Responses of James E. Graves, Jr.
Nominee to be United States Circuit Judge for the Fifth Circuit
to the Written Questions of Senator Jeff Sessions

1. At the hearing on your nomination, one of my colleagues asked you whether you would "just simply go by the text of the law" when interpreting statutes, or whether, instead, you would "go into the record that was made while the law was debated and passed." In response, you said "I think on first approach, you look at the statute and try and determine what the language of the statute says, and that's the first place to look in determining what the statute means. Hopefully, it says what it means and it means what it says." In the course of your answer, you discussed the dearth of legislative history for Mississippi statutes, but noted that "with the United States Congress, there could be some more extensive records, history regarding legislative intent."

a. Given the greater availability of legislative history in the federal system, do you think it is proper for federal judges to look to legislative history when construing an otherwise unambiguous statute?

Response: No.

b. Would it ever be proper for a court to determine that the meaning of a seemingly unambiguous statute is ambiguous based on the legislative history of that statute?

Response: No.

c. To what extent do you think a court should look to legislative history when a statute is ambiguous on its face?

Response: To the extent that it is available, it is appropriate to look to legislative history to see if it clarifies the ambiguity in any way.

2. At your hearing, I asked you a number of questions about why you joined Justice Diaz's dissent in *Doss v. State*, NO. 2007-CA-00429-SCT, 2008 Miss. LEXIS 608 (Miss. Dec. 11, 2008), wherein he argued the death penalty violated the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution. At one point during our discussion, you said that "when [you] read what he wrote, [you] viewed it as his plea for a dialogue on the efficacy of the death penalty."

a. Do you believe that the courts are a proper forum for "a dialogue on the efficacy of the death penalty"? Please explain your answer.

Response: No.

b. I understand that the opinion cited above was withdrawn and a subsequent opinion, *Doss v. State*, 19 So. 3d 690 (2009), was substituted in its place. Have you ever discussed either of these opinions with anyone other than your colleagues and staff at the Mississippi Supreme Court? If so, please describe with whom and in what context.

Response: In preparation for the Senate Judiciary Committee hearing, I discussed ***Doss v. State*** with staff members of the Department of Justice and White House Counsel's office.

3. At your hearing, you stated that you have had the opportunity to vote on at least a dozen death penalty cases while serving on the Mississippi Supreme Court.

a. Please provide a list of these cases, and, to the extent available, copies of those opinions.

Response: At my hearing I stated that among the numerous death penalty cases I have heard, I voted to affirm both a conviction and sentence to death in at least a dozen of them. These are those cases:

Moffett v. State, --- So. 3d ----, 2010 WL 3704988 (Miss. 2010).
Gillett v. State, --- So. 3d ----, 2010 WL 2609432 (Miss. 2010).
Loden v. State, --- So. 3d ----, 2010 WL 1507600 (Miss. 2010).
King v. State, 23 So. 3d 1067 (Miss. 2009).
Chamberlin v. State, 989 So. 2d 320 (Miss. 2008).
Havard v. State, 988 So. 2d 322 (Miss. 2008), and 928 So. 2d 771 (Miss. 2006).
Turner v. State, 953 So. 2d 1063 (Miss. 2007).
Brown v. State, 948 So. 2d 405 (Miss. 2006), and 890 So. 2d 901 (Miss. 2004).
Bennett v. State, 933 So. 2d 930 (Miss. 2006).
Spicer v. State, 921 So. 2d 292 (Miss. 2006).
Underwood v. State, 919 So. 2d 931 (Miss. 2005), and 37 So. 3d 10 (Miss. 2010).
Jordan v. State, 918 So. 2d 636 (Miss. 2005), and 912 So. 2d 800 (Miss. 2005).
Walker v. State, 913 So. 2d 198 (Miss. 2005).
Knox v. State, 901 So. 2d 1257 (Miss. 2005).
Grayson v. State, 879 So. 2d 1008 (Miss. 2004).
Burns v. State, 879 So. 2d 1000 (Miss. 2004).
Brawner v. State, 872 So. 2d 1 (Miss. 2004).
Dycus v. State, 875 So. 2d 140 (Miss. 2004), *vacated*, 544 U.S. 901, 125 S. Ct. 1589, 161 L. Ed. 2d 271 (2005).
Lynch v. State, 877 So. 2d 1254 (Miss. 2004).
Stevens v. State, 867 So. 2d 219 (Miss. 2003).
Woodward v. State, 843 So. 2d 1 (Miss. 2003).
Simmons v. State, 805 So. 2d 452 (Miss. 2001).

b. To the extent possible, please provide a list of any death penalty cases you presided over during your time as a Circuit Court judge on the Hinds County Circuit Court, and, to the extent available, copies of those opinions.

Response: I presided over one death penalty case. The jury determined that the defendant should receive a life sentence. The appellate citation is ***Robert Lindsey, Jr., v. State***, 754 So. 2d 506 (Miss. 2000).

4. In a speech you delivered several times in 2005 and 2006, which was also published in the *Mississippi College Law Review* under the title "The Constitution and Judicial Independence," you stated that "[a] judicial activist is any judge who makes a decision with which a very vocal group, large or small, disagrees."

a. Is it still your view that there is no such thing as judicial activism?

Response: It was never my view that there is no such thing as judicial activism.

b. Some have characterized the current Supreme Court as "activist." Given your stated view that "[a] judicial activist is any judge who makes a decision with which a very vocal group, large or small, disagrees," do you disagree with that characterization?

