protects the free speech of corporate institutions, as the Supreme Court held recently in *Citizens United v. Federal Election Commission*? Please explain your answer.**

The United States Supreme Court held in *Citizens United* that the First Amendment provides protection to corporate institutions. If confirmed, I would follow that decision.

4. **Now that the guidelines are advisory rather than mandatory, a judge may impose any sentence ranging from probation to the statutory maximum.**

- a. **What are your views of the guidelines?**

As a trial judge sitting in the criminal/civil division of our circuit court for nearly six years, I have utilized sentencing guidelines for all felony sentences. I have found the guidelines extraordinarily helpful in standardizing sentencing so that comparably situated criminal defendants are treated comparably, while still taking into account the individual circumstances of each defendant. If confirmed, I expect to take the same approach to the federal sentencing guidelines.

b. Do you commit to follow the guidelines?

The United States Supreme Court held in United States v. Booker, 543 U.S. 220 (2005) that the federal sentencing guidelines are advisory, not mandatory. Based on my very favorable experience in state court with sentencing guidelines, I would consult and take into account the federal sentencing guidelines as required by Booker.

c. 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?

Yes.

5. 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. I recognize that you do not know 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?

I do not know what the President may have had in mind when he made his statement. At least one dictionary definition of the term “empathy” is an understanding of another person’s feelings, situation or motives. As such, it is a cognitive skill, which I believe I possess.

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

I do not believe empathy plays any role in interpreting the law.

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

No.

a. If so, under what circumstances?

See above.

ii. Please provide an example of a case in which you have done so.

See above.

iii. Please provide an example of a case where you had to set aside your own subjective sense of empathy and rule solely based on the law.

I do not recall a case where I had to set aside my sense of empathy in ruling on a case.

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

After I drafted answers, I conferred with attorneys from the United States Department of Justice. I then finalized my answers and submitted them to the Department of Justice for submission to the United States Senate.

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

Yes.