

Responses of Michael H. Simon
Nominee to be United States District Judge for the District of Oregon
to the Written Questions of Senator Jeff Sessions

- 1. You have been heavily involved with the ACLU of Oregon throughout your legal career, including as a member of the Board of Directors from 1997 to 2004, Vice President for Legislation from 1997 to 1998, and Vice President for Litigation from 2000 to 2004. At your hearing, I asked whether you agreed with the ACLU's positions regarding the legalization of drugs and the death penalty. You responded, in part, by stating: "I have been involved as a volunteer lawyer for the ACLU for a number of years and it certainly is true in my case, as well as, frankly, in almost everyone's that I have interacted with, that we do not necessarily agree with all of the positions taken by the American Civil Liberties Union." Please describe in detail the legal or policy positions advocated by the ACLU with which you disagree.**

Response: As a member of the Lawyers Committee of the ACLU of Oregon, I participated in meetings to decide whether the ACLU of Oregon would accept or decline requests to provide legal representation in specific matters and whether the ACLU would appear as an *amicus curiae* in specific litigation. The decisions of the Lawyers Committee were made by majority vote, and its deliberations and vote counts were consistently treated as confidential and subject to the attorney-client privilege under Oregon law. Thus, all that I can say in direct response to this question is that on some occasions my vote in the Lawyers Committee was in the minority. In addition, under the rule of law, a judge's personal opinion is not relevant to the decision in a case, which must be based solely on the application of law to facts.

- 2. At your hearing, you testified that the primary focus of your "activities for the American Civil Liberties Union of Oregon has been involved in First Amendment issues."**

- a. According to the ACLU, the Pledge of Allegiance is unconstitutional and should not be recited in schools because it includes the words "under God."**

- i. Do you personally agree with that position? Please explain your answer.**

Response: Under the rule of law, a judge's personal opinion is not relevant to the decision in a case, which must be based solely on the application of law to facts. If confirmed by the Senate, in all cases that came before me I would fairly determine the facts and faithfully apply the law, including all governing precedent.

- ii. **If you do not agree with the ACLU's position, did you ever express your concern or opposition to their position? Please explain your answer.**

Response: Please see my response to 2(a)(i) above.

- b. **As a result of several lawsuits brought by the ACLU, communities must remove all vestiges of America's history and heritage that include religious symbols on public lands or on city or county seals. This includes Ten Commandments monuments and crosses – even when those symbols honor those who died in service to their country.**

- i. **Do you agree with that position? Please explain your answer.**

Response: Under the rule of law, a judge's personal opinion is not relevant to the decision in a case, which must be based solely on the application of law to facts. If confirmed by the Senate, in all cases that came before me I would fairly determine the facts and faithfully apply the law, including all governing precedent. Moreover, I note that the decisions from the Supreme Court in this area show that the constitutional analysis regarding the display of religious symbols on public lands is highly dependent on the specific facts presented in a particular case. For example, in *Van Orden v. Perry*, 545 U.S. 677 (2005), the Supreme Court upheld against constitutional challenge the display of a monument containing the Ten Commandments alongside other monuments on public grounds near the Texas Capitol. In *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), however, the Supreme Court struck down on constitutional grounds the stand-alone posting of the Ten Commandments in a county courthouse. In addition, in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Supreme Court upheld against constitutional challenge a Christmas display in a public park that included a nativity scene alongside secular symbols of the Christmas holiday season. In *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989), however, the Supreme Court struck down on constitutional grounds a Christmas display in a prominent position in a county courthouse that included a nativity scene and a banner reciting in Latin "Glory to God in the Highest," and lacking any secular symbols of the holiday season. Further, in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995), the Supreme Court upheld against constitutional challenge the display of a cross placed by the Ku Klux Klan in a state-owned park in front of the Ohio statehouse. If confirmed by the Senate, I will faithfully follow all governing precedent.

- ii. **If you do not agree with the ACLU's position, did you ever express your concern or opposition to their position? Please explain your answer.**

Response: Please see my response to 2(b)(i) above.

- c. **In 2008, the ACLU of Northern California joined an amicus brief that argued that doctors could not refuse to give infertility treatment to gay or lesbian patients on the basis of the doctors' personal religious beliefs.**

- i. **Do you agree with that position? Please explain your answer.**

Response: I am not familiar with the amicus brief from the ACLU of Northern California referred to in this question. In addition, under the rule of law, a judge's personal opinion is not relevant to the decision in a case, which must be based solely on the application of law to facts. If confirmed by the Senate, in all cases that came before me I would fairly determine the facts and faithfully apply the law, including all governing precedent.

- ii. **If you do not agree with the ACLU's position, did you ever express your concern or opposition to their position? Please explain your answer.**

Response: Not applicable.

- d. **The ACLU has opposed tax exemptions for churches. For example, in 2008, the Alaskan arm of the ACLU argued that it was unconstitutional for the state Legislature to restrict taxing homes owned by a church.**

- i. **Do you personally agree with that position? Please explain your answer.**

Response: I am not familiar with the legal position taken by the ACLU of Alaska referred to in this question. In addition, under the rule of law, a judge's personal opinion is not relevant to the decision in a case, which must be based solely on the application of law to facts. If confirmed by the Senate, under all cases that came before me I would fairly determine the facts and faithfully apply the law, including all governing precedent.

- ii. **If you do not agree with the ACLU's position, did you ever express your concern or opposition to their position? Please explain your answer.**

Response: Not applicable.

3. **In 2007, you spoke before the Oregon Board of Rabbis and expressed concern that Americans' civil liberties have been threatened because of measures undertaken after the terrorist attacks of September 11, 2001. In the speech, you said that "our thinking would be clearer and our solutions more effective if we stop thinking about – and stop calling – terrorism a 'war' or a 'crime.'" You argued that calling military action against terrorism a "war" "implies that a military conquest is the best tool for this fight" and that terminology "may limit more creative and even more successful techniques to promote and protect our security."**

- a. **Please provide examples of the "more creative and even more successful techniques" to which you referred in your speech.**

Response: In my March 2007 presentation to the Oregon Board of Rabbis, entitled "Preserving Civil Liberties and Security: What We Can Learn from History, Language, and First Principles," I commented that some refer to our response to the threat of global terrorism as a "war on terror" while others speak of terrorist acts as "crimes." I attempted to explain that, in my view, neither a "law enforcement" model nor a "law of war" model was entirely accurate or particularly helpful in responding to what appears to be a *sui generis* problem that presents both a global and a national security threat. I argued that we should not try to formulate legal and policy responses in a framework designed either for domestic criminal activity (which includes, but is not limited to, punishing past criminal acts in the expectation that such punishment or the risk of punishment may serve to deter both the offender and others from future criminal acts) or for traditional wartime activity (against a uniformed enemy serving a foreign sovereign capable of negotiating for peace). I asserted that neither model applied to the global threat of terrorism, and I suggested that the best way both to preserve civil liberties and promote security would be for Congress, working with the President, to develop a new framework or paradigm for responding to and preventing global terrorism. In my speech, I did not offer any specifics for such a framework, which would require difficult and studied policy decisions by elected officials in consultation with others having substantive expertise in various fields that I do not have.

- b. **Do you believe that detainees captured on the battlefield should be tried in Article III courts, subject to all of the typical rules of evidence and procedure?**

Response: This is not an area in which I have expertise. If confirmed by the Senate, in all cases that came before me I would fairly determine the facts and faithfully apply the law, including all governing precedent.

- c. **If a detainee makes a self incriminating statement on the battlefield, but he is not Mirandized prior to interrogation, should that statement be suppressed?**

Response: This is not an area in which I have expertise. If confirmed by the Senate, in all cases that came before me I would fairly determine the facts and faithfully apply the law, including all governing precedent.

4. **At a May 23, 2007 Conference on Religious Freedom and the Law sponsored by the Oregon Lawyers Chapter of the American Constitution Society, you stated: “There is . . . support for the conclusion that the Founders did not believe that their intentions and understandings should bind future generations.”**

- a. **Do you equate the originalist understanding of constitutional interpretation with an attempt to discern the framers or ratifiers’ “original intent” or “original understanding”?**

Response: Yes.

- b. **Do you reject originalism as a method of interpretation even if it is aimed at determining the original public meaning of the constitutional text (i.e., what the words, in context, would have meant to intelligent, reasonably informed readers at the time the words were enacted)?**

Response: No. The Founders' (or ratifiers') original understanding of the meaning of the text at the time it was written (or ratified) is a very important, but not exclusive, consideration in the interpretation of the Constitution. If confirmed by the Senate, I will faithfully follow all governing precedent.

- c. **Under what circumstances should the text, as written, not control constitutional decision making?**

Response: If confirmed by the Senate, I will faithfully follow all governing precedent. In the absence of such precedent, I would begin with both the text and context and all interpretative judicial doctrines directed by the Supreme Court or other governing precedent. If further interpretive methodology were needed, I would look both to the original meaning (or understanding) of the text and to the fundamental and enduring principles expressed by the text, as well as to history and tradition. I would not, however, substitute my own policy preferences or personal values for the policy preferences, values, or choices determined by the legislative or executive branches.

- d. **Also at that conference, you stated “[t]here is . . . support for the proposition that the concept of ‘separation of the state and the**

church’ was an ‘unfolding and evolving’ idea at the time of the Founders”

i. Do you believe that the meaning of the constitutional text changes over time?

Response: No. The text of our written Constitution and the enduring and fundamental principles that its words express do not change over time except by formal amendment ratified in accordance with Article V of the Constitution.

ii. Please identify the “support” to which you referred.

Response: In THE FEDERALIST No. 37 (1788), James Madison wrote: "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." In certain areas of the Constitution, the Founders used precise and unambiguous words and phrases. In other areas, however, the Founders deliberately used more general words and phrases in order to express fundamental and enduring principles, rather than to dictate specific outcomes in specific applications. In addition, concerning the Establishment Clause in particular, the Founders' views concerning the proper relationship between church and state were varied and changing, even within their own lifetimes, a fact of which they were aware.

iii. Do you believe the Constitution is a “living” document?

Response: No. The text of our written Constitution and the enduring and fundamental principles that its words express do not change over time except by formal amendment ratified in accordance with Article V of the Constitution.

5. At your hearing, Senator Whitehouse asked for your comments on the following:

“It is my belief that judges must do a number of things. One is to respect the role of Congress as the duly elected representatives of the American people in our system of American democracy. Two is to decide cases based on the facts and the law, nothing else. Three is to not prejudge any case, but listen to every party that comes before you, powerful or weak, rich or poor, irrespective of station or position; to respect the precedent that the Supreme Court and the circuit courts for your districts have laid down and the precedent that exists within your own district; and, finally, to limit yourself in your decisions to the issues that the court must decide that are properly

presented before it. It is my belief that those disciplines, which must be self-imposed by judges, are key to the successful operation of the carefully balanced system of government that the Founding Fathers created and that we all honor and enjoy the fruits of."

You responded:

"I, too, agree with everything that you have just described as the qualities and character of judging."

Do you also agree that when Congress, in its role as the legislative branch, enacts a law that is contrary to the Constitution or takes action not authorized by some enumerated power therein, a court must either invalidate the Congressional action or, where appropriate, limit its application on an "as applied" basis?

Response: The laws enacted by Congress are entitled to great deference and a presumption of constitutionality in our democratic republic. If, however, Congress (or any other branch of government) exceeds its constitutional authority, and if that question is properly presented before a federal court, and if there is no other appropriate way to avoid a constitutional violation, then the Supreme Court has held that it is the responsibility of the federal courts either to invalidate the Congressional action or, where appropriate, to limit its application on an "as applied" basis.

6. What, in your view, is the proper role of a judge?

Response: The rule of law is the cornerstone of our democratic republic. It is the responsibility of the judge to determine the applicable law, to interpret the law when interpretation is required, and to apply the law to the facts presented and fairly determined. In performing these responsibilities, the judge must always recognize the limited role of the court and must always act impartially, neutrally, and fairly, without bias, sympathy, or prejudice for or against any party. The judge must also treat all who appear before the court with courtesy, civility, and respect, recognizing that every matter before the court is important to the parties in that matter and will likely affect how those parties believe they have been treated by their government. The judge must also act with diligence, as well as care, to ensure that decisions are not only correct, well-reasoned, and clearly explained, but also timely delivered. In presiding over trials, a judge must ensure that all parties receive a fair trial under the law and that the time spent by juries, witnesses, and parties are efficiently used. Finally, the judge must at all times exhibit the highest standards of ethics and integrity and ensure that not only is our system of justice under the law fair in fact but also fair in appearance.

7. In 2008, President Obama said,

"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."

Do you agree with the President's statement?

Response: It is essential for a judge to listen with an open mind and without bias or prejudice to all parties, to treat all parties respectfully and politely, and to understand all of the relevant facts and circumstances. To the extent that empathy assists a judge in fulfilling these responsibilities, it is appropriate. To the extent, however, that empathy may imply that a judge should fail to apply the law to the facts or should fail to be neutral and impartial, that understanding of empathy plays no proper role in the consideration of a case by a judge.

- 8. 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." Do you believe judges should base their decisions on a desired outcome, or solely on the law and facts presented?**

Response: A judge should never base a decision on a desired outcome, but solely on the reasoned and neutral application of law to the facts presented.

- 9. 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.

- 10. Under the Supreme Court's decision in *United States v. Booker*, the federal sentencing guidelines are now advisory, rather than mandatory.**

- a. 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.

- b. Under what circumstances do you believe it appropriate for a district court judge to depart downward from the sentencing guidelines?**

Response: If confirmed by the Senate, I would give great deference to the sentencing guidelines. A district court judge should only depart from the sentencing guidelines when such a result is warranted by an application of law to facts. One possible circumstance when a downward departure may be appropriate is when it is part of a plea agreement recommended by the United States with good cause shown.

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

Response: On November 23, 2010, I received a copy of these questions from the U.S. Department of Justice. I then performed research and prepared a draft of my answers. On November 26th, I sent a copy of my draft answers to the Department of Justice, and on November 27th, I spoke by telephone with a representative of the Department of Justice regarding my draft answers. Later that day, I sent my final answers to the Department of Justice for transmission to the Senate Committee on the Judiciary.

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

Response: Yes.