Response: Yes.

5. In an October 21, 2004 interview with the *Jackson Free Press*, you said that you entered the legal profession because you "saw the law as an opportunity to effect change, make policy and influence the law."

a. Of course I understand that you were not a judge when you said that. Having been a judge, do you still see the law that way?

Response: Yes, I still see the legal profession that way, but not the role of a judge. Lawyers serve in the legislative and executive branches of government where they should seek to effect change, make policy and influence the law. That is not the role of a judge.

b. Do you believe it could ever be acceptable for a judge to view that law as "an opportunity to effect change, make policy and influence the law"?

Response: No.

6. During your time on the Mississippi Supreme Court, you have heard several cases concerning the First Amendment rights of state judges. In *Mississippi Comm'n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006 (2004), the Mississippi Supreme Court held that the First Amendment prohibited a judge from being punished for writing a letter to a newspaper expressing his view that homosexuality was a mental disorder. You joined a dissent that argued "when the judge in today's case stated

that certain individuals in our society were sick and that they all needed to be indiscriminately placed in mental institutions, he crossed over the line!" Several years later, in *Mississippi Comm'n on Judicial Performance v. Boland*, 975 So. 2d 882 (2008), a majority of the court held a judge could be constitutionally punished for making the statement "all you African-Americans can go to hell" at a drug court conference. You concurred in that opinion. One year later, in *Mississippi Comm'n on Judicial Performance v. Osbourne*, 11 So. 3d 107 (2009), a majority of the court held that a sitting judge could be disciplined for making a campaign speech in which he stated that "[w]hite folks don't praise you unless you're a damn fool. Unless they think they can use you. If you have your own mind and know what you're doing, they don't want you around." You joined a dissent in that case, arguing that the First Amendment prohibited discipline of the judge for that statement. Please explain why you distinguished *Boland* from *Osbourne*.

Response: Judge Osborne was a candidate for judicial election and his speech was clearly protected under ***Republican Party of Minnesota v. White***, 536 U.S. 765, 794, 122 S. Ct. 2528, 153 L.Ed.2d 694 (2002). Neither Judge Boland nor Judge Wilkerson was a candidate for judicial election at the time their remarks were made.

7. When Justice Stevens announced his retirement, the President said that he would select a Supreme Court nominee with "a keen understanding of how the law affects the daily lives of the American people."

a. Do you believe judges should ever base their decisions on a desired outcome?

Response: No.

i. If so, under what circumstances?

Response: Not applicable.

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

Response: Not applicable.

iii. Please discuss an example of a case where you have had to set aside your own desired outcome and rule based solely on the law.

Response: Not applicable.

b. Do you believe a judge should consider his or her own values or policy preferences in determining what the law means?

Response: No.

i. If so, under what circumstances?

Response: Not applicable.

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

Response: Not applicable.

iii. Please discuss an example of a case where you have had to set aside your own values or policy preferences and rule based solely on the law.

Response: Not applicable.

c. During her confirmation hearings, Justice Sotomayor rejected President Obama's 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.

8. What is your view of the role of a judge?

Response: The role of a judge is to interpret and apply the law fairly and impartially.

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

Response: I drafted answers to these questions. I discussed some of my answers with a staff member of the U.S. Department of Justice. I prepared final answers to these questions.

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

Response: Yes.

Responses of James E. Graves, Jr.
Nominee to be United States Circuit Judge for the Fifth Circuit
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.

2. **What principles of constitutional interpretation would you look to in analyzing whether a particular statute infringes upon some individual right?**

   Response: I would look to the principles of constitutional interpretation which are set forth in U.S. Supreme Court precedent.

3. **As a judge, what approach do you take when interpreting a statute? Please describe your analysis process.**

   Response: I would look first to the plain meaning of the statute. Where it is clear and unambiguous, there is no need for further interpretation. If it is unclear, then I would apply the rules of statutory construction as set forth by the U.S. Supreme Court.

4. **Do you believe judges should look to the original intent of those who wrote the Constitution when determining the meaning of words and phrases?**

   Response: I believe judges should look to U.S. Supreme Court precedent when determining the meaning of words and phrases.

   a. **Should they be limited to only looking to the text and the original intent of the founders? If not, why?**

      Response: No. See preceding response.

5. **Justice William Brennan once said: "Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized." Do you agree with him that constitutional interpretation today must take into account this supposed transformative purpose of the Constitution?**

   Response: No.

6. **Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

Response: I do not agree with the premise that there are, "evolving understandings of the Constitution."

7. Do you believe empathy is an essential ingredient for arriving at just decisions and outcomes and should play a role in a judge's consideration of a case?

Response: No.

8. What limitations remain on the individual Second Amendment right now that it has been incorporated against the States?

Response: The most recent U.S. Supreme Court decisions on the Second Amendment are *District of Columbia v. Heller*, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), and *McDonald v. Chicago*, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010). These cases did not specify what limitations remain on the individual Second Amendment right. I would look to U.S. Supreme Court precedent in my analysis of any Second Amendment issue.

a. Is it limited only to possession of a handgun for self-defense in the home, since both *Heller* and *McDonald* involved cases of handgun possession for self-defense in the home?

Response: As regards limitations on the individual Second Amendment right, I would examine the U.S. Supreme Court precedent in *Heller* and *McDonald* and any subsequent cases which may emanate from the Fifth Circuit Court of Appeals.