

Responses of Gary Scott Feinerman
Nominee to the United States District Court for the Northern District of Illinois
to the Written Questions of Senator Jeff Sessions

1. At your hearing, I asked you about your involvement as Illinois Solicitor General in the case *People v. Sutherland*, an Illinois capital case where a man was convicted and sentenced to death for murdering a 12 year old girl. Your notes indicate that you recalled asking yourself before the case, “Am I OK with this, with my role in the case? . . . I am a blue state kind of guy. Should somebody like me be part of the machinery of death?” Your notes also stated that you concluded that you were “OK” with your role because it was an essential part of the job and “whatever qualms I have about the death penalty’s administration were not implicated in the case.”

- a. What qualms do you have with the administration of the death penalty?

Response: My qualms concern particular cases, not capital punishment in general. When delivering the quoted remarks, I had in mind several instances in Illinois where it was determined that innocent persons had been convicted of capital crimes and sentenced to death. As an advocate for the State of Illinois, and based upon the materials then before me, I did not have any such qualms in *People v. Sutherland* – where in my view the defendant was guilty, the trial fair, and the sentence just – or in any other capital case my office briefed and argued in the Supreme Court of Illinois during my tenure as Illinois Solicitor General.

- b. Do you have a personal objection to the death penalty?

Response: No.

- c. Do you personally believe that the death penalty should be unconstitutional?

Response: No; if confirmed as a district judge, I would be bound by the precedents of the Supreme Court, which expressly hold that the death penalty is constitutional. Supreme Court precedent, not my personal beliefs, would guide my work as a district judge.

- d. If confirmed, do you have any reservations about imposing the death penalty where appropriate?

Response: No.

2. You were Solicitor General of Illinois when Illinois joined 12 other states and some localities in *Massachusetts v. EPA*, in an attempt to force the EPA to regulate carbon dioxide emissions.

- a. **As Solicitor General, did you participate in the decision to join this litigation?**

Response: Although the decision to join the *Massachusetts v. EPA* litigation is the kind of decision that typically would have been discussed among senior staff, I have no recollection of participating in any such discussions. Therefore, I cannot say with certainty whether or not I participated in the decision.

- b. **Did you have input into the litigation strategy? If so, please explain.**

Response: No.

- c. **As you know, the Supreme Court's 5-4 decision was sharply split on the question of standing to sue. Traditionally, standing requires a showing of an actual or imminent injury, caused by conduct of the defendant, which is likely to be redressed by the Court ruling for the plaintiff. In this case, the majority found standing for Massachusetts even though the supposed injury – coastal erosion due to global warming – was highly speculative, as was the supposed redress.**

- i. **What are your views of the standing requirement, particularly for states, after this decision?**

Response: As the Supreme Court held, States must satisfy the traditional three-part standing test established by precedent. *Massachusetts v. EPA*, 549 U.S. 479, 517-526 (2007). If confirmed as a district judge, my views of the standing requirement – for States, individuals, corporations, and other non-State entities – would be governed by Supreme Court and Seventh Circuit precedent.

- ii. **Are there any limits to state standing?**

Response: Yes, to have standing, States must satisfy the test set forth in *Massachusetts* and other governing precedent.

- d. **When the decision was announced, you were quoted in the media as saying that it “could portend a more active role for states in attempting to drive the regulatory agenda at the national level.”**

- i. **What did you mean by that statement?**

Response: I made that statement in my capacity as Illinois Solicitor General. In that capacity, I meant that the law allows States to challenge a federal regulatory agency when, in the States' view, the agency is not properly administering a statute enacted by Congress – as in, for example,

Alaska Dep't of Environmental Conservation v. EPA, 540 U.S. 461 (2004), and *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

- ii. **Do you think it would be a good thing for states to try and “drive the regulatory agenda” at the federal level through litigation? Please explain your answer.**

Response: In my capacity as Illinois Solicitor General, my answer would have been that it generally would not be a good thing for States to “drive the regulatory agenda” at the federal level, that the federal regulatory agenda ideally should be driven by federal regulatory agencies, but that the law allows States to challenge a federal agency when, in the States’ view, the agency is not properly administering a statute enacted by Congress. If confirmed as a district judge, my consideration of these issues would be governed by Supreme Court and Seventh Circuit precedent.

- iii. **Do you think courts are equipped to handle these types of scientific questions? Please explain why or why not.**

Response: In my capacity as Illinois Solicitor General, my point was not to opine whether courts are or are not equipped to handle these types of scientific questions; rather, my point was that the law allows States to challenge a federal regulatory agency when, in the States’ view, the agency is not properly administering a statute enacted by Congress. If confirmed as a district judge, my consideration of these issues would be governed by Supreme Court and Seventh Circuit precedent.

- e. **As you are aware, Congress has thus far declined to enact caps on greenhouse gas emissions. Do you agree that this litigation is an example of advocates trying to obtain from courts what they cannot obtain in the democratic process?**

Response: As Illinois Solicitor General, in which capacity I commented on the *Massachusetts v. EPA* litigation, I would not have agreed with the statement, and would have said that the litigation was an example of the States successfully seeking redress for what they viewed as a federal regulatory agency’s failure to properly administer a statute enacted through the democratic process by Congress. If confirmed as a district judge, my consideration of these issues would be governed by Supreme Court and Seventh Circuit precedent.

- f. **If confirmed, what assurances can you provide to the Committee that you will resist the urge to legislate from the bench, even on matters about which you have strongly held views?**

Response: I assure the Committee that I do not believe federal judges should legislate from the bench, that I understand that a federal judge's proper role is to faithfully interpret the laws enacted by others, and that, if confirmed as a district judge, I would fully abide by these principles.

3. **In June 2009, you were installed as the president of the Appellate Lawyers Association of Illinois. In your remarks at the installation ceremony, you commented that "It's the appellate judges, of course, whose opinions develop, shape, and change the law."**

- a. **How do you define the role of a trial court judge?**

Response: The role of a trial court judge is to follow the precedents of higher courts, to faithfully interpret statutes and the Constitution, and to find facts in those instances where a trial judge has a duty to find facts.

- b. **If confirmed, would you interpret the law as written, or try to develop, shape, and change the law?**

Response: If confirmed, I would interpret the law as written. In the remarks quoted in Question #3, I had in mind the role of reviewing courts in applying constitutional provisions to new circumstances ("develop, shape") and in overturning their own precedent ("change").

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. **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?**

Response: Yes, with respect to that criterion, I believe I have empathy for other persons.

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

Response: I believe a judge should treat litigants and lawyers with dignity and respect, that empathy is not an analytical tool, and that cases should be decided based on the governing law and the relevant facts.

- c. **Do you think that it's ever proper for judges to indulge their own subjective sense of empathy in determining what the law means? If so, under what circumstances?**

Response: No.

5. **Do you think it is ever proper for judges to indulge their own values in determining what the law means? If so, under what circumstances?**

Response: No.

6. **Do you think it is ever proper for judges to indulge their own policy preferences in determining what the law means? If so, under what circumstances?**

Response: No.

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

Response: I received a copy of these questions via email from Department of Justice staff on March 17, 2010. I prepared a draft of the answers, emailed the draft to Department of Justice staff on March 18, 2010, and discussed the draft with staff on March 19, 2010. I then provided a final version of my answers to Department of Justice staff for transmission to the Committee.

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

Response: Yes